

# **Unanswered questions**

## **Companies, conflict and the Democratic Republic of Congo**

**May 2004**

**The Work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo**

**and**

**The OECD Guidelines for Multinational Enterprises**

*RAID*

Rights & Accountability in Development

# RAID

Rights & Accountability in Development

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Rights and Accountability in Development (RAID) was founded in 1997 and carried out a 3-year research project investigating the human rights impacts of the privatisation of Zambia's copper mines under the auspices of the Refugee Studies Centre, Queen Elizabeth House, University of Oxford. In September 2003, RAID was incorporated as a private, not-for-profit, limited company. RAID aims through its research to promote social and economic rights and improve corporate accountability. RAID participated in the review of the *OECD Guidelines for Multinational Enterprises* and, through OECD WATCH, an international network of NGOs, works for their effective implementation.

## Acknowledgements

RAID would like to acknowledge its thanks to the Ford Foundation, the Fafo Institute for Applied International Studies and the International Peace Academy for providing financial support for the research and publication of this report. The views expressed in the report do not necessarily reflect those of the funding organisations.



## Principal abbreviations

AFDL	Alliance des forces démocratiques pour la libération du Congo-Zaïre (Alliance of Democratic Forces for the Liberation of Congo-Zaire)
coltan	columbo-tantalite
COMIEX	Compagnie mixte d'import-export
COSLEG	COMIEX-OSLEG joint venture
Gécamines	Générale des carrières et des mines
ILO	International Labour Organisation
IMF	International Monetary Fund
KMC	Kababankola Mining Company
MIBA	Société minière de Bakwanga
MLC	Mouvement de libération congolais
NCP	National Contact Point
OECD	Organization for Economic Cooperation and Development
OSLEG	Operation Sovereign Legitimacy
RCD	Rassemblement congolais pour la démocratie (Rally for Congolese Democracy)
RCD-Congo	Rassemblement congolais pour la démocratie (newly formed rebel group made up of MLC and RCD-Goma dissidents)
RCD-Goma	Rassemblement congolais pour la démocratie, based in Goma
RCD-K/ML	Rassemblement congolais pour la démocratie — Mouvement de libération, initially based in Kisangani, now headquartered in Bunia
RPA	Rwandan Patriotic Army
SCEM	Société congolaise d'exploitation minière
SOMIGL	Société minière des Grands Lacs
SOMIKIVU	Société minière du Kivu
SOMINKI	Société minière et industrielle du Kivu
SOCEBO	Société congolaise d'exploitation du bois
UN	United Nations
UPDF	Uganda People's Defence Forces
ZANU-PF	Zimbabwe African National Union Patriotic Front
ZDF	Zimbabwe Defence Forces

# Unanswered questions: Companies, conflict and the Democratic Republic of Congo

## Abstract

The Democratic Republic of Congo (DRC) is emerging from a devastating five-year war that is estimated to have cost the lives of more than three million people. Multinational corporations have been accused of helping to perpetuate the war and of profiteering from it. In a series of reports documenting the links between business, resource exploitation and conflict in the DRC, a UN Panel of Experts listed companies considered to be in violation of international business norms such as the *OECD Guidelines for Multinational Enterprises*. The UN reports raised the expectation that governments would hold to account those companies that were responsible for misconduct in the DRC. To date, there have been few signs of a response.

The furore created by the Panel's reports has heightened the need to distinguish between culpable multinational enterprises and those who acted responsibly in the DRC. Yet the Panel's final report failed to establish this distinction with rigour and clarity. Many unanswered questions remain about the allegations against companies. This raises concerns about how corporations should conduct business in zones of conflict and whether their behaviour ought to be regulated.

This report by Rights and Accountability in Development (RAID) examines the role of companies in the DRC conflict, their reactions to being listed by the UN Panel and the publicly unanswered questions that remain about their conduct. It frames the questions in relation to the *OECD Guidelines*. Governments adhering to the *Guidelines* have a responsibility to ensure that they are applied. It is in nobody's interest — neither that of responsible companies, nor that of the people of the DRC — to leave these questions unresolved. This report should act as a catalyst for action by governments.

An electronic version of RAID's full report has been submitted to the UN Security Council, the Committee established under Security Council resolution 1533 (2004) to monitor an arms embargo in eastern DRC, OECD Governments, the OECD's Committee on International Investment and Multinational Enterprises (CIME) and the International Criminal Court. Companies are urged to use the good offices of the NCPs to both provide and obtain further information.

## Key Recommendations

- ❖ *Prompt government investigations:* Governments must give much greater priority to the examination of the role of companies in the DRC. The mechanism that exists under the *OECD Guidelines for Multinational Enterprises* for the investigation of company conduct should be used now with a view to issuing public recommendations on compliance. This will require revisiting many cases declared by the Panel as resolved.
- ❖ *International Criminal Court:* The United Nations and governments should co-operate fully with investigations which are being launched by the ICC into, *inter alia*, the complicity of business in war crimes in the DRC.
- ❖ *Domestic prosecutions:* National governments must investigate and prosecute companies where their conduct is shown to contravene domestic legislation. This includes the urgent investigation of alleged money laundering and arms trafficking by companies based in their jurisdictions in relation to the DRC.
- ❖ *Action by the OECD:* The OECD's Committee on International Investment and Multinational Enterprises should issue a clarification to companies about acceptable and unacceptable corporate conduct in conflict and post-conflict situations. The UN Human Rights Norms for Business should be incorporated into the text of the *OECD Guidelines*.
- ❖ *Call for permanent monitoring:* A permanent UN body, with clear and transparent procedures, should be established to monitor the role of business in conflict.
- ❖ *Binding regulation of business:* The *OECD Guidelines* – which can neither impose sanctions nor offer compensation – are a positive, but preliminary step, towards holding companies to account for their actions. In the absence of sufficient progress to redress corporate misconduct under the *Guidelines*, governments should consider a renewed call for the binding regulation of multinationals.

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S/2003/1027

### B. Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l'implication de la Belgique, Sénat de Belgique, Session de 2002-2003, 20 Février 2003, 2-942/1..... CD (insert)

or follow link

<<http://www.senate.be/www/?Mival=/publications/viewPub.html&COLL=S&LEG=2&NR=942&VOLGMR=1&LANG=fr>>

### C. Republic of Uganda, 'Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001,' *Final Report*, November 2002..... CD (insert)

or follow link <<http://www.mofa.go.ug/pdfs/Final%20Report.pdf>>

<p>The RAID report should be read in conjunction with the source documents. Links to electronic versions of the key official documents (either on CD or online) have been included to facilitate this.</p>
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# Unanswered questions: Companies, conflict and the Democratic Republic of Congo

## Executive Summary

### Introduction

This report is an examination of the role of companies in the five-year conflict that ravaged the Democratic Republic of Congo (DRC), their reactions to being listed by the UN Panel, and the publicly unanswered questions that remain about their conduct.<sup>1</sup> For the first time, both the Panel's allegations and the companies' responses are framed in relation to specific provisions of the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises*, the standard the Panel adopted as its yardstick.

*Unanswered Questions* argues that given the UN Security Council's failure to resolve satisfactorily and publicly the outstanding alleged breaches of the *OECD Guidelines*, governments now have an obligation to use the mechanisms they set up to monitor compliance under the *Guidelines* to investigate the Panel's allegations and put an end to speculation. Many of the companies share this viewpoint and may be frustrated by the lack of opportunity to have their views heard. But others may be simply satisfied with their 'resolved' status and may oppose any further inquiry.

The DRC is at a critical phase in its transition to the rule of law and desperately needs investment by responsible businesses to help repair the country's shattered infrastructure and regenerate its economy. Until impartial and fair public investigations have been carried out, the unanswered questions will continue to cast their shadow over the DRC's future and company activities in the country. Above and beyond the particular problems of the DRC, there are broader questions: What standards of corporate conduct are governments prepared to tolerate in conflict- and post-conflict situations? Are the existing instruments and voluntary codes adequate? And are the available implementation procedures of the *OECD Guidelines* sufficient for monitoring and enforcing them?

RAID makes no allegations of its own nor does it claim that any of the UN's allegations amount to a final determination of misconduct.<sup>2</sup> It simply argues that the Panel's reports raise legitimate, ethical

<sup>1</sup> UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.

<sup>2</sup> The allegations that are restated do not purport to be based on material other than the Panel's reports or company responses unless specific reference is made to other sources.

questions which, in the interest of all parties concerned, must be resolved publicly and unambiguously.

### The human and economic costs of the war

The war in the DRC, which began in August 1998, is estimated to have cost some 3 million lives, making it the most devastating conflict in terms of civilian deaths since World War II.<sup>3</sup> Human rights organisations have documented grave abuses that have been carried out by all parties during the war. Unarmed civilians have been massacred; forcible abductions, arbitrary arrest and torture have been widespread; and thousands of women and girls have been subjected to rape by combatants.<sup>4</sup> The human and economic costs of the war have been immense. According to the World Bank 'Physical damage is extensive, institutions are in a shambles and the economy has literally collapsed'.<sup>5</sup> Accurate and reliable data on levels of poverty and deprivation are not readily available, but information from a range of UN and other sources, including the Interim Poverty Reduction Strategy, makes grim reading.

- ❖ More than 2.4 million people are internally displaced, living in extreme poverty.
- ❖ 37 per cent of the Congo's 55 million people have no access to any kind of health care — most health districts are in a state of complete abandonment.<sup>6</sup>
- ❖ 33 per cent of the population — 16 million people — suffer from serious malnutrition
- ❖ Per capita income has declined steadily from \$ 250 in 1990 to \$ 85 in 2000.
- ❖ DRC is now one of the world's poorest countries and social indicators are among the worst in Africa.

The war has left the country in a state of economic collapse. According to the World Bank, 'the widespread looting of public and individual assets, and the absence of any effective economic

<sup>3</sup> International Rescue Committee, 'Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey,' April 2003.

<sup>4</sup> See for example, Human Rights Watch, *Democratic Republic of the Congo: Confronting Impunity*, January 2004.

<sup>5</sup> World Bank, *Emergency Economic and Social Reunification Support Project*, 11 September 2003.

<sup>6</sup> World Bank, Democratic Republic of the Congo, *Interim Poverty Reduction Strategy and Joint IDA-IMF Staff Assessment*, 24 May 2002.

management systems have discouraged economic production, while laying the ground for a mushrooming of semi-criminal networks'.<sup>7</sup>

In April 2003, the warring parties finally agreed to share power and signed the All Inclusive Agreement on the Transitional Government. Elections are due to be held in 2005. The Government of National Unity was installed in June 2003 but the peace remains fragile. A Truth and Reconciliation Commission is supposed to be established to consider political, economic and social crimes committed from 1960 to 2003. The transitional government is also obliged under the terms of the peace agreement to set up a mechanism to review all commercial agreements and contracts signed during the conflict.

### **The Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo**

In October 2003, the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo published its final report to the UN Security Council. The Security Council had appointed the Panel in 2000, as a response to widespread concern at the link between exploitation of gold, diamonds, and other minerals in the east of the DRC, and the war ongoing in that region since 1996. In the course of its work, the Panel has provided the most detailed account of how the exploitation of resources has funded many of the different armed groups fighting in eastern DRC, and has also enriched individual officers of the Rwandan, Ugandan and Zimbabwean armies that have intervened in the conflict. In addition, the Panel identified business enterprises from outside the region that it believed to be implicated in the conflict.

### **The UN Panel names companies considered to be in violation of the OECD Guidelines for Multinational Enterprises**

In an unprecedented step, the Panel in its October 2002 report listed 29 companies and 54 individuals against whom it recommended the imposition of financial restrictions and travel bans. It included in an annex (Annex III) 85 other companies, which it declared to be in violation of the *OECD Guidelines for Multinational Enterprises*.

The *OECD Guidelines*, adopted by governments in all thirty OECD member countries and by eight non-members, are recommendations addressed directly

### **War in the Democratic Republic of Congo**

1996: The first Congolese war begins.

May 1997: The government of President Mobutu is overthrown, bringing to power the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL) led by Laurent-Désiré Kabila.

August 1998: A falling out between Kabila and his former Ugandan and Rwandan allies, sparks a second Congolese war. The war draws in Angola, Namibia and Zimbabwe on the side of the DRC government and Uganda, Rwandan and Burundi on the side of several rebel groups.

1999: Lusaka Peace Accords are signed, but the peace collapses. DRC is divided among four regimes supported by foreign forces. A 'resource war' is fought, mainly in the eastern DRC: resources fuel the war, which is perpetuated to control resources.

16 January 2001: Laurent Kabila is assassinated and succeeded by his son, Joseph Kabila.

April 2002: Two of the principal rebel movements agree the Sun City Peace Accord with the DRC government.

30 July 2002: Rwanda and DRC sign bilateral accords, leading to Rwandan troop withdrawals in October 2002.

6 September 2002: Uganda and DRC sign bilateral accords leading to Ugandan troop withdrawals in May 2003.

April 2003: The third major rebel force, together with the other parties, sign the All Inclusive Agreement on the Transitional Government.

June 2003 onwards: The naming of a transitional government and the swearing in of two former rebel leaders as vice-presidents. However, serious microconflicts and human rights violations continue throughout 2003, especially in the provinces of Ituri and northern Katanga.

to companies setting down 'shared expectations for business conduct'.<sup>8</sup>

Most significantly, the *OECD Guidelines* are the first international instrument on corporate social responsibility to provide a government-supported (though voluntary) mechanism for monitoring and influencing corporate behaviour. Governments adhering to the *Guidelines* have been obliged to set up 'National Contact Points' (NCPs) to promote the *Guidelines* and 'contribute to the solution of problems which may arise.' Each NCP must report annually to the OECD Committee on International Investment and Multinational Enterprises (CIME). The *OECD Guidelines* outline a procedure, known as the 'specific instance' mechanism, for bringing issues of compliance to the attention of the relevant NCP.

<sup>7</sup> World Bank, *Emergency Economic and Social Reunification Support Project*, September 2003.

<sup>8</sup> Member countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the USA; adhering non-members are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia.

The Panel's reports depict a self-reinforcing cycle of conflict and resource exploitation in the DRC: natural resources fuelled the war, which was perpetuated to control resources. All parties to the conflict have been accused of serious human rights violations. By mapping the interconnections between Congolese parties to the conflict, foreign governments and companies, the Panel maintained that business activities, directly or indirectly, deliberately or through negligence, contributed to the prolongation of the conflict and other human rights abuses.

In some cases, the Panel detailed specific allegations against companies in the main body of its reports. In others, it merely listed companies as being in violation of the *Guidelines* without further

elaboration. Nowhere did the Panel relate its concerns to specific provisions within the *Guidelines*.

*Unanswered Questions* attempts to use the *OECD Guidelines* to identify the varying types and degrees of misconduct by companies doing business in the DRC and to do so on the basis of information publicly provided by the UN Panel and by the companies themselves in their responses.

Types of alleged misconduct	Questions of compliance
❖ Companies who benefited from the direct assistance of the combatants, such as those trading in minerals, which were, mined using forced labour or those whose assets were protected by soldiers or militia.	⇒ Such conduct raises serious questions in relation to the provision in the <i>Guidelines</i> which specifies that enterprises should '[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.'
❖ Companies supplying arms to either rebel or government forces or even participating in military action.	⇒ Irrespective of whether or not sanctions have been breached, activity of this kind should be scrutinized to determine whether or not it is consistent with the human rights provision under the <i>Guidelines</i> .
❖ Companies engaged in the smuggling of diamonds to supply international markets, money laundering, and illegal currency transactions.	⇒ The <i>Guidelines</i> seek the adoption of accounting and auditing practices that prevent 'off the books transactions' or the creation of documents which do not properly and fairly record transactions. Clearly smuggling would represent a total disregard for such requirements.
❖ Companies buying minerals from former foreign or rebel-controlled areas without conducting due diligence tests as to where the minerals came from or who was profiting from the trade.	⇒ Under the <i>Guidelines</i> , it is specified that enterprises should encourage business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the <i>Guidelines</i> .
❖ Companies indirectly involved in the trade in resources from former foreign army and rebel-controlled areas of DRC.	⇒ The supply-chain provision places an onus on all companies to comply with the <i>Guidelines</i> and to consider whether their own role in exploiting resources in a conflict zone is compatible with the provisions on human rights and sustainable development.
❖ Companies offering inducements or exercising anti-competitive influence at a time of great instability to secure lucrative concessions or contracts.	⇒ Under the <i>Guidelines</i> , enterprises should not offer promise, give or demand bribes or other undue advantage to obtain or retain business. They should also refrain from entering into anti-competitive agreements and from seeking or accepting exemptions from statutory regulation.
❖ Companies profiting from lucrative joint ventures, mainly in government controlled areas, set up to exploit DRC's natural resources with little or no benefit going to the Congolese people.	⇒ Under the <i>Guidelines</i> , enterprises should '[c]ontribute to economic, social and environmental progress with a view to achieving sustainable development.' The compatibility of exploitative joint ventures with such a provision is highly questionable.
❖ Banks failing to exercise due diligence when providing facilities for companies engaged in misconduct.	⇒ The <i>Guidelines</i> require all enterprises, including banks, to '[s]upport and uphold good governance principles and to develop and apply good corporate governance practices.' A responsibility is therefore placed on banks and financiers to exercise due diligence and to encourage business partners to apply principles of corporate conduct compatible with the <i>Guidelines</i> .

## The UN Expert Panel is forced to backtrack

The Panel's naming of companies prompted many of them to lobby their own governments and the Security Council to seek their removal from the annexes. The Security Council, stung by criticism that companies had been denied an opportunity to respond to the Panel's allegations, invited them to send their reactions and gave an undertaking to publish them. The Security Council recommended a six-month renewal of the Panel's mandate. The main purpose of this was to review existing and new information 'in order to verify, reinforce and, where necessary, update the Panel's findings, and/or clear parties named in the Panel's previous reports, with a view to adjusting accordingly the lists attached to these reports'.<sup>9</sup>

In the final report of October 2003, the vast majority of company cases were listed as resolved. But serious questions about corporate conduct remain which require a public response.

### Potential miscategorisations and unanswered questions

The categories used in the Panel's October 2003 report are confusing and contradictory. The 'resolved' category includes many cases where it is not at all apparent that there has been any resolution, and the reasons for determining that a case has been 'resolved' are not transparent. Many named companies have publicised their appearance in category I (resolved) as though it were synonymous with 'exoneration,' but that is not what the categorisation entails because the Panel's message is ambiguous. The Panel states that '[c]onsequently, the parties listed in Category I may be viewed as having been removed from the Annexes.'<sup>10</sup> However, it also asserts: 'for any particular party the Panel has acquired information indicating that, *prima facie*, a party has been engaged in conduct related to business dealings linked to the DRC...that do not meet generally accepted international standards of corporate behaviour or governance'<sup>11</sup> and that '[i]t should be stressed that resolution should not be seen as invalidating the Panel's earlier findings with regard to the activities of these actors.'<sup>12</sup> In other words, 'resolved' does not necessarily mean absolved, only that there are 'no current outstanding issues'.

In its final report, there is no way of differentiating between those companies who were in violation of the *Guidelines* and those that were not because the Panel leaves unexplained the passage to category I

<sup>9</sup> UN Security Council, Resolution 1457 of 23 January 2003, paragraph 9.

<sup>10</sup> UN Panel Report, 23 October 2003, S/2003/1027, paragraph 23.

<sup>11</sup> *Ibid.*, paragraph 15.

<sup>12</sup> *Idem.*

**Category I** companies are those whose cases are described as 'resolved', where the Panel has concluded that 'there are no current outstanding issues, the original issues that led to their being listed in the Annexes having been worked out to the satisfaction of both the Panel and the companies and individuals concerned.' In all, 42 of the companies formerly listed in annex III are now placed in the 'resolved' category.

**Category II** comprises two cases concerning companies which have reached a 'provisional resolution' on matters of substance, but one that is dependent on them fulfilling commitments that will only occur after the end of the Panel's mandate. Details have therefore been referred to the relevant NCPs for monitoring of these commitments.

In **category III** are those companies where issues have been 'referred to NCPs for updating or further investigation', often because they have rejected the Panel's contentions. Also in this category are companies currently involved in legal proceedings, for example, those making defamation claims against newspapers on the same subject matter. The outcome of such proceedings may provide additional documents and information for NCPs. Overall, dossiers on 11 cases have been referred to NCPs in Belgium, Germany and the UK for further investigation.

**Category IV** identifies 29 cases of companies and individuals that either have been 'referred to Governments for further investigation' or have been the subject of requests from Governments for further information so that they can conduct their own enquiries. Of these, 12 are Annex III companies.

**Category V** contains those companies and parties, 38 cases in all, that 'did not react to the Panel's report'. Ten companies in this final category are Annex III companies.

status.<sup>13</sup> This is unacceptable both from the point of view of accountability and the public interest and also from the point of view of the parties concerned. Not only is it impossible to identify those companies who have agreed to take remedial action from those who have not, but no details whatsoever are given on what this action might entail. It is therefore impossible for the public and affected parties to judge their adequacy or whether, indeed, anything at all is being done.

Moreover, there are significant gaps in the public record. Some companies that seemingly have not responded to the Panel nevertheless appear in the resolved category. Others that are listed as not having responded, including several operating out of

<sup>13</sup> The Panel lists a company in category I because: it has either acknowledged inappropriate behaviour and has taken or proposes time-bound remedial action; or because it has ceased trading with Congolese partners who cannot meet international standards of business ethics; or because it has shown that conduct perceived as suspect due to lack of transparency, was, in fact, acceptable; or because it has been doing business for many years in DRC prior to the outbreak of conflict in 1998 and, although finding itself operating in areas recently held by rebels or opposition groups, did so in a responsible manner; or else because it has only tangential or indirect links to DRC, being one step removed from direct trade. The Panel does not state into which of these 'sub-categories' a company falls.

adhering countries, have profited from their silence and escape scrutiny altogether.

Problems with the Panel's final classification include:

- ❖ The failure to distinguish between acceptable and unacceptable behaviour.
- ❖ An undifferentiated approach to 'resolution'.
- ❖ Gaps in the public record.
- ❖ Corporate silence and the avoidance of scrutiny.
- ❖ Potential miscategorisation and unresolved allegations.

The potentially most serious aspect of the Panel's final categorisation is that there is no publicly available record of how each case was decided. It cannot therefore be satisfactorily determined why certain companies are placed in a particular category. In other terms, why are certain companies listed in the resolved category I when the Panel's original allegations against them have not been publicly answered or re-examined? Or why have certain companies been listed for further investigation when others have not, even though their compliance with the *Guidelines* is equally, if not more, questionable?

In the light of the unanswered questions over conduct that remain, the limited list of companies for further investigation by National Contact Points (NCPs) drawn up by the Panel should be extended.

## Next Steps

The mandate of the UN Panel of Experts has now ended; there will be no further extensions from the Security Council. The responsibility to act on its findings relating to businesses operating in the DRC thus rests with the OECD mechanisms for monitoring compliance with the *Guidelines*, and in particular with the National Contact Points. The Panel has drawn up a limited list of companies for further investigation in the OECD forum. It is of paramount importance that governments adhering to the *OECD Guidelines* not only launch full investigations into these companies, but also seek to address the anomalies arising from the Panel's final categorisation. This will require revisiting many cases declared by the Panel as 'resolved' because of the Panel's assertion that 'resolution should not be seen as invalidating the Panel's earlier findings'.

Indeed, under the *Guidelines*, the conduct of any company – resolved, unresolved or otherwise – may give rise to the examination of a specific instance whereby information on misconduct is presented to

the NCP by interested parties (including NGOs and trade unions). New and existing cases alike can be the subject of an NGO complaint.

Responsible companies, who share the view that the best way of resolving specific instances under the *Guidelines* is to do so through the NCPs, should welcome a dialogue that gives them the opportunity to show how their conduct in the DRC was ethical. The Panel's initiative to provide information to NCPs is a positive step yet, at the same time, this process raises a number of concerns and issues that require clarification.

❖ **Transparency.** Dossiers on 11 companies in category III have been forwarded by the Panel to NCPs in Belgium, Germany and the UK for further investigation. Two further companies are listed in category II for subsequent monitoring by the UK and Belgian NCPs. It is necessary, in the interests of accountability and impartiality, to establish on what basis the companies concerned were selected and why others were not selected.

❖ **NCPs' Investigative powers.** Of course, the agreement to receive cases is meaningless if no action is then to be taken on the cases. It seems that the receipt of dossiers from the Panel has not automatically triggered implementation of the *Guidelines* under the specific instance mechanism. NCPs do have an investigative function and their role is not limited to that of mediation. The OECD's own commentary on procedures makes clear that when issues arise in a non-adhering country, NCPs 'may...be in a position to pursue enquiries and engage in other fact finding activities'.<sup>14</sup> Moreover, the disbanding of the UN Panel and the absence of a formal complainant need not be an insuperable obstacle to NCP action. The commentary further specifies that NCPs 'may also take other steps to further the effective implementation of the *Guidelines*'.<sup>15</sup> There are precedents where NCPs have initiated the examination of a specific instance in the absence of a formal complainant.<sup>16</sup>

❖ **Alleged lack of evidence.** Adhering governments and NCPs have complained about the difficulty in obtaining further evidence on misconduct from the UN Panel. Now the UN Panel has disbanded, governments and the UN must find a mechanism by which the additional

<sup>14</sup> *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, I. Procedural Guidance for NCPs, paragraph 20.

<sup>15</sup> *Ibid.*, paragraph 13

<sup>16</sup> The Finnish NCP, for example, at the request of a company listed by the Panel, examined the issues raised by the Panel and made a report of its findings.

information it gathered can be handed over. At the same time, and as the full RAID report demonstrates, detailed information is already in the public domain. Moreover, the argument that insufficient evidence exists to launch an investigation is defeated by the counter-argument that a key purpose of any investigation is to uncover such evidence in the first place.

- ❖ **Reluctance to determine that a breach has occurred.** Certain NCPs have stressed that their role is that of a mediator and not to decide whether a company has breached the *Guidelines* in a particular instance. This approach ignores an NCP's responsibility to make such a determination ('the procedure makes clear that an NCP will issue a statement').<sup>17</sup> Given the gravity of the allegations concerning corporate activities in the DRC, NCPs who seek only to facilitate discussion between the parties or merely to extract a promise from a company about future behaviour risk appearing to turn a blind eye to past harm. Confidence in the future requires the acknowledgement of past wrongs.
- ❖ **Complaints by NGOs.** NGOs, as interested parties, may raise issues independently under the *Guidelines*. Even though the dossiers on certain companies have been listed as 'resolved' by the Panel, many NGOs, do not consider that all of the enterprises concerned were in compliance with the *Guidelines*. At the same time, re-listed or unexonerated companies should also be given the opportunity to explain their conduct or to provide clarification.

## The contribution of this report

The RAID report examines the role of companies in the DRC conflict as described by the Panel, their reactions to being listed by the UN Panel and the unanswered questions that remain about their conduct in the wake of the Panel's final report.

The purpose of the RAID report is to bring to the attention of both CIME and appropriate NCPs those contradictions, inconsistencies and unanswered questions that remain, based on information already in the public domain. It is in the interests of all parties to seek clarification of these matters. The report is intended to offer a constructive approach. In order to organise the material a broad distinction is made in the full report — following the Panel's

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<sup>17</sup> *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, I. Procedural Guidance for NCPs, paragraph 18.

own practice — between those companies operating in government-controlled areas and those doing business in areas formerly controlled by foreign armies and rebel forces.

An electronic version of RAID's full report is to be submitted to the UN Security Council, OECD Governments, the OECD's Committee on International Investment and Multinational Enterprises (CIME) and the International Criminal Court. Companies are urged to use the good offices of the NCPs to both provide and obtain further information.

## Sources

The full RAID report provides detailed information on the businesses involved in the DRC, based on the reports of the UN Panel, the companies' responses and, where available and appropriate, additional, expressly referenced information.<sup>18</sup> This includes the final reports of a Belgian Senate 'Great Lakes' Commission of Inquiry and a Ugandan Judicial Commission of Inquiry, both established and conducted in response to the Panel's work and Security Council statements and resolutions.<sup>19</sup> In addition, RAID interviewed members of the UN Panel of Experts, Congolese and OECD government officials, National Contact Points, World Bank staff, employees of Gécamines (the Congolese state-owned mining corporation), the staff of private sector companies operating in the DRC, Congolese trade unionists and other civil society representatives, and international and OECD-based NGOs.

For each company or group of companies, a chart is provided in the full RAID report indicating the questions about that company's activities that remain to be answered, and the provisions of the *Guidelines* that might apply.

## Lessons and recommendations

When considered as a whole, the Panel's work has been invaluable in examining the self-reinforcing cycle of conflict and resource exploitation in the DRC. The Panel's decision to use a benchmark against which to assess corporate conduct has given the *OECD Guidelines* a new impetus. However, by

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<sup>18</sup> The RAID report relies exclusively on the UN Panel's reports and company responses unless the text or a footnote expressly states otherwise. It is not based on investigative research by RAID.

<sup>19</sup> The President of Uganda 'took urgent steps to implement the decision to set up an inquiry' in response to the Security Council urging 'governments named in the [Panel's] reports to conduct their own inquiries into these allegations.' (See S/PRST/13, 3 May 2001). The Belgian Senate 'Great Lakes' Commission of Inquiry 'a été instituée à l'occasion du rapport des Nations unies relatif aux activités illégales d'entreprises belges et autres en République démocratique du Congo' and in its final conclusions it is stated that 'La commission prend acte de la résolution 1457 du 24 janvier 2003 du Conseil de sécurité de l'ONU.'

listing companies that it considered to be in violation of the *Guidelines* in its annexes, the Panel gave rise to the expectation that governments would act to curb corporate misconduct in the DRC.

The call for investigation came from the highest authority. In a resolution after the Panel's October 2002 report, the Security Council requested the Panel 'to establish a procedure to provide to Member States, upon request, information previously collected by the Panel to help them take the necessary investigative action' and urged all States 'to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel'.<sup>20</sup> The call for appropriate action by governments on the basis of information provided by the Panel was reiterated in a second resolution.<sup>21</sup> In the Security Council's final public statement to date, following the Panel's October 2003 report, all States were again urged to proceed with their own investigations 'on the basis in particular of information and documentation accumulated by the Panel during its work and forwarded to governments'.<sup>22</sup> The basis for investigation is not, therefore, *exclusively* tied to information from the Panel.

While it is not correct to say that NCPs have done nothing, many of their activities so far have been ineffectual. The main reason for this has been the low priority OECD governments have given to following up on the UN Panel's work. Without a clear signal from their governments, NCPs have been unwilling or unable to take a more vigorous approach. Few, if any, have taken steps to obtain background information on the activities of companies in the DRC from informed sources. Government departments have failed to coordinate with NCPs or to share relevant information. While recognising that they could be more proactive in their fact-finding, NCPs have been hampered by limited resources. This inaction is a cause for serious concern and public confidence in the effectiveness of the *OECD Guidelines* is being damaged. This situation reflects less on the NCPs themselves, but upon the sincerity and determination of OECD governments to address the issue of corporate accountability in conflict zones.

As the Panel has always recognised, the responsibility to implement the *Guidelines* rests with adhering governments. The onus has shifted to the OECD forum. Adhering governments have a responsibility to ensure that the *Guidelines* are applied. It is in nobody's interest – neither that of

responsible companies, nor that of the people of the DRC – to leave hanging those questions left unanswered by the Panel.

❖ **Prompt government investigations:**

Governments must give much greater priority to the examination of the role of companies in the DRC. Adhering governments, acting through the CIME and individual NCPs, must establish a clear time-table for carrying out the investigation of specific instances with a view to issuing public recommendations on compliance. This will require revisiting many cases declared by the Panel as resolved. As the full RAID report demonstrates, there is sufficient information in the public domain for NCPs to act without waiting for a submission from an interested party. NCPs should be given additional resources to carry out this task.

❖ **The NCP process:** A high-ranking official or independent expert should be appointed in each adhering country to coordinate the work of the NCP and to prepare a progress report for consideration by national parliaments. The findings of NCPs should be subject to parliamentary scrutiny.

❖ **International Criminal Court:** Governments and the UN should co-operate fully with investigations which are being launched by the ICC into, *inter alia*, the complicity of business in war crimes in the DRC.

❖ **Domestic prosecutions:** National governments must investigate and prosecute companies where their conduct is shown to contravene domestic legislation. In particular, Governments should urgently investigate whether there have been any breaches of domestic anti-bribery laws and money laundering legislation by companies based in their jurisdictions in relation to the DRC.

❖ **Action by the OECD:** In its forthcoming generic study on business in weak governance zones, CIME should issue a clarification to companies about the use of the *Guidelines* in determining acceptable and unacceptable corporate conduct in conflict and post-conflict situations.

<sup>20</sup> Security Council Resolution 1457 (2003) of 24 January 2003, respectively paragraphs 12 and 15.

<sup>21</sup> Security Council Resolution 1499 (2003) of 13 August 2003, paragraph 3.

<sup>22</sup> Security Council, Presidential Statement S/PRST/2003/21 of 19 November 2003.

- ❖ ***Incorporation of the UN Human Rights Norms for Business into the OECD Guidelines:*** This would immediately strengthen companies' understanding of what is expected of them and reinforce the existing – if unelaborated – human rights provision.
- ❖ ***Review of existing commercial agreements:*** The transitional government has resolved to establish a mechanism for the review of all commercial agreements and contracts signed during the conflict. Such a review will underpin the future prosperity and stability of the DRC. OECD member states are called upon to assist the transitional government in its implementation of this review.
- ❖ ***Improve anti-money laundering efforts:*** Governmental Financial Intelligence Units (FIUs) should enhance their scrutiny of correspondent banking arrangements. FIUs should undertake an audit of transactions to and from the DRC between 1998 and 2002, particularly in relation to 'politically exposed persons'.
- ❖ ***Call for compliance with the Guidelines within the diamond industry:*** The World Federation of Diamond Bourses and the International Diamond Manufacturers Association through their respective member organizations represent well over 20,000 diamond traders and manufacturers. Both bodies should, through their affiliated organizations, ensure that diamond companies are made aware of, and fully comply with, the *OECD Guidelines for Multinational Enterprises*.
- ❖ ***Call for permanent monitoring:*** A permanent UN body, with clear and transparent procedures, should be established to monitor the role of business in conflict.
- ❖ ***Binding regulation of business:*** The *Guidelines* – which can neither impose sanctions nor offer compensation – are a positive, but preliminary step, towards holding companies to account for their actions. In the absence of sufficient progress to redress corporate misconduct under the *Guidelines*, governments should consider a renewed call for the binding regulation of multinationals.



# Unanswered questions: Companies, conflict and the Democratic Republic of Congo

## Introduction

In October 2003, the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo published its final report to the UN Security Council. The Security Council had appointed the Panel in 2000, as a response to widespread concern over the link between exploitation of gold, diamonds, and other minerals in the east of the Democratic Republic of Congo (DRC) and the war ongoing in that region since 1996. In the course of its work, the Panel has provided the most detailed account of how the exploitation of resources has funded many of the different armed groups fighting in eastern DRC and how it has also enriched individual officers of the Rwandan, Ugandan and Zimbabwean armies that have intervened in the conflict, as well as their political masters. In addition, the Panel has identified business enterprises from both inside and outside the region that it believed to be implicated in the conflict. In an unprecedented step, the Panel listed 29 companies and 54 individuals against whom it recommended the imposition of financial restrictions and travel bans, and 85 other companies which it declared to be in violation of the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises*.<sup>1</sup> First adopted in 1976 and recently revised in 2000, the *Guidelines* 'provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, competition, taxation, and science and technology.'<sup>2</sup>

This report is based upon the UN Panel report of October 2002, the reactions of the companies to that report, and the October 2003 follow-up report of the Panel re-examining their status. It addresses the unanswered questions left by the final Panel report. The failure to conclusively resolve outstanding cases of misconduct in the UN forum requires governments to use the mechanisms they have set up to monitor compliance under the OECD *Guidelines* for Multinational Enterprises.

**Part I** of this report summarises the background to the UN Panel's work in the DRC, provides an overview of the OECD *Guidelines*, and seeks to analyse the Panel's final categorisation of companies in order to prepare the ground for action in the OECD forum. It is argued that the Security Council, responding to lobbying from some of the businesses concerned, has left the Panel with little option but to re-categorise cases of misconduct as 'resolved' when the grounds for doing so have not been publicly if at all established. It may be that some of these cases may need to be reopened and the list of companies forwarded by the Panel for updating or investigation under the OECD *Guidelines* may need to be expanded.

**Part II** sets out the reasons why compliance with the *Guidelines* has always been, and remains, a responsibility of companies doing business in the DRC. It identifies two overarching provisions in the *Guidelines* on human rights and sustainable development that have a direct bearing on corporate conduct and the exploitation of resources in conflict areas such as the DRC.

The Panel has been reticent about citing provisions in the *Guidelines* when alleging a violation. **Part III** therefore seeks to interpolate the grounds for determining compliance or non-compliance in specific instances and to highlight a number of unanswered questions, based on public documents, about corporate conduct in the DRC. It presents the Panel's findings on a number of selected companies by recourse to provisions within the *Guidelines*. Clarification is sought on a number of contentious points: in this respect, implementation of the *Guidelines* is viewed in a constructive light in that companies whose conduct has come under public scrutiny following the Panel's reports should be equally concerned with reaching a resolution in the OECD forum.

A number of recommendations are forwarded in **Part IV** by way of conclusion. Effective implementation of the *Guidelines* is essential if they are to play a positive role in informing the future of corporate responsibility in the DRC and other conflict situations.

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<sup>1</sup> See *The OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2000).

<sup>2</sup> See <[http://www.oecd.org/department/0,2688,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html)> (visited 17 December 2003).

# Part I

## The UN Panel's findings and the OECD response

This section of the report begins by considering the work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo and its use of the OECD *Guidelines*. It ends by examining the OECD's response to the Panel's work. Following the furore stirred up by the Panel's listing of companies, the Security Council moved to restrict the Panel's mandate and to steer it away from declaring violations of the OECD *Guidelines*. The result has been a re-categorisation of the companies concerned. Most cases now appear as resolved, a category so broadly defined that companies who have failed to provide the Panel with responsive facts are listed alongside others who have explained their actions. The Panel has drawn up a limited list of companies for further investigation in the OECD forum. It is of paramount importance that governments adhering to the OECD *Guidelines* not only launch full investigations into these companies, but also seek to address the anomalies arising from the Panel's final categorisation. This will require revisiting many cases declared by the Panel as resolved.

### War in the Democratic Republic of Congo

The first war in the Democratic Republic of Congo began in 1996 when Uganda and Rwanda supported the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL) led by Laurent-Désiré Kabila. It ended in May 1997 with the accession to power of President Laurent Kabila, following the overthrow of President Mobutu Sese Seko, after over three decades in power.

Over the next year, relations between Kabila and the Ugandan and Rwandan governments deteriorated. Kabila ordered all foreign troops to leave the DRC in July 1998. Their refusal to do so sparked the second Congo war, which began in August 1998. It drew in Angola, Namibia and Zimbabwe on the side of the DRC government who were engaged in fighting with several rebel groups supported by the armed forces of Uganda, Burundi and Rwanda.<sup>3</sup> In 1999, the major parties to the war signed the Lusaka Peace Accords and a United Nations force was deployed to monitor arrangements for the ending of the conflict. However, the peace collapsed and the DRC was divided among four regimes supported by foreign forces.<sup>4</sup>

Laurent Kabila was assassinated on 16 January 2001 and succeeded by his son, Joseph Kabila. Two of the principal rebel movements, the Ugandan-backed MLC (Mouvement de libération congolais) and RCD-ML (Rassemblement congolais pour la démocratie — Mouvement de libération), agreed the Sun City Peace Accord with the DRC government in April 2002. Rwanda and Uganda signed bilateral accords that led to the withdrawal of their troops in October 2002 and May 2003, respectively.<sup>5</sup> In April 2003, the third major rebel force, the Rwandan-backed RCD-Goma, together with the other parties, signed the All Inclusive Agreement on the Transitional Government.

President Joseph Kabila named a transitional government in June 2003 in advance of democratic elections to take place in two years time. The following month, two leaders of the former rebel groups were sworn in as vice-presidents. However, serious microconflicts and human rights violations have continued throughout 2003, especially in Ituri province in the north east of the country.<sup>6</sup>

The second Congo war, fought mainly in the eastern DRC, is a classic example of what has come to be called a 'resource war'. From its outset, national and international NGOs have raised concern over the links between exploitation of the country's vast natural wealth and the continued and brutal fighting in the east of the country.

- ❖ **Since 1998, the second Congolese war has cost over 3 million lives.**
- ❖ **More than 2.4 million are internally displaced, living in extreme poverty.**
- ❖ **37 per cent of the Congo's 55 million people have no access to any kind of health care - most health districts are in a state of complete abandonment.**
- ❖ **33 per cent of the population -16 million people - suffer from serious malnutrition.**

Sources: International Rescue Committee, 'Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey', April 2003; World Bank, Democratic Republic of the Congo, Interim Poverty Reduction Strategy and Joint IDA-IMF Staff Assessment, 24 May 2002.

<sup>3</sup> Amnesty International, 'Democratic Republic of the Congo: 'Our brothers who help kill us' - economic exploitation and human rights abuses in the East,' 1 April 2003, p.7.

<sup>4</sup> Human Rights Watch, 'Democratic Republic of Congo, Ituri: "Covered in Blood" - Ethnically Targeted Violence in Northeastern Congo,' Vol. 15, No. 11 (A) - July 2003, p. 5.

<sup>5</sup> *Idem*; also 'Our brothers who help kill us,' op. cit., p.10.

<sup>6</sup> For a full account of this violence, see 'Ituri: "Covered in Blood",' op. cit..

## A. The UN Panel of Experts

In June 2000, responding to increasing levels of concern over the war in eastern Congo, the UN Security Council requested the Secretary-General to establish an expert panel on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo for a period of six months, with the following mandate:

- To follow up on reports and collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, including in violation of the sovereignty of that country;
- To research and analyse the links between the exploitation of the natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict;
- To revert to the Council with recommendations.<sup>7</sup>

The Secretary-General formally established the Panel in September 2000, and it began its investigations and deliberations. The mandate of the Panel was repeatedly extended, and it submitted several reports, via the Secretary-General, to the Security Council. The report of 16 October 2002 was to have been the Panel's final report.<sup>8</sup> It concluded:

The regional conflict that drew the armies of seven African States into the Democratic Republic of the Congo has diminished in intensity, but the overlapping microconflicts that it provoked continue. These conflicts are fought over minerals, farm produce, land and even tax revenues. Criminal groups linked to the armies of Rwanda, Uganda and Zimbabwe and the Government of the Democratic Republic of the Congo have benefited from the microconflicts. Those groups will not disband voluntarily even as the foreign military forces continue their withdrawals. They have built up a self-financing war economy centred on mineral exploitation.<sup>9</sup>

Accordingly,

The most important element in effectively halting the illegal exploitation of resources in the Democratic Republic of the Congo relates to the political will of those who support, protect and benefit from the networks. This may pose a great challenge, given the intricate relationships they have forged and the dependency they have developed on the profits from these activities.<sup>10</sup>

Based on its findings, the Panel's October 2002 Report listed, in Annex I, companies on which it recommended the placing of financial restrictions; and, in Annex II, persons for whom it recommended a travel ban and financial restrictions. The Panel stated:

By contributing to the revenues of the elite networks, directly or indirectly, those companies and individuals [listed in Annex I and II] contribute to the ongoing conflict and to human rights abuses. More specifically, those business enterprises are in violation of the OECD Guidelines for Multinational Enterprises.<sup>11</sup>

In addition, the report listed, in Annex III, 85 'Business enterprises considered by the Panel to be in violation of the OECD *Guidelines* for Multinational Enterprises', but against which it did not recommend specific measures to be taken by the Security Council.<sup>12</sup> The Panel was of the view that:

### Chronology of the Panel's reports

- Interim report dated 16 January 2001 (S/2001/49).
- Report dated 12 April 2001 (S/2001/357).
- Addendum report dated 13 November 2001 (S/2001/1072).
- Interim report dated 22 May 2002 (S/2002/565).
- Report dated 16 October 2002 (S/2002/1146).
- Addendum dated 20 June 2003 (S/2002/1146/Add.1).
- Report dated 23 October 2003 (S/2003/1027).

### Key Security Council Resolutions and Presidential Statements on the Panel and its work

- Presidential Statement, Security Council, S/PRST/2000/20, 2 June 2000.
- Presidential Statement, Security Council, S/PRST/2001/13, 3 May 2001.
- Presidential Statement, Security Council, S/PRST/2001/39, 19 December 2001.
- Security Council Resolution 1457 (2003), 24 January 2003.
- Security Council Resolution 1499 (2003), 13 August 2003.
- Presidential Statement, Security Council, S/PRST/2003/21, 19 November 2003.

<sup>7</sup> UN Security Council Presidential statement, 2 June 2000, S/PRST/2000/20.

<sup>8</sup> Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo [hereafter '*UN Panel Report*'], 16 October 2002, S/2002/1146.

<sup>9</sup> *Ibid.*, paragraph 12.

<sup>10</sup> *Ibid.*, paragraph 152.

<sup>11</sup> *Ibid.*, paragraph 175.

<sup>12</sup> *Ibid.*, paragraph 177.

## The OECD Guidelines for Multinational Enterprises

*The OECD Guidelines for Multinational Enterprises*, adopted by governments in all thirty OECD member countries and by eight non-members, are recommendations addressed directly to companies setting down 'shared expectations for business conduct'.<sup>16</sup> The *Guidelines* relate to all key aspects of multinational enterprises' operations: human rights, sustainable development, information disclosure, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation. They should be observed wherever a company operates.<sup>17</sup> In other words, a company based in an adhering country operating in any other country in the world (including non-adhering countries) is subject to the *Guidelines*, which are addressed to both parent companies and local entities according to the actual distribution of responsibilities among them.<sup>18</sup>

Although their observance is voluntary, the *Guidelines* have been endorsed by multinational companies, represented through the OECD's Business and Industry Advisory Committee (BIAC), as well as by the corresponding Trade Union Advisory Committee (TUAC).<sup>19</sup> Moreover, adhering governments are obliged to promote their respect. This commitment was strengthened by a national level implementation procedure agreed when the *Guidelines*, originally adopted in 1976, were revised in June 2000 to ensure their continued relevance and effectiveness.<sup>20</sup> They are the first international instrument on corporate social responsibility to provide a government-supported mechanism for monitoring and influencing corporate behaviour. Indeed, a company may find its operations under scrutiny whether or not it has individually endorsed the *Guidelines*.

The *Guidelines* are implemented through a dual system of National Contact Points (NCPs) in each adhering country and the Committee on International Investment and Multinational Enterprises (CIME), made up of NCPs from member countries, which oversees the process.<sup>21</sup> Institutional arrangements are flexible, allowing adhering countries to nominate an official, a government office or cooperative body to carry out the NCP function. The overriding majority of NCPs are based in economic or trade ministries.<sup>22</sup> NCPs are required to raise awareness of the *Guidelines* among business, employee organisations, NGOs and the interested public by making them known and available in national languages.<sup>23</sup> There are specific requirements to inform prospective investors about the *Guidelines* and to respond to enquiries from interested parties.<sup>24</sup> A crucial and unique element of the *Guidelines* is that NCPs are required to examine specific instances of company misconduct when these are raised by parties concerned, including trade unions or NGOs.<sup>25</sup>

An NCP makes a prima facie assessment of whether the issues raised warrant further investigation.<sup>26</sup> In warranted cases, the NCP then offers its good offices to bring the parties together to resolve the issue.<sup>27</sup> An NCP may seek advice from business, employee representatives, NGOs and relevant experts; consult with NCPs in other countries concerned; and seek the guidance of the CIME over matters of interpretation.<sup>28</sup> Provided the parties agree, the NCP then offers conciliation or mediation to deal with the issue. The examination procedure is confidential and the NCP must protect sensitive business and other information.<sup>29</sup> If the parties fail to reach agreement, the NCP releases a statement and makes recommendations, as appropriate, on the implementation of the *Guidelines*.<sup>30</sup> Hence the results of the procedure are made public, but only after consultation with the parties and 'unless preserving confidentiality would be in the best interests of effective implementation of the *Guidelines*.'<sup>31</sup>

'the OECD Guidelines offer a mechanism for bringing violations of them by business enterprises to the attention of home Governments, that is, Governments of the countries where the enterprises are registered. Governments with jurisdiction over these enterprises are complicit themselves when they do not take remedial measures.'<sup>13</sup>

The *Guidelines* represent a commitment by all thirty OECD member countries and by eight non-members to make recommendations to multinational companies operating in or from their territories. The *Guidelines* should be observed in all the countries of the world in which a company or its subsidiaries operate, including the DRC. This makes the *Guidelines* one of the most geographically extensive of the corporate codes.

Following the publication of the Panel's report, the Security Council issued a resolution 1457 in which it strongly condemned the illegal exploitation of natural resource in DRC, noted its concern that this plunder fuelled the conflict, and demanded that all States concerned act immediately to end these illegal activities. It reiterated that exploitation should occur transparently, legally and on a fair commercial basis, to benefit the country and its people.<sup>14</sup> The Security Council recommended a six month renewal of the Panel's mandate, to include a review of existing and new information 'in order to verify, reinforce and, where necessary, update the Panel's findings, and/or clear parties named in the Panel's previous reports, with a view to adjusting accordingly the lists attached to these reports'.<sup>15</sup> Companies and others named in the Panel's October 2002 report were invited to send their reactions to the Panel for subsequent publication. Of particular significance in the context of the *Guidelines*, the Security Council resolution,

<sup>13</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 170.

<sup>14</sup> UN Security Council, Resolution 1457 of 23 January 2003, paragraphs 2 – 4.

<sup>15</sup> Ibid., paragraph 9.

<sup>16</sup> *The OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2000), Preface, 7. Member countries of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the USA. Eight non-member countries - Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia - have also declared their adherence to the *Guidelines*.

Requests the Panel to provide information to the Organisation for Economic Cooperation and Development (OECD) Committee on International Investment and Multinational Enterprises and to the National Contact Points for the OECD Guidelines for Multinational Enterprises in the States where business enterprises listed in annex 3 of the last report as being allegedly in contravention of the OECD guidelines are registered, in accordance with United Nations established practice...<sup>32</sup>

Whereas the Panel initially stated that business enterprises in both annexes I and III were in violation of the *Guidelines*, the Security Council made reference only to those in Annex III. Purely in respect of the *Guidelines*, this apparent narrowing of focus has few consequences because the overwhelming majority of enterprises doing business in the DRC and operating out of countries adhering to the *Guidelines* appearing in Annex I were also listed in Annex III. The main focus of this memorandum, written in the context of further action in the OECD forum, is therefore on Annex III companies. There are two exceptions. The first is Oryx Natural Resources, listed in Annex I but not Annex III of the Panel's October 2002 report, and referred to in the main body of this and other Panel reports. Oryx has recognised and endorsed the *Guidelines vis-à-vis* their activities in the DRC.<sup>33</sup> The second is the Belgium-based diamond dealer Abadiam, which did not appear in any of the annexes to the Panel's October 2002 report, but which is referred to within the body of that report. The Panel does not explicitly state that Abadiam had violated the *Guidelines*. Nevertheless, the company has reacted to the Panel in the context of the *Guidelines*, although without endorsing them.<sup>34</sup>

The Panel sought to establish a dialogue and to exchange information with all named enterprises to seek clarification of the issues raised. Beginning in early April 2003, it held face-to-face meetings in Nairobi and Paris with many of the parties interested in conducting a dialogue and in submitting a reaction.<sup>35</sup> Out of the 85 enterprises listed in Annex III, 44 replied by the deadline of 31 May 2003.<sup>36</sup> The replies from all the parties submitting reactions, including those from Oryx and Abadiam, were published by the UN in an addendum to the Panel's report on 20 June 2003, with the exception of five unnamed respondents who had asked for their correspondence to be kept confidential.<sup>37</sup> In some instances, because the Panel did not publish detailed allegations against the companies in Annex III, it is necessary to rely on a company's own public statement of the Panel's allegations. On 13 August 2003, the Security Council adopted Resolution 1499 extending the Panel's mandate until 31 October 2003.

In October 2003, the Panel determined what action to take in the light of this dialogue and published its final report.<sup>38</sup> It divided the companies into five categories: please see the annex to this report for information on which companies appear in which categories.

- **Category I** companies are those whose cases are described as '**resolved**', where the Panel has concluded that 'there are no current outstanding issues, the original issues that led to their being listed in the Annexes having

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<sup>17</sup> *Guidelines*, op. cit., I. Concepts and Principles, 1 & 2.

<sup>18</sup> *Ibid.*, I. Concepts and Principles, 3.

<sup>19</sup> *Ibid.*, I. Concepts and Principles, 1.

<sup>20</sup> Statement by the Chair of the Ministerial, June 2000, reproduced in *The OECD Guidelines for Multinational Enterprises: Meeting of the OECD Council at Ministerial Level* (Paris: OECD, 2000), p.5.

<sup>21</sup> *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, paragraph 4 [hereafter '*Commentary on Implementation*'].

<sup>22</sup> Thirty NCPs are located in such ministries or in linked offices (OECD Guidelines for Multinational Enterprises, *Annual Report 2002*, Annex I).

<sup>23</sup> *Implementation Procedures of the OECD Guidelines for Multinational Enterprises* [hereafter, '*Implementation Procedures*'], Procedural Guidance, I. National Contact Points, B. Information and Promotion, 1 & 2.

<sup>24</sup> Respectively, *ibid.*, 1 and 3. NCPs must deal with enquiries from other NCPs, business, employee organisations, NGOs, the public and from Governments of non-adhering countries.

<sup>25</sup> *Implementation Procedures*, Procedural Guidance, op. cit., I. National Contact Points, C. Implementation in Specific Instances. Parties to a specific instance are listed as the business community, employee organisations and 'other parties'. (*Ibid.*). Hence the process is open to unions and NGOs. The wording does not rule out submissions from individuals.

<sup>26</sup> *Ibid.*, 1.

<sup>27</sup> *Ibid.*, 2.

<sup>28</sup> *Ibid.*, 2(a) – (c).

<sup>29</sup> *Ibid.*, 4(a).

<sup>30</sup> *Ibid.*, 3.

<sup>31</sup> *Ibid.*, 4(b).

<sup>32</sup> UN Security Council, Resolution 1457, op. cit., paragraph 14.

<sup>33</sup> Another Oryx Group company, Artic Investments, was listed in Annex III.

<sup>34</sup> See Reaction No.28, written statement from Abadiam to the Panel, reproduced in the Addendum to the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2003/1146/Add.1, 20 June 2003.

<sup>35</sup> Letter from the Chairman of the Panel to the Secretary General, 17 June 2003, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>36</sup> The original deadline for reactions by States, individuals and companies was 31 March 2003. However, in a note from the President, S/2003/340, 24 March 2003, the deadline for reactions was extended to 31 May 2003.

<sup>37</sup> The original deadline for publication was 15 April 2003. This was extended by the Council to 20 June 2003 (see note from the President, S/2003/340, 24 March 2003). The addendum was forwarded to the Secretary General from the Panel on 17 June 2003.

<sup>38</sup> Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2003/1027, 23 October 2003.

been worked out to the satisfaction of both the Panel and the companies and individuals concerned.<sup>39</sup> In all, 42 of the companies formerly listed in annex III are now placed in the ‘resolved’ category.

- **Category II** comprises two cases concerning companies which have reached a ‘**provisional resolution**’ on matters of substance, but one that is dependent on them fulfilling commitments that will only occur after the end of the Panel’s mandate.<sup>40</sup> Details have therefore been referred to the relevant NCPs for monitoring of these commitments.
- In **category III** are those companies where issues have been ‘**referred to NCPs for updating or further investigation**’, often because they have rejected the Panel’s contentions.<sup>41</sup> Also in this category are companies currently involved in legal proceedings, for example, those making defamation claims against newspapers on the same subject matter. The outcome of such proceedings may provide additional documents and information for NCPs and hence their placement in category III. Overall, dossiers on 11 cases have been referred to NCPs in Belgium, Germany and the UK for further investigation.
- **Category IV** identifies 29 cases of companies and individuals that either have been ‘**referred to Governments for further investigation**’ or have been the subject of requests from Governments for further information so that they can conduct their own enquiries.<sup>42</sup> Of these, 12 are Annex III companies.
- **Category V** contains those companies and parties, 38 cases in all, that ‘**did not react to the Panel’s report**’.<sup>43</sup> Ten companies in this final category are Annex III companies.

## B. Potential miscategorisations: the Panel’s final word on corporate misconduct

There are a number of contradictions, anomalies and inconsistencies in the Panel’s final report and categorisations. An analysis of these is essential to further accountability. As the discussion of company conduct *vis-à-vis* the *Guidelines* moves to the OECD forum, the CIME and NCPs are in a position to act on these concerns.

- (1) *Dilution of the verdict of misconduct* – A number of inconsistencies in the Panel’s most recent approach to the question of corporate conduct stem from the Security Council’s 1457 resolution, which defined the Panel’s mandate for the final phase of its work in 2003. Resolution 1457 instructed the Panel to ‘verify, reinforce and, where necessary, update its findings and/or clear parties named in the Panel’s previous reports’. The Panel was caught between the Security Council’s expediency – to see companies cleared – and its own conviction that violations had taken place. Yet, ultimately, it seems that behind the scenes lobbying of the Security Council by the businesses listed in the October 2002 report had the desired effect and the Panel bowed to the pressure. The unequivocal language of violation used in this penultimate report gives way to ‘apparent breaches’ in the final report of October 2003.<sup>44</sup> Moreover, the vast majority of company cases are listed as resolved.
- (2) *The failure to distinguish the culpable from the innocent* – This tension is carried over into the Panel’s categorisations. Many observers will consider that those companies listed in Category I (resolved) have been exonerated. Indeed, the Panel states, in line with the Security Council’s instructions, that ‘[t]he overarching goal of the dialogue was to achieve a resolution of the issues that led to the parties being listed so that they can be removed from the annexes....Consequently, the parties listed in Category I may be viewed as having been removed from the Annexes.’<sup>45</sup> However, the Panel’s message is far more ambiguous than that. It also asserts: ‘for any particular party the Panel has acquired information indicating that, prima facie, a party has been engaged in conduct related to business dealings linked to the DRC...that do not meet generally accepted international standards of corporate behaviour or governance’<sup>46</sup> and that ‘[i]t should be stressed that resolution should not be seen as invalidating the Panel’s earlier findings with regard to the activities of these actors.’<sup>47</sup> It therefore may be that some of the companies or individuals listed in category I *did* breach the *Guidelines*. In its final report, there is a complete absence of analysis by the Panel on a case by case basis and, because of this,

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<sup>39</sup> Ibid., paragraph 23.

<sup>40</sup> Ibid., paragraph 29.

<sup>41</sup> Ibid., paragraph 30.

<sup>42</sup> Ibid., paragraph 31.

<sup>43</sup> Ibid., paragraph 32.

<sup>44</sup> For examples of the use of the language of violation see, *UN Panel Report*, 16 October 2002, op. cit., paragraphs 177 and 175. The phrase ‘apparent breaches’ appears in the *UN Panel Report*, 23 October 2003, op. cit., paragraph 12.

<sup>45</sup> *UN Panel Report*, 23 October 2003, op. cit., paragraphs 22 - 23.

<sup>46</sup> Ibid., paragraph 15.

<sup>47</sup> Ibid., paragraph 23.

there is no way of way of differentiating between those companies who were in violation and those that were not. The culpable and innocent are listed side by side in the same category. This is unacceptable both from the point of view of accountability and the public interest and also from the point of view of the parties concerned.

(3) *An undifferentiated approach to 'resolution'* – Category I is also far too imprecise, both in the widely differing 'resolved' cases it encompasses and in its definition of remedial action.<sup>48</sup> A company may be listed in category I because:

- it has either acknowledged inappropriate behaviour and has taken or proposes time-bound remedial action;
- or because it has ceased trading with Congolese partners who cannot meet international standards of business ethics;
- or because it has shown that conduct perceived as suspect due to lack of transparency, was, in fact, acceptable;
- or because it has been doing business for many years in DRC prior to the outbreak of conflict in 1998 and, although finding itself operating in areas recently held by rebels or opposition groups, did so in a responsible manner;
- or else because it has only tangential or indirect links to DRC, being one step removed from direct trade.

The Panel does not specify which companies belong in which sub-categories. Hence it is impossible to differentiate between those who have admitted a breach of the *Guidelines* and those, for example, who behaved responsibly throughout. The range of conduct encompassed is so broad that the categorisation becomes meaningless in respect of furthering accountability. Moreover, some companies are included in category I because they have agreed a course of remedial action; yet no details are given about what these remedies entail and it is therefore impossible for the public and affected parties to judge their adequacy or whether they are being correctly implemented to a specified timetable.

(4) *Gaps in the public record* – A total of 75 enterprises originally listed as in violation of the OECD *Guidelines* in Annex III of the Panel's October 2002 report are included across categories I to IV.<sup>49</sup> The remaining 10 Annex III companies are placed in category V. Yet only 49 of the companies originally listed in annex III had actually replied to the Panel by the June 2003 deadline. This means that 26 companies who did not reply to the Panel are nevertheless categorised as if they had done so. Moreover, 14 of these companies appear in the resolved category when there is no public record of their having responded to the Panel: the companies concerned are indicated in the annex to this report. Given that the Panel has determined to place all parties who did not respond in category V, then why have these companies been listed elsewhere? Did these companies reply to the Panel outside of the agreed timeframe? If so, why have their replies not been published in an addendum? Or did they meet with the Panel without providing a written response? It may be that the 14 cases includes those 5 companies who specified that their replies be kept confidential, but that still does not account for the other 9 cases. Either way, the absence of a reaction in the public domain undermines the principles of transparency and accountability.

(5) *Inequalities of 'further investigation'* – There is overlap between categories III and IV. Both concern cases requiring further investigation, but it is not apparent why companies in the former category are to be referred to NCPs while those in the latter are to be examined by governments. It is not the case that all companies listed in category III are in countries adhering to the OECD *Guidelines* with NCP representation while all those in category IV are in non-adhering countries. On the contrary, 4 companies in category IV operate out of adhering countries. This raises the obvious question as to why they are not to be examined under the *Guidelines* by NCPs? In other words, companies operating out of the same jurisdictions are being treated differently. Why have adhering Governments approached the Panel in this manner to discuss certain companies it listed, but not others? This is an important issue as companies in category IV are seemingly removed from potential scrutiny by NCPs.

(6) *Corporate silence and the avoidance of scrutiny* – The listing of companies who failed to reply or engage with the Panel in category V is highly problematic. The Panel makes no further comment on their conduct and acknowledges their right not to respond.<sup>50</sup> The outcome is that those companies who have not cooperated with the Panel are the least scrutinised. This is inequitable, sets a poor precedent and is a matter that must be addressed by those governments from whose territory the companies in question operate.

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<sup>48</sup> Ibid., paragraphs 24 – 28.

<sup>49</sup> The Panel enters certain enterprises, which it had listed separately in Annex III of its October 2002 report, together under one combined entry in the categories in its October 2003 report. The entries which it has combined are: Eagle Wings Resources International/Trinitech International Inc; Banque Belgoise/Fortis; Umicore/SOGEM; Bayer AG/H.C. Starck GmbH & Co; ISCOR/ZINCOR (Kumba); Kababankola Mining Company/Tremalt Ltd; Entreprise Générale Malta Forrest/George Forrest International; ASA Diam/ASA International; KHA International AG/Masingiro GmbH; Finmining/Raremet Ltd..

<sup>50</sup> UN Panel Report, 23 October 2003, op. cit., paragraph 32.

- (7) *Potential miscategorisations and unresolved allegations* – The potentially most serious aspect of the Panel’s final categorisation is that there is often no publicly available record of how each case was resolved. It cannot therefore be satisfactorily determined why certain companies are placed in a particular category. In other terms, why do a number of companies appear in the resolved category I when the Panel’s original allegations against them have not been publicly answered?

## C. Future action in the OECD forum

The mandate of the UN Panel of Experts has now ended; there will be no further extensions from the Security Council. The responsibility to act on its findings relating to businesses operating in the DRC thus rests with the OECD mechanisms for monitoring compliance with the *Guidelines*, and in particular with the National Contact Points.

Given the expediency surrounding the Panel’s final report and inconsistencies of categorisation, there is a pressing need for the CIME and NCPs to act. The basis for their doing so has already been established. The Panel recognised that the ultimate responsibility for implementing the *Guidelines* lies with adhering governments.<sup>51</sup>

The OECD Guidelines outline a procedure for bringing violations of the Guidelines to the attention of the Governments of the States where the business enterprises are registered.<sup>52</sup>

The UN Panel’s October 2002 report and annexes were discussed at a meeting of the CIME in December 2002 and a letter was sent to the Security Council outlining the CIME’s views and seeking cooperation with the Panel.<sup>53</sup> In this letter, the Chair of the OECD Committee on International Investment and Multinational Enterprises (CIME) has acknowledged this responsibility:

The [October 2002] report names companies located in adhering countries that the Panel concludes have not observed the Guidelines. The Committee is concerned about the proper use and application of the Guidelines. In order for the Committee and the National Contact Points to meet their responsibilities, it would be very helpful for them to have access to the information on which the Panel based its conclusions. The Committee stands ready to work with the appropriate United Nations contact on making this information available to the National Contact Points concerned and to explore how co-operation can best be pursued as the Security Council considers follow up to the Panel’s report.<sup>54</sup>

Members of the Panel met with representatives of adhering Governments at the OECD in Paris in April 2003. Despite a general agreement ‘to take steps to pursue effective co-operation’, contacts between the Panel and NCPs proceeded on an ad hoc basis.<sup>55</sup> Following the June 2003 NCP annual meeting, the chair of CIME wrote a follow-up letter to the Chair of the Panel. Subsequently, the Panel and the CIME discussed the *modus operandi* by which the Panel was to pass information to NCPs concerning companies operating from within their territories.<sup>56</sup>

The premise must be that responsible companies, who share the view that the best way of resolving specific instances under the *Guidelines* is to do so through the good offices of NCPs, would welcome a dialogue that gives them the opportunity to show how their conduct in the DRC was ethical. Any suggestion that the implementation of the *Guidelines* is merely an exercise in ‘naming and shaming’ is to be avoided. NGOs have their own experience to offer and would wish to contribute to this dialogue. The Panel’s initiative to provide information and the CIME’s and NCPs’ invitation to receive it is welcomed; yet, at the same time, this process raises a number of concerns and issues that require clarification.

- Dossiers on 11 companies in category III have been forwarded by the Panel to NCPs in Belgium, Germany and the UK for further investigation. Two further companies are listed in category II for subsequent monitoring by the UK and Belgian NCPs. It is necessary, in the interests of accountability and impartiality, to establish on what basis the companies concerned were selected and why others were not selected.
- Of course, the agreement to receive cases is meaningless if no action is then to be taken on the cases which have been passed on by the Panel. Will the receipt of such material from the Panel automatically trigger implementation of the *Guidelines* under the specific instance mechanism? NCPs do have an investigative

<sup>51</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 177: ‘Countries which are signatories to those Guidelines and other countries are morally obliged to ensure that their business enterprises adhere to and act on the Guidelines.’

<sup>52</sup> *Ibid.*, paragraph 178.

<sup>53</sup> OECD Guidelines for Multinational Enterprises: 2003 Annual Meeting of the National Contact Points, *Report by the Chair*, Section V, p.11; Letter from the Chair of CIME to the UN Secretary General, 23 January 2003.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *UN Panel Report*, 23 October 2003, op. cit., paragraph 21.



function and their role is not limited to that of mediation. The OECD's own commentary on procedures makes clear that when issues arise in a non-adhering country, NCPs 'may...be in a position to pursue enquiries and engage in other fact finding activities'.<sup>57</sup> Moreover, the disbanding of the UN Panel and the absence of a formal complainant need not be an insuperable obstacle to NCP action. The commentary further specifies that NCPs 'may also take other steps to further the effective implementation of the *Guidelines*'.<sup>58</sup> There are precedents where NCPs have initiated the examination of a specific instance in the absence of a formal complainant. The Finnish NCP, for example, at the request of a company listed by the Panel, examined the issues raised by the Panel and made a report of its findings.

- The *Guidelines* encourage NCPs to seek advice from NGOs and it is therefore expected that they will be called upon to contribute additional information on the cases which have already been received from the UN Panel.<sup>59</sup>
- Moreover, NGOs, as interested parties, may raise issues independently under the *Guidelines*. Even though the dossiers on certain companies have been listed as 'resolved' by the Panel, many NGOs, in common with the Panel, do not adhere to the view that the enterprises concerned were therefore in full compliance with the *Guidelines*. Many of the cases detailed in Part III of this memorandum are also candidates for examination under the specific instance mechanism. NCPs should seek further information about those companies from their own directors, and from other sources, including NGOs.
- At the same time, re-listed or unexonerated companies should also be given the opportunity to explain their conduct or to provide clarification. If the OECD is to maintain both the authority of NCPs to make recommendations on the implementation of the *Guidelines* and the authority of CIME to clarify interpretation of the *Guidelines*, then it follows that both resolved and unresolved company cases may be subject to the specific instance procedure.

The call for investigation by governments comes from the highest authority. Examining company conduct within the OECD forum and the framework of the *Guidelines* is one way in which governments can fulfil responsibilities arising out of the resolutions and statements of the Security Council on follow-up to the Panel's work. In a resolution after the Panel's October 2002 report, the Security Council requested the Panel 'to establish a procedure to provide to Member States, upon request, information previously collected by the Panel to help them take the necessary investigative action' and urged all States 'to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel, taking into account the fact that the Panel, which is not a judicial body, does not have the resources to carry out an investigation whereby these findings can be considered as established facts'.<sup>60</sup> The request to the Panel to provide governments with the necessary information 'in order to enable them, if necessary, to take appropriate action according to their national laws and international obligations' was reiterated in a second resolution.<sup>61</sup> In the Security Council's final public statement to date, following the Panel's October 2003 report, all States were again urged to proceed with their own investigations 'on the basis in particular of information and documentation accumulated by the Panel during its work and forwarded to governments'.<sup>62</sup> The basis for investigation is not, therefore, *exclusively* tied to information from the Panel.

Please refer to Part IV of this memorandum for recommendations on implementation of the *Guidelines* by NCPs and the CIME.

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<sup>57</sup> *Commentary on the OECD Guidelines for Multinational Enterprises* [hereafter, '*Commentary on the Guidelines*'], paragraph 20.

<sup>58</sup> *Ibid.*, paragraph 13.

<sup>59</sup> *Implementation Procedures*, op. cit., Procedural Guidance, C.2.a.

<sup>60</sup> Security Council Resolution 1457 (2003) of 24 January 2003, respectively paragraphs 12 and 15.

<sup>61</sup> Security Council Resolution 1499 (2003) of 13 August 2003, paragraph 3.

<sup>62</sup> Security Council, Presidential Statement S/PRST/2003/21 of 19 November 2003.

## Part II

# Applying the OECD Guidelines to the DRC: resource exploitation, sustainable development and human rights abuse

### A. Compliance versus illegality

In certain instances, the Panel detailed specific allegations against companies in the main body of the text of its reports. In other instances, it listed companies as being in violation of the *Guidelines* without further elaboration in its published documents. Yet, in all instances, the Panel did not relate its concerns to specific provisions within the *Guidelines* – presumably counting on the obligation falling upon adhering governments to interpret and apply the *Guidelines* to the companies concerned. This section identifies the main clauses in the *Guidelines* that are of particular relevance to companies operating in the DRC.

The Panel's ultimate finding is that the exploitation of resources provided the revenue for a bloody war which was then perpetuated in order to control the trade in lucrative natural resources. The conflict has been characterised by widespread human rights violations. Multinational enterprises based in adhering countries who obtained, traded or purchased these resources, directly or indirectly, financed the groups who carried out these violations. It is intended that this memorandum acts as a primer, relating alleged misconduct to Guideline provisions and using a number of cases to demonstrate how unanswered allegations and contradictions remain in the public domain.

Responding to the UN Panel's reports, companies have argued that their activities were legal. They continued to do business in the absence of a UN Security Council resolution or other binding international instrument, trade embargo or other measures that declared the DRC as 'off limits'. Alternatively, companies argue that they were unaware that their activities were contributing to conflict or human rights abuses in the DRC. The appeal is to the longstanding, but now discredited, idea that business is neutral, apolitical; the only responsibility of business is to make a profit. Companies are only obliged to change their conduct when the law requires them to do so; or — a softer version — when they are formally put on notice by official interventions that their activities are problematic.

Yet this defence – that companies were given no guidance on how to act and were therefore unaware of the serious implications of their conducting business in DRC – fails to take into consideration two factors.

Firstly, far from being politically naïve, businesses have an acute understanding of political risk in order to do business in a destabilised country. To quote two examples, America Mineral Fields, a company originally listed by the Panel in Annex III and now placed in the resolved category I, asserts that its 'ability to manage the political and economic risks associated with doing business in countries such as the DRC and Angola' is key to its success.<sup>63</sup> Another company, Anvil Mining, which did not appear in any of the annexes to the Panel's October 2002 report nor in the body of the text, is praised by analysts for its political risk management: 'Throughout the rule of three separate governments, Anvil has carefully nurtured relationships at all levels within the various bureaucracies. The company has demonstrated a non-partisan approach to the political developments within the DRC, and has at all times shown a willingness to work with whatever political body was running the country.'<sup>64</sup> Companies operating in countries like the DRC routinely purchase advice on political risk from consultancies specializing in such analysis.

Secondly, benchmarks defining acceptable and unacceptable behaviour are in place. There has been a proliferation of corporate codes of conduct. The OECD *Guidelines* themselves have been in existence in their original form since 1976 and in a revised form since 2000. Minimally, professed ignorance of the *Guidelines* and other international standards must represent a wilful neglect at a time when progressive businesses have been actively developing and endorsing corporate codes of conduct.

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<sup>63</sup> President's Message, America Mineral Fields Inc., *Annual Report 2002*.

<sup>64</sup> RFC Capital Limited, 'Anvil Mining NL - The Start of Something Big,' 23 April 2003, p.10.

## B. Exploitation, sustainable development and human rights abuse: two overarching provisions

Two overarching provisions within the *Guidelines* governing respect for human rights and sustainable development have a bearing on the relationship between resource exploitation and conflict, in the DRC and elsewhere.

### 1. Human rights

The *Guidelines* specify that enterprises should:<sup>65</sup>

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

The commentary on the *Guidelines* makes it clear that this respect for human rights applies not only to the dealings of MNEs with their employees, but also to their relations with others affected by their activities.<sup>66</sup> Furthermore, reference is made in the Preface to the international legal and policy framework in which business is conducted.<sup>67</sup> The Universal Declaration of Human Rights is cited as part of this framework and its relevance to corporate conduct duly noted.<sup>68</sup> As an integral part of the International Bill of Human Rights, the Universal Declaration is implemented via the two corresponding International Covenants on Civil and Political (ICCPR) and Economic, Social and Cultural Rights (ICESCR). The ICCPR guarantees, *inter alia*, the right to life, the right to be free from torture, the right to freedom of expression and the right to a fair trial. The ICESCR protects, *inter alia*, rights to food, health, housing, and education and the committee responsible for its supervision has determined that there is a minimum core obligation upon every State party to ensure the satisfaction of each of the rights.<sup>69</sup> Amnesty International testifies that:<sup>70</sup>

Four years of conflict in the Democratic Republic of Congo (DRC) have proved among the most disastrous in the history of modern Africa. Some three million people are believed to have lost their lives and more than two-and-a-half million have been driven from their homes, 500,000 to neighbouring countries....Thousands of Congolese civilians have been tortured and killed during military operations to secure mineral-rich lands. Foreign forces have promoted interethnic conflicts and mass killings as a means to secure mining zones. Combatants of the various forces in the region have killed or tortured independent miners and traders for their minerals or money. Many of the hundreds of thousands of inhabitants, driven from their homes into neighbouring countries or other parts of the DRC, have died from malnutrition and lack of access to humanitarian assistance. Children as young as 12 have been among those forced into hard labour in the mines. Human rights defenders who have reported or criticized such abuses have been beaten, detained, forced to flee, or killed.

It is estimated that more than three quarters of the killings in the DRC over the last four years have taken place in eastern DRC and about 90 per cent of the DRC's internally displaced population have fled violence in that region. However, in eastern DRC, the neighbouring states of Rwanda and Uganda, in alliance with Congolese armed political groups have systematically plundered the region on a vast scale....The ambition of all these combatant forces to exploit eastern DRC's mineral and economic wealth has been the biggest single factor in the continuing violence. The major beneficiaries have been senior members of the Ugandan and Rwandese armed forces, foreign businesses and leaders of armed political groups.

The widespread abuse of human rights in the DRC has been clearly documented. The link between this abuse and the struggle to control lucrative resources has been established. Companies operating in the DRC cannot claim to be ignorant of this situation. In such a context, an enterprise must operate on the assumption that *all* of its business transactions, both direct and indirect, require scrutiny under the human rights provision of the *Guidelines* and require it to exercise due diligence. Any failure to do so places a company at serious risk of non-compliance with the human rights provision under the *Guidelines*.

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<sup>65</sup> *Guidelines*, op. cit., II. General Policies, paragraph 2.

<sup>66</sup> *Commentary on the Guidelines*, op. cit., Commentary on General Policies, paragraph 4.

<sup>67</sup> See, respectively, *Guidelines*, op. cit., Preface, paragraph 8; *Commentary on the Guidelines*, op. cit., Commentary on General Policies, 4.

<sup>68</sup> *Idem*.

<sup>69</sup> UN Committee on Economic, Social and Cultural Rights, The nature of States parties obligations (Article 2, paragraph 1), *General Comment 3*, paragraph 10.

<sup>70</sup> Amnesty International, 'Our brothers who help kill us,' op. cit., pp. 3-4.

## 2. Sustainable development

In order to adhere to the *Guidelines*, enterprises should:

Contribute to economic, social and environmental progress with a view to achieving sustainable development.<sup>71</sup>

The Panel draws a distinction between those areas in the north and east of DRC which were controlled by Rwandan and Ugandan forces and their allied rebel movements, and the remainder of the territory controlled by Government forces, assisted principally by Zimbabwe.<sup>72</sup>

In the foreign and rebel controlled areas, the Panel described a first phase of mass-scale looting and a second phase of systematic and systemic exploitation by elite networks who turned to extraction, the imposition of trading monopolies and price-fixing to generate huge revenues.<sup>73</sup>

In the Government controlled areas, the Panel highlighted the use of the mining and minerals sector to finance the war by seeking cash payments for the attribution of monopolies and concessions; by the uptake of funds from parastatals; and by the creation of joint ventures between parastatals and foreign companies in countries allied with the Democratic Republic of the Congo.<sup>74</sup> The Panel described how the elite network of Congolese and Zimbabwean government officials and private businessmen transferred ownership of at least US\$ 5 billion of assets from the State mining sector to private companies under its control in the past three years with no compensation or benefit for the State treasury of the Democratic Republic of the Congo.<sup>75</sup>

For the purpose of determining compliance with the provision on sustainable development, both corporate participation in either illicit resource exploitation by foreign armies and rebels, or in rigged commercial exploitation in government-controlled areas, must represent its antithesis.

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<sup>71</sup> *Guidelines*, II. General Policies, paragraph 1.

<sup>72</sup> Rebel groups include, *inter alia*, RCD-Goma (Rwanda-backed) and RCD-K/ML, RCD-Congo, MLC (Uganda-backed).

<sup>73</sup> UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/357, 12 April 2001, especially sections II.B and C.

<sup>74</sup> *Ibid.*, paragraph 148.

<sup>75</sup> *UN Panel Report*, 16 October 2002, *op. cit.*, paragraphs 22 and 25.

## Part III

### Corporate conduct in the DRC: specific instances

This part of the report provides detailed information on the businesses involved in the DRC, based on the reports of the UN Panel and, where available and appropriate, additional referenced sources. This includes the findings of both a Belgian Senate ‘Great Lakes’ Commission of Inquiry and a Ugandan Judicial Commission of Inquiry, both of which were established and conducted in response to the Panel’s work and Security Council statements and resolutions<sup>76</sup> Information from experts, business representatives and company executives was given before the Belgian Senate Commission of Inquiry which conducted hearings with experts and also heard testimony under oath. All hearings and testimony were conducted and given in public unless closed hearings were requested.<sup>77</sup> The Ugandan Commission was bound by the Commissions of Inquiry Act to work only with sworn evidence, given in public.<sup>78</sup>

In addition, RAID interviewed members of the UN Panel of Experts, Congolese and OECD government officials, national contact points, World Bank staff, employees of Gécamines (the Congolese state-owned mining corporation), the staff of private sector companies operating in the DRC, Congolese trade unionists and other civil society representatives, and international and OECD-based NGOs.

The purpose is to bring to the attention of both CIME and appropriate NCPs those contradictions, inconsistencies and publicly unanswered questions left open by the UN Panel, based on information already in the public domain. RAID makes no allegations of its own nor does it claim that any of the reported UN’s allegations amount to a determination of misconduct. It simply argues that the Panel’s reports raise legitimate, ethical questions which, in the interest of all parties concerned, must be fully and publicly determined. It is also recognised that, in some cases, the Panel, while listing a company in Annex I or Annex III of its October 2002 report, did not published its detailed allegations. In such cases, we can only rely on the company’s own public statement of the Panel’s allegations. Where applicable, attention is drawn to any endorsement of the *Guidelines* by the enterprise concerned. This is taken as an indication that it is willing to reach a resolution with the respective NCP.

In order to organise the material a broad distinction is made — following the Panel’s own practice — between those companies operating in government-controlled areas and those doing business in areas formerly controlled by Uganda and Rwanda and their allied rebel forces.

For each company or group of companies, questions that the UN Panel has left publicly unanswered about that company’s activities are summarised in a box, together with a separate listing of the provisions of the *Guidelines* that might apply.

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<sup>76</sup> See Republic of Uganda, ‘Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001,’ *Final Report*, November 2002, p.1. The President of Uganda ‘took urgent steps to implement the decision to set up an inquiry’ in response to the Security Council urging ‘governments named in the [Panel’s] reports to conduct their own inquiries into these allegations.’ (See *Statement by the President of the Security Council*, S/PRST/13, 3 May 2001). Following the Panel’s original report in April 2001, the judicial commission of inquiry, chaired by Hon. Justice David Porter, was established by the Ugandan government to investigate the Panel’s allegations of illegal exploitation and mass scale looting by the Government of Uganda, top ranking UPDF officers and other Ugandan individuals. In June 2001, the Belgian government established a parliamentary commission of inquiry in the Belgian Senate to examine conflict and resource exploitation in the Great Lakes region in response to the UN Panel’s work. For the findings and conclusions of this commission, see Commission d’enquête parlementaire chargée d’enquêter sur l’exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l’implication de la Belgique, Sénat de Belgique, Session de 2002-2003, 20 Février 2003, 2-942/1 [hereafter, ‘*Belgian Senate Inquiry*’]. The Belgian Senate Commission of Inquiry ‘a été instituée à l’occasion du rapport des Nations unies relatif aux activités illégales d’entreprises belges et autres en République démocratique du Congo’ (ibid., p.4) and in its final conclusions it is stated that ‘La commission prend acte de la résolution 1457 du 24 janvier 2003 du Conseil de sécurité de l’ONU’ (ibid., p.225).

<sup>77</sup> *Belgian Senate Inquiry*, Session de 2002-2003, 20 Février 2003, 2-942/1, op. cit., p.5: ‘Entre novembre 2001 et janvier 2003, la Commission a organisé plus de septante auditions d’experts et de témoins. Bien que les auditions soient en principe publiques, un tiers des auditions en question ont eu lieu à huis clos, à la demande des personnes à entendre.’ Those giving testimony were invited ‘à prêter le serment suivant: « Je jure de dire toute la vérité, rien que la vérité. »’.

<sup>78</sup> Ugandan Judicial Commission, *Final Report*, op. cit., p.3. The Commission was empowered to adopt its own rules of procedure, but on the whole adhered to the Evidence Act (see ibid., p.9).

## A. Former Rwanda and Uganda controlled areas<sup>79</sup>

### 1. The exploitation of coltan

The international traders and the tantalum-processing companies worldwide that purchased coltan directly from the Rwandese army and RCD-Goma sources or their proxies in eastern DRC or Rwanda are complicit in the human rights abuses by these forces in the region. Their business deals have paid for the "war within a war" in eastern DRC that has claimed hundreds of thousands of civilian lives and subjected millions of others to an associated humanitarian catastrophe.<sup>80</sup>

Coltan (columbo-tantalite) is an ore comprising the rare metals columbium or niobium and tantalum. The former is used in heat resistant alloys and glass, the latter primarily for the manufacture of hi-tech capacitors used in a wide range of electronic products from mobile phones to Playstations. From November 2000 to March 2001, there was a surge in demand for such capacitors from electronics manufacturers and the price for processed coltan ore rose sharply from \$40 per pound to \$300 per pound.<sup>81</sup> Kivu province in eastern DRC has extensive coltan deposits. During the boom, the reserves were monopolised by the Rwandan Patriotic Army (RPA) and its rebel allies, RCD-Goma. Impoverished Congolese farmers mined the ore, although the RPA also used forced and child labour.<sup>82</sup> The International Peace Information Service (IPIS) estimates that the RPA made \$100 million profit in 2000 and 2001 from the trade.<sup>83</sup>

#### *i. Eagle Wings, Trinitech and Chemie Pharmacie Holland*

**Trinitech Holdings** is the holding company for two US-based mining and distribution companies, **Trinitech International Inc** and **Eagle Wings Resources LLC**, both based in Ohio, United States. **Chemie Pharmacie Holland BV** is a chemical and pharmaceutical company which, among other activities, procures raw materials including non-ferrous metals and derivatives.<sup>84</sup> It is based in Amsterdam, the Netherlands.

Eagle Wings Resources International (EWRI), formed in 2000, is described in the report of the Belgian Senate of Inquiry as a 'joint venture entre la société américaine Trinitech et hollandaise, Chemie Pharmacie Holland'.<sup>85</sup> The assertion by Chemie Pharmacie Holland (CPH) that it suspended this relationship in March 2002 neither negates its previous involvement nor explains why it was still listed as the European business partner of EWRI on the Eagle Wing's website until May 2003.<sup>86</sup> EWRI is in turn the holding company for the operating companies EWRI (Rwanda) SARL, EWRI (Burundi) SPRL, and EWRI (Congo) SARL.<sup>87</sup> The latter function as trading posts or 'comptoirs', sourcing and supplying reserves of coltan. All three companies – EWRI, Trinitech and CPH – appeared in Annex III of the Panel's October 2002 report. EWRI was also listed in Annex I as a company on which the Panel recommended the placing of financial restrictions.

The Panel alleged that '[t]he manager of Eagle Wings in Kigali has close ties to the Rwandan regime' and that the company 'operates in the Democratic Republic of the Congo as a Rwanda-controlled *comptoir* with all the privileges derived from this connection'.<sup>88</sup> Testimony by IPIS before the Belgian Senate Commission of Inquiry similarly asserts that Alfred Rwigema, the son-in-law of the Rwandan President Paul Kagame, represented EWRI in the DRC and Rwanda and the Panel lists him in Annex I of its October 2002 report as a 'principal officer' of EWRI, Kigali, Rwanda and as 'Manager Eagle Wings' in Annex II.<sup>89</sup> The Rwandan President has, in an official interview, denied having any form of commercial relationship with Alfred Rwigema.<sup>90</sup> Mr Rwigema told IPIS in an interview on 21 May 2002 that

Panel's  
allegation

<sup>79</sup> Generally, the companies that appear in this section have been expressly identified by the Panel in its discussion of exploitation in former Rwanda and Uganda controlled areas of DRC. For those companies where there was no explicit discussion of their activities under these areas by the Panel, the companies' responses, other information provided by the Panel and other publicly available reports are cited to explain their placement.

<sup>80</sup> Amnesty International, 'Our brothers who help kill us,' op. cit., p. 37.

<sup>81</sup> Jeroen Cuvelier and Tim Raeymaekers, *European Companies and the Coltan Trade: An Update*, part 2, International Peace Information Service (IPIS), September 2002, p.19.

<sup>82</sup> Amnesty International, 'Our brothers who help kill us,' op. cit., p.35.

<sup>83</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p.19.

<sup>84</sup> <[http://www.chromium-asoc.com/publications/directory/pdf/TRADER/bv\\_chemie\\_pharmacie\\_holland.pdf](http://www.chromium-asoc.com/publications/directory/pdf/TRADER/bv_chemie_pharmacie_holland.pdf)>.

<sup>85</sup> *Belgian Senate Inquiry*, op. cit., 3. FILIÈRE COLTAN, 3.2.2. Les sociétés qui commercialisent le coltan au niveau international et qui ont des liens avec l'Afrique centrale; also note 174. CPH has not sought to publicly revise the Belgian Senate's description of its relationship to Eagle Wings Resources International.

<sup>86</sup> See Milieudefensie (Friends of the Earth Netherlands) et al. 'Request for investigation of possible breach of the OECD Guidelines by Chemie Pharmacie in the Democratic Republic of Congo,' 30 October 2003, p.9.

<sup>87</sup> <<http://www.trinitechholdings.com/eagleswings/history.html>> (visited 17 December 2003).

<sup>88</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 79.

<sup>89</sup> Respectively: Audition de MM. Cuvelier et Raeymaekers, auteurs du rapport IPIS, Sénat de Belgique, Session ordinaire 2001-2002, Commission d'enquête parlementaire "Grands Lacs", Auditions, Vendredi 15 mars 2002, Réunion du matin, Compte rendu, GR 15, p.6. (See also *European Companies and the Coltan Trade*, part 2, op. cit., p.13); *UN Panel Report*, 16 October 2002, op. cit., Annexes I and II.

<sup>90</sup> The interview of President Paul Rwigema with Marc Hoogsteyns in April 2002 [on tape] is cited in *European Companies and the Coltan Trade*, part 2, op. cit., p.13.

he had ceased doing business in the DRC and had closed his Bukavu trading post.<sup>91</sup> In the Panel's October 2003 report, Alfred Rwigema is listed in the 'resolved' category.

Panel's allegation  
The Rwandan regime has been severely criticised by the Panel for mass-scale looting, systematic and systemic exploitation, and the organisation of elite networks to capture revenue from DRC's natural resources.<sup>92</sup> In so doing, it has perpetuated the conflict in DRC. According to the Panel, 'Eagle Wings collaborates with RPA to receive privileged access to coltan sites and captive labour' and is named with other *comptoirs* who 'have obtained their own mining sites and conscript their own workers to exploit the sites under severe conditions.'<sup>93</sup> The Rwandan government dismisses the Panel's allegation of the use of forced labour in coltan mines as 'baseless and unfounded' and challenges it 'to identify by name a single prisoner who has been taken from a detention centre to work in the mines in the DRC.'<sup>94</sup>

Panel's allegation  
NGOs filed a specific instance concerning the conduct of CPH in the DRC in July 2003.<sup>95</sup> Reference is made in the complaint to a prospecting authorisation between Eagle Wings Resources LLC (i.e., the US company) and the RPA-backed RCD-Goma rebels, concluded on 12 March 2001.<sup>96</sup> Another agreement was drawn up in April 2001 between RCD and Eagle Wings Resources International, authorising the company to act as a *comptoir* in the buying and export of coltan.<sup>97</sup> The Panel maintains that 25 percent of Eagle Wings coltan is sold to 'the parent company of Eagle Wings, Trinitech International Inc. in the United States' and that 'H. C. Starck, based in Germany and a subsidiary of the transnational corporation Bayer AG, purchases about 15 per cent of Eagle Wings coltan'.<sup>98</sup> According to correspondence with the Panel from the logistics manager of EWRI Kigali:<sup>99</sup>

'in Kigali we were not in contact with the buyers as our exports were always made towards CPH or EWR USA. The shipping documentation was even handled through EWR or CPH. As such I could not have any implication in this since it was handled by EWR USA or CPH and as such [was] beyond my knowledge and control.'

### ***Compliance with the Guidelines***

Both the Dutch and US governments adhere to the *Guidelines*. CPH and Trinitech operate out of their respective territories. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities).<sup>100</sup> They therefore apply to all subsidiaries, including both the holding and operating companies of Eagle Wings. The *Guidelines* require that companies eliminate all forms of forced or compulsory labour.<sup>101</sup> Hence the conduct of Eagle Wings, as described by the Panel, would raise questions about compliance with this provision. The *Guidelines* also address the core labour right of the right to health and safety in the workplace, whereas the Panel attests to severe working conditions in Eagle Wings controlled mines.<sup>102</sup> Furthermore, it is recognised in the chapter on employment and industrial relations that the applicable law to which MNEs are subject includes both national and supranational levels of regulation.<sup>103</sup> The *Guidelines* complement the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.<sup>104</sup> The latter can 'be of use in understanding the *Guidelines* to the extent that it is of a greater degree of elaboration.'<sup>105</sup>

<sup>91</sup> Ibid.

<sup>92</sup> See *UN Panel Report*, 12 April 2001, op. cit., especially paragraphs 5–6 and paragraphs 32 ff., 46 ff. and 71 ff.

<sup>93</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 79; also paragraph 76.

<sup>94</sup> See Reaction No.56, Republic of Rwanda – Reply to the Final Report, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.

<sup>95</sup> See SOMO, Centre for Research on Multinational Corporations, 'Complaints under the OECD Guidelines – specific instances brought by NGOs,' Update March 2004 <<http://www.oecdwatch.org/docs/update%20cases%20March%202004.PDF.PDF>> (visited 26 March 2004); also SOMO, 'Table of cases raised by NGOs at National Contact Points,' Update March 2004 <<http://www.oecdwatch.org/docs/table%20cases%20March%202004.pdf.pdf>> (visited 26 March 2004). See also Milieudefensie (Friends of the Earth Netherlands) et al, 'Request for investigation,' op. cit..

<sup>96</sup> République démocratique du Congo, Rassemblement congolais pour la Démocratie, département des terres, mines et énergie; Arrête départemental No 019/RCD/CAB/DIME -2001 du 12 mars 2001 portant attribution de l'autorisation personnelle de prospection No 005/DTME/2001, cited in Milieudefensie (Friends of the Earth Netherlands) et al, 'Request for investigation,' op. cit., fn 12.

<sup>97</sup> 'République démocratique du Congo, Rassemblement congolais pour la Démocratie, département des terres, mines et énergie; Arrête départemental No 020/RCD/CE/DTME/2001 du 12 Avril 2001 portant agrément d'un comptoir d'achat et d'exportation du Coltan.'

<sup>98</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 80.

<sup>99</sup> Reaction No. 1, Letter to the Panel from Anthony Marinus, Logistics Manager of EWRI Kigali, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.. Marinus was listed in Annex II of the Panel's October 2002 report. In the Panel's October 2003 report, his case is placed in the resolved category I. Eagle Wings Resources USA was founded as a corporation in Ohio in 1999 (<<http://www.trinitechholdings.com/eagleswings/history.html>>).

<sup>100</sup> *Guidelines*, op. cit., I. Concepts and Principles, paragraph 3.

<sup>101</sup> Ibid., IV. Employment and Industrial Relations, paragraph 1(c).

<sup>102</sup> Respectively, *Guidelines*, op. cit., IV. Employment and Industrial Relations, paragraph 4(b) and *UN Panel Report*, 16 October 2002, op. cit., paragraph 76.

<sup>103</sup> *Commentary on the Guidelines*, op. cit., Commentary on Employment and Industrial Relations, paragraph 19.

<sup>104</sup> Ibid., paragraph 20. See also *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4: 'The principles set out in the ILO Declaration are commended to governments, employers' and workers' organisations of home and host countries and to the multinational enterprises themselves.'

<sup>105</sup> See *Commentary on the Guidelines*, op. cit., Commentary on Employment and Industrial Relations, paragraph 20; also *ILO Tripartite Declaration*, op. cit., 7.

Further recognition is given to the relevance of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>106</sup> It is specified that the *Guidelines* have a role to play in promoting observance of ILO standards and principles among multinational enterprises.<sup>107</sup> It is acknowledged that the principles and rights in the 1998 Declaration ‘have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.’<sup>108</sup> It is therefore pertinent to refer to the corpus of ILO Conventions when interpreting the *Guidelines*. The commentary refers by name to, *inter alia*, ILO Conventions 29 and 105 on forced labour and its abolition. Article 4(1) of Convention 29 protects against the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations while article 21 specifically prohibits the use of forced or compulsory labour for work underground in mines. Article 1 of Convention 105 prohibits the use of any form of forced or compulsory labour, *inter alia*, as a method of mobilising and using labour for purposes of economic development while Article 2 requires the use of effective measures to secure its immediate and complete abolition.

As coltan revenues financed the continued prosecution of the war in eastern Congo, then it is also fair and appropriate to examine the conduct of Eagle Wings, Trinitech and CPH in terms of how they respected the human rights of those affected by their activities, as specified in provision II.2. Furthermore, it should also be established whether their conduct ran contrary to the provision that enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development.<sup>109</sup>

In respect of the specific instance filed by NGOs concerning the conduct of CPH in the DRC, the Dutch NCP accepted the case as admissible and has met with both the complainants and the company.<sup>110</sup> Discussion is reported to have centred on whether or not CPH’s business in the DRC constituted an ‘investment nexus’;<sup>111</sup> please see *intra*, the Supplement on the Scope of the *Guidelines*, for a discussion of this factor. The employment of a narrow definition of an investment nexus and the dismissal of cases on a technicality would severely restrict the scope of the *Guidelines* and would ultimately damage their credibility as universal instrument. At the time of writing, a statement from the NCP was expected. While no complaint has been submitted to the US NCP – and notwithstanding the US NCP’s view that all questions raised by the Panel with respect to US companies have been satisfactorily resolved and that there is no need for further action by the US NCP<sup>112</sup> – it is maintained that the role of Trinitech International Inc., as the parent company of Eagle Wings, is an appropriate subject for the US NCP to examine in detail. It should be recalled that, at the time of the Security Council’s discussion of the Panel’s October 2002 report, the US representative stated: ‘The United States Government will look into the allegations against these companies and take appropriate measures. We will not turn a blind eye to these activities.’<sup>113</sup>

The Belgian Senate Commission of Inquiry, reporting in February 2003, stated: ‘The commission has also met representatives of Eagle Wings. They have acknowledged their activities related to coltan, but deny the facts of which they have been accused. The commission asks that the UN Panel continue its investigations into these allegations.’<sup>114</sup>

Neither Trinitech, nor Eagle Wings nor CPH responded publicly to the Panel. This has done nothing to advance corporate accountability and it is fair and appropriate that the CIME and NCPs ensure that there is disclosure on the activities of all three companies. While CPH is listed by the Panel as not having responded in category V of the Panel’s October 2003 report, Trinitech and Eagle Wings are listed in the ‘resolved’ category I. It is important to establish whether the replies of the latter two companies have been kept confidential or whether there is another reason as to why they are not categorised alongside CPH. Their cases were ‘resolved’ without publicly addressing the factual issues raised in the Panel’s October 2002 report – factual issues that fairly engage provisions III.1 on disclosure, including high quality standards for social reporting under provision III.2 and performance in relation to value statements on social and ethical conduct under provision III.5.a.

Eagle Wings Resources LLC and Trinitech International issued a press release after publication of the Panel’s October 2003 report in which they stated that the final report of the Panel vindicated both companies and the affiliates of EWR.

EWR’s  
response

<sup>106</sup> *Guidelines*, op. cit., Preface, paragraph 8.

<sup>107</sup> *Commentary on the Guidelines*, op. cit., Commentary on Employment and Industrial Relations, paragraph 20. The commentary determines that the International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration.

<sup>108</sup> *Idem*.

<sup>109</sup> *Guidelines*, op. cit., II. General Policies, paragraph 1.

<sup>110</sup> See SOMO, ‘Complaints under the OECD Guidelines – specific instances brought by NGOs,’ op.cit..

<sup>111</sup> *Ibid.*.

<sup>112</sup> Letter from the US NCP to Dr Brent Blackwelder, President US Friends of the Earth, 4 December 2003.

<sup>113</sup> Statement by Ambassador Richard S. Williamson, U.S. Alternate Representative for Special Political Affairs to the United Nations, delivered during the Open Meeting of the UN Security Council discussion on the Democratic Republic of the Congo Panel of Experts, 5 November 2002.

<sup>114</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D’ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 1. Le coltan, 6: ‘La commission a également rencontré des responsables d’Eagle Wings. Ces derniers reconnaissent leurs activités dans le domaine du coltan, mais nient les faits qui leur sont reprochés. La commission demande que les représentants de l’ONU poursuivent leurs investigations sur ces accusations.’



They cited the listing of Eagle Wings and three employees in Category I and referred to the refutation of allegations in a meeting with the Panel and the constructive resolution of ‘the erroneous misconceptions of the company’s activity.’<sup>115</sup>

### Eagle Wings, Trinitech and Chemie Pharmacie Holland

#### Questions that the Panel reports leave publicly unanswered

- According to the Panel, Eagle Wings collaborates with RPA to receive privileged access to captive labour and conscripts its own workers to exploit the sites under severe conditions. What, if any, controls did Eagle Wings/Trinitech put in place to ensure that the coltan it traded was not produced using forced labour?
- What action did Eagle Wings/Trinitech take to discover the identity of those benefiting from its purchases of coltan?
- According to the Panel, ‘Eagle Wings collaborates with RPA to receive privileged access to coltan sites’. How does Eagle Wings respond to this allegation? Does the company believe that transactions in such coltan are justified when, in the Panel’s view, they fuelled the conflict in DRC?
- What is Eagle Wings Resources International’s exact relationship to Trinitech and Chemie Pharmacie Holland? What is the validity of CPH’s claim that its relationship with EWRI was suspended in March 2002?
- Eagle Wings employees allegedly told the Panel that Eagle Wings supplied coltan to H.C. Starck, while the latter denies this.<sup>116</sup> How is this discrepancy to be explained?

#### Provisions potentially at issue

- IV.1.c forced labour
- IV.4.b occupational health & safety
- II.10 supply chain
- II.1 sustainable development
- II.2 human rights
- III.1, III.2, III.5.a disclosure

## ii. H.C. Starck GmbH and Amalgamated Metal Corporation PLC

**H.C. Starck GmbH** is a wholly owned subsidiary of **Bayer AG**. It is a leading supplier of specialty chemicals and products formulated for the electronics industry.<sup>117</sup> It produces an assortment of refractory metal powders including, among others, tantalum and niobium. H.C. Starck’s headquarters are in Goslar, Germany, where most of its output of tantalum and niobium is produced.<sup>118</sup> H.C. Starck was listed by the Panel in Annex III of its October 2002 report.

Panel’s allegation  
Starck’s response  
Panel’s allegation

The Panel alleged in its April 2001 report that H.C. Starck was a client of Mrs Aziza Kulsum Gulamali, described by the Panel as having ‘become a major ally of the Kigali regime and RCD-Goma’.<sup>119</sup> According to the Panel, Mrs Gulamali was appointed by RCD-Goma as the general manager of SOMIGL, the enterprise accorded a monopoly over coltan exports at the height of the coltan boom by RCD-Goma rebel forces in eastern DRC.<sup>120</sup> In an initial response of May 2001, Starck strongly denied the claim that it was participating in the illegal exploitation of natural resources from the Congo, stated that it had never dealt with Mrs Gulamali, and denied obtaining illegally mined material from Central Africa.<sup>121</sup> In a press release one year later, in May 2002, the company stated that it had purchased no material of Central African origin since August 2001.<sup>122</sup> In the same release, Starck maintained that its coltan had come via trading partners from peasant suppliers and not from rebel groups.<sup>123</sup> The Panel disputed this in its October 2002 report, noting that no coltan exited eastern DRC without benefiting rebel forces or foreign armies.<sup>124</sup> It also referred to documentation showing that Starck bought coltan from DRC on 21 September 2001, after the date on which it had claimed the trade had stopped.<sup>125</sup> Furthermore, the coltan in question had ultimately been obtained from the Rwanda-controlled Eagle Wings and therefore mined, in the Panel’s view, using captive labour under severe working conditions. A number of clarifications are required:

<sup>115</sup> Eagle Wings LLC and Trinitech International, ‘New UN report vindicates Eagles Wings Resources and Trinitech International of all accusations,’ 4 November 2003, <<http://www.trinitechholdings.com/eagleswings/news.cfm>> (visited 17 December 2003).

<sup>116</sup> See reaction No. 3, Statement to the Panel from H.C. Starck, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.. Starck refers to the statement made by Eagle Wings employees about supplying H.C. Starck with up to 15% of Eagle Wings production and refers, ‘as evidence for that allegation’, to a document drawn up by the Panel after a telephone call with Eagle Wings dated March 2002. See also *infra*, fn 137.

<sup>117</sup> <[http://www.hcstarck.com/index.php?page\\_id=108](http://www.hcstarck.com/index.php?page_id=108)> (visited 17 December 2003).

<sup>118</sup> <[http://www.hcstarck.com/index.php?page\\_id=562](http://www.hcstarck.com/index.php?page_id=562)> (visited 17 December 2003).

<sup>119</sup> UN Panel Report, 12 April 2001, op. cit., paragraphs 92.

<sup>120</sup> *Ibid.*, paragraph 93.

<sup>121</sup> H.C. Starck, ‘H.C. Starck denies UN allegations about raw material trading’, Press Release, 25 May 2001.

<sup>122</sup> H.C. Starck, ‘Statement on procurement of tantalum raw materials: H.C. Starck once again denies accusations,’ Press Release, 24 May 2002, paragraph 2.

<sup>123</sup> *Ibid.*, paragraph 6.

<sup>124</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 80.

<sup>125</sup> *Ibid.*, paragraph 81.

- (1) Much of the discussion between the Panel and the company centres on whether Starck imported coltan from DRC after August 2001. Focusing attention on Starck's denial of subsequent dealings is to miss what the company has confirmed:

'...our company took every possible precaution to ensure that we would never again be supplied with raw materials that had been mined in the DRC. H.C. Starck is absolutely convinced that our company has not purchased any coltan from the DRC after August 2001.'<sup>126</sup>

Starck's response

In other terms, the company's denial is simultaneously an admission that it may have purchased coltan from DRC prior to August 2001. This possibility should be investigated.

- (2) H.C. Starck, having not ruled out the possible earlier purchase of coltan from DRC, the next question that arises concerns its source within the country. The company describes this as 'peasant suppliers'.<sup>127</sup> Given that artisanal miners and destitute local people were marshaled by rebel-backed networks to mine coltan, it is plausible that Starck's 'peasant suppliers' were enmeshed in this supply chain. Starck's related claim – that it did not obtain its raw materials from rebel organisations or conscripted prospectors – relies on assurances received from its partners.<sup>128</sup> The Panel, on the other hand, categorically states that: 'no coltan exits from the eastern Democratic Republic of the Congo without benefiting either the rebel group or foreign armies.'<sup>129</sup> These two contradictory positions remain to be reconciled. The Panel claimed that one of H.C. Starck's suppliers, CPH, acquired coltan from rebel-controlled mining operations via Eagle Wings.<sup>130</sup>

Starck's response

Panel's allegation

The Panel details how one consignment of coltan was purchased by Starck:<sup>131</sup>

In one instance on which the Panel has documentation, Mozambique Gemstone Company provided false documents establishing Mozambique as the origin of a shipment of coltan originating in Rwanda and transiting through South Africa. Mozambique Gemstone Company then sold the consignment to AMC African Trading and Consulting Company Ltd., based in South Africa, which subsequently sold the consignment to H. C. Starck Ltd. in Rayong, Thailand, on 21 September 2001. H. C. Starck sent a letter of credit for this consignment on 9 May 2002 to Chemie Pharmacie Holland, which oversaw the transaction, and which is a commercial partner of Eagle Wings providing logistical and financial services.

Panel's allegation

The consignment was stockpiled in the port of Dar-es-Salaam, Tanzania before being shipped to H.C. Starck's Thai subsidiary.<sup>132</sup> While Starck maintains that it has at no time had direct contact with Eagle Wings, it neither confirms nor denies dealing with Chemie Pharmacie Holland.<sup>133</sup> Yet the Panel asserts that 'Eagle Wings is the only coltan source for Chemie Pharmacie. Eagle Wings has no operations in Mozambique.'<sup>134</sup>

Starck's response

In its defence, Starck states that it was misled about the origin of the coltan because its contract partner (the South African company AMC) maintained that the material originated in Mozambique.<sup>135</sup> Two questions arise: (1) should Starck have been aware that the coltan originated with Eagle Wings? If Starck was aware that Eagle Wings was a joint-venture of CPH and Trinitech, then it would have been aware of this possibility. Moreover, the Panel has stated that 'H. C. Starck...purchases about 15 per cent of Eagle Wings coltan'.<sup>136</sup> This is flatly denied by H.C. Starck in its response to the Panel.<sup>137</sup> (2) Was it plausible for Starck to believe that the origin of the consignment was Mozambique? On the basis of documents referring to a contract with the South African company AMC, given to the Panel voluntarily and of its own accord by H.C. Starck, the Panel conducted phonecalls which, in the Panel's opinion, permitted the conclusion that the material was supplied from central

Starck's response

Starck's response

<sup>126</sup> H.C. Starck, Letter to the President of the Security Council, reproduced in a Press Release, 11 November 2002.

<sup>127</sup> H.C. Starck, Press Release, 25 May 2001, op. cit..

<sup>128</sup> H.C. Starck, Press Release, 24 May 2002, op. cit., paragraph 6.

<sup>129</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 80.

<sup>130</sup> *Ibid.*, paragraph 81; also, see *intra*, section on Eagle Wings, Trinitech and Chemie Pharmacie Holland.

<sup>131</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 81.

<sup>132</sup> Reaction No. 1, Attached letter from Doron Sanders, Managing Director CPH, to Anthony Marinus, Logistics Manager EWRI Kigali, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.. The letter from Doron Saunders was written to Anthony Marinus after the latter had asked for an explanation from CPH. It is not a written response from CPH to the Panel: CPH has not replied to the Panel and is listed in the Panel's October 2003 in Category V.

<sup>133</sup> Reaction No. 3, Statement to the Panel from H.C. Starck, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.; H.C. Starck, 'Statement on allegations published in a new report of the UN Panel of Experts,' Press Release, 23 October 2002; H.C. Starck, Letter to the President of the Security Council, op. cit..

<sup>134</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 81.

<sup>135</sup> Reaction No. 3, op. cit., section 3.

<sup>136</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 80; see also, *intra*, fn 116.

<sup>137</sup> Reaction No.3, op. cit., section 1. In its reply to the Panel, Starck quotes from a statement that it issued: 'As far as we know, the statement made by Eagle Wings is incorrect. At no time has H.C. Starck had direct contact with Eagle Wings. The panel can check this claim at any time by inspecting our order documents – as we have already offered on several occasions.'

Africa and not from Mozambique.<sup>138</sup> In his response to the Panel, an employee of CPH is on record stating that no questions were asked about the origin of the shipment at the time and that when CPH was later asked by Starck Germany about its origin following the Panel's report, the company was able to clearly indicate that the material came from Rwanda/DRC.<sup>139</sup>

- (3) If both the South African company AMC and CPH were clear about the origin of the coltan as central Africa/Rwanda/DRC, then why was not H.C. Starck also aware of this? Irrespective of the alleged falsification of the documentation by MGC, it is apparent that H.C. Starck dealt directly with CPH and should therefore have been aware of CPH's venture with Eagle Wings. The Panel asserts that Eagle Wings is the only coltan source for CPH and that Eagle Wings has no operations in Mozambique.<sup>140</sup> In the light of this, is it tenable that the shipment in question could have originated in that country?
- (4) The Dar-es-Salaam shipment is important primarily because it establishes a transaction linking H.C. Starck and CPH and ultimately therefore Eagle Wings. The transaction also shows that Starck continued to trade in coltan from the DRC after the Panel's condemnation of the practice and beyond its own stated cut-off date of August 2001. In respect of non-compliance with the *Guidelines*, the precise date upon which Starck ceased to buy coltan from DRC is less important than establishing the facts about its relationships to the aforementioned companies. This shipment, it maintains, was the one exception to its policy to stop purchasing materials from Central Africa, although its account is internally inconsistent.<sup>141</sup>

### *Compliance with the Guidelines*

Following meetings with the German NCP, Starck stated that 'non-compliance with OECD guidelines by a German company can only be ascertained by the competent national contact office for OECD guidelines or by the Committee for International Investment and Multinational Enterprises (OECD-CIME). Since there are no such specific findings with regard to non-compliance of OECD guidelines, there are currently no proceedings pending with the competent German national contact office for OECD guidelines.'<sup>142</sup> Indeed, compliance should be ascertained by all the relevant NCPs and the purpose here is to relate the panel's public findings to the publicly promulgated *Guidelines*.

Under provision II.10 of the *Guidelines*, it is specified that enterprises should encourage business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*.<sup>143</sup> H.C. Starck stated in May 2002, prior to publication of the Panel's October 2002 report, that '[o]ur partners have convincingly assured us that these raw materials come from independent peasant miners and not from rebel organizations or from conscripted prospectors'<sup>144</sup> while the Panel asserted 'no coltan exits from the eastern Democratic Republic of the Congo without benefiting either the rebel group or foreign armies.' As a knowledgeable business actor, it is not unreasonable to expect that H.C. Starck should have been in a position to ascertain the source of the coltan it was importing and to establish the conditions under which it was mined. Public clarification by the company of who its partners and suppliers were prior to August 2001 and its public disclosure of the documented steps it took at the time to establish the conditions under which any coltan it was buying from the DRC was being mined would further any examination of adherence to the *Guidelines*. However, in examining any potential breach of the supply chain provision, the degree of non-compliance would be compounded if H.C. Starck transacted with companies which it might reasonably, with due diligence, have determined were trading resources from rebel-controlled Eastern DRC. Did H.C. Starck, through its trading and purchasing practices, exercise due diligence in respect of those suppliers whose conduct the Panel alleges was incompatible with the *Guidelines*? Based on the Panel's October 2002 report of the coltan supply-chain in the DRC, H.C. Starck did business via CPH with Eagle Wings, a company the Panel alleges was implicated in the use of 'compulsory labour'. Such conduct would engage provision IV.1.c which requires MNEs to contribute to the abolition of forced labour. Furthermore, this business chain is alleged to have provided funds to rebel and foreign forces and thereby perpetuated the conflict: it is pertinent to question whether a company's participation in this supply chain is compatible with both provision II.2 on respect for human rights and provision II.1 on sustainable development under the *Guidelines*.

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<sup>138</sup> See H.C. Starck's statement to the Panel, Reaction No.3, op. cit., section 2.

<sup>139</sup> Reaction No. 1, op. cit..

<sup>140</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 81.

<sup>141</sup> In respect of coltan supplies, H.C. Starck admits 'the exception of one case in which our subsidiary in Thailand received a small quantity from Mozambique'. This is assumed to be the September 2001 shipment of coltan originating in DRC, referred to by the Panel in its October 2002 report. Yet in the same press release, H.C. Starck reiterates that it 'is absolutely convinced that our company has not purchased any coltan from the DRC after August 2001' and that: 'Although H.C. Starck has not purchased any more coltan from Central Africa since August 2001, the [UN Panel] REPORT dated October 2002 refers to a sale in September initiated by our subsidiary in Thailand. This statement is not supported by our documents.' (H.C. Starck, Letter to the President of the Security Council, op. cit.).

<sup>142</sup> Reaction No.3, op. cit.

<sup>143</sup> *Guidelines*, op. cit., II. General Policies, paragraph 10.

<sup>144</sup> H.C. Starck, Press Release, 24 May 2002, op. cit..

H.C. Starck is listed in category I ('resolved') of the Panel's October 2003 report. H.C. Starck issued a press release after the publication of the Panel's October 2003 report announcing that the UN Panel, by placing H.C. Starck and Bayer AG in category I, had exonerated both companies from previous allegations.<sup>145</sup> It added that its willingness to cooperate with UN representatives and the German government 'had helped substantially in refuting the false accusations'.

<b>H.C. Starck</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ What volumes of coltan did H.C. Starck purchase from DRC prior to August 2001?</li> <li>▪ Who did it purchase such consignments from?</li> <li>▪ How did H.C. Starck ascertain that the coltan it bought was from 'peasant suppliers'?</li> <li>▪ Will H.C. Starck provide details of all coltan transactions with Chemie Pharmacie Holland? What was H.C. Starck's understanding of the relationship between Chemie Pharmacie Holland and Eagle Wings?</li> <li>▪ The Panel stated – based on a document that it drew up after a telephone call with Eagle Wings employees – that Eagle Wings sold fifteen per cent of its coltan to H.C. Starck.<sup>146</sup> Starck has characterised this statement as incorrect, denying any direct contact with Eagle Wings. Will it offer a public explanation of what it meant by 'direct contact' and produce, in public, those order documents it offered to the Panel?</li> <li>▪ If both the South African company AMC and CPH knew that the consignment purchased by H.C. Starck on 21 September 2001 was from Rwanda/DRC, irrespective of the false documentation, why did not H.C. Starck ask detailed questions about the origin of the consignment before going ahead with the purchase?</li> <li>▪ How does H.C. Starck respond to the claim made by IPIS that coltan exported by Masingiro to Germany from eastern DRC in specific shipments (see below) over the period June to September 2001 was 'presumably destined for the tantalum processing plant operated by the Bayer subsidiary H.C. Starck'?</li> </ul>	<p>II.10 supply chain</p> <p>IV.1.c forced labour</p> <p>IV.4.b health &amp; safety</p> <p>II.1 sustainable development</p> <p>II.2 human rights</p>

### iii. KHA International AG/Masingiro GmbH, C. Steinweg NV, SDV Transintra and Cogecom

**KHA International AG** and **Masingiro GmbH** were listed by the Panel in annex III of its October 2002 report. The business of the former is described by the Panel as minerals trading and exploitation and that of the latter as minerals trading. Both are German companies headed by the businessman Karl Heinz Albers. SOMIKIVU is a subsidiary company, 70 percent owned by Mr. Albers's management company Gesellschaft für Elektrometallurgie in partnership with the Government of the DRC.<sup>147</sup> It processes pyrochlore concentrate to produce niobium. Karl Heinz Albers is the managing director of the company.<sup>148</sup> The Niobium Mining Company (NMC), based in London, is a 100 percent owned subsidiary of KHA International AG.<sup>149</sup> NMC specialises in financing and operating facilities for processing niobium, tantalum and associated minerals. NMC Metallurgie SARL, based in Kigali, is a 100% owned subsidiary of NMC.<sup>150</sup> NMC Metallurgie SARL was created to acquire and operate the Karurume smelter in Rwanda, assigned to the company in December 2001 as part of the privatisation of the Public Office for Mine Development (Régie de Développement des Mines – REDEMI).<sup>151</sup> The company has also invested in a sampling laboratory run by UK-based assayers A.H. Knight.<sup>152</sup>

SOMIKIVU operations are located to the north west of Goma in former RCD-Goma held areas of the DRC.<sup>153</sup> The Panel alleges that Karl Heinz Albers's business interests were guarded by RCD-Goma soldiers and notes that the former

<sup>145</sup> H.C. Starck, 'New UN report exonerates H.C. Starck of all allegations,' Press Release, 4 November 2003, <[http://www.hcstarck.com/index.php?bereich\\_id=19&news\\_id=20031104091801635781000000](http://www.hcstarck.com/index.php?bereich_id=19&news_id=20031104091801635781000000)> (visited 17 December 2003).

<sup>146</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 80; see also *intra*, fn 116.

<sup>147</sup> Reaction No.33, written statement from Karl Heinz Albers International, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.. See also IPIS, *Supporting the War Economy in the DRC: European Companies and the Coltan Trade – Five Case Studies*, January 2002, p.23.

<sup>148</sup> Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/1072, 13 November 2001, paragraph 25.

<sup>149</sup> Reaction No. 33, op. cit.

<sup>150</sup> *Idem*.

<sup>151</sup> *Idem*. See also *Rwanda Privatisation Magazine*, No. 12, March/April 2002, p.2, available at <[http://www.privatisation.gov.rw/documents/magazine12\\_e.pdf](http://www.privatisation.gov.rw/documents/magazine12_e.pdf)>.

<sup>152</sup> Reaction No. 33, op. cit.

<sup>153</sup> UN Panel Report, 13 November 2001, op. cit., paragraph 25.

chief of finance for RCD-Goma, Emmanuel Kamanzi, was a partner with Karl Heinz Albers and board member of Gesellschaft für Elektrometallurgie.<sup>154</sup> It also states that SOMIKIVU paid taxes to RCD-Goma.<sup>155</sup>

Masingiro GmbH, established in 1996, is based in Burgthann, Germany.<sup>156</sup> It is listed in an annex of the Panel's April 2001 report as a company importing coltan from the DRC via Rwanda.<sup>157</sup> IPIS, in its testimony to the Belgian Senate Commission of Inquiry, referred to the activities of Mr Albers and Masingiro:<sup>158</sup> 'For the period of high coltan prices, he [Mr Albers] exported 50 tons a month to Germany using the Dutch transport company, Steinweg and Handelsveem. These exports were destined for H.C. Starck....' The *Financial Times Deutschland* cited Mr Albers confirming that he supplied 'the big three' – among them H. C Starck in Germany.<sup>159</sup> In its own report, IPIS provided further details of Masingiro's role in procuring and exporting large quantities of coltan from eastern DRC:

Research into the activities of the German corporation *Masingiro GmbH* documents three business transactions covering the export of 75 tonnes of coltan from June to September 2001. The volume of these cargoes makes it plausible that these deliveries originated from old stocks of RCD's *SOMIGL* monopoly. The coltan exported by *Masingiro* was transported to Germany via the airport of Ostend and the seaport of Antwerp by the expedition companies *TMK* (DRC), *A.B.A.C* and *NV Steinweg* (Belgium). The coltan was presumably destined for the tantalum processing plant operated by the *Bayer* subsidiary *H.C. Starck*, a world leader in this field.<sup>160</sup>

Undoubtedly, Karl-Heinz Albers' businesses in Eastern DRC contributed to the financing and continuation of the war – even if further investigation is needed to assess the extent of his responsibility. Besides, serious questions can be raised about the German processing company *H.C. Starck's* involvement in this business network. Whereas its management has always maintained that it does not import coltan from DRC, it cannot be ruled out that some cargoes indeed ended up in its factory through the services of *Masingiro*.<sup>161</sup>

KHA's  
response

In its public reply to the Panel, KHA International does not refer to the activity of Masingiro, but furnishes notes on SOMIKUVU and NMC Metallurgie Rwanda. According to KHA International, SOMIKUVU operated under a Mining Convention ratified by Presidential decree in 1982 and this Convention was accepted by RCD-Goma as a legal basis for restarting operations.<sup>162</sup> It says that several attempts were made to force SOMIKUVU to pay taxes to RCD-Goma, but that these were always resisted, even though this resulted in the cessation of production and exports, which cost the company revenue.<sup>163</sup> The company's response has not persuaded the Panel to resolve the case. KHA International and Masingiro are listed in category III of the Panel's October 2003 report and a dossier has been forwarded to the German NCP.

Panel's  
allegation

The freight-forwarding company **C. Steinweg N.V** was listed by the Panel in annex III of its October 2002 report. As noted above, Steinweg, and its associated Belgo-Dutch company Handelsveem, were referred to by IPIS in its testimony before the Belgian Senate Commission of Inquiry.<sup>164</sup> Both companies, together with a second associated Belgo-Dutch company, Hollands Veem, are the subject of a detailed case study by IPIS: 'Steinweg is amongst the most important forwarders of coltan originating from the DRC.'<sup>165</sup> IPIS details a 40 tonne trans-shipment from Bukavu to Masingiro GmbH on 12 June 2001, handled by Steinweg, followed by six other coltan transports between the same companies from August to December 2001 totalling 132,083 tonnes valued at US\$1,436,941. Based on detailed research into one shipment, IPIS reports that the end destination was recorded as Steinweg N.V.:<sup>166</sup> given that such ores are processed by specialist metals firms, why was a freight handling company entered as the ultimate destination? Steinweg has failed to reply to the Panel and is listed in the non-responding category V in the Panel's October 2003 report.

<sup>154</sup> *UN Panel Report*, 12 April 2001, op. cit., respectively paragraphs 186 and 84.

<sup>155</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 71. According to the Panel, the company operated with Congolese government knowledge and its concessions were not revoked.

<sup>156</sup> Von Nikolaus Förster, 'Bayer: Der Teufelskreis,' *Financial Times Deutschland*, 29 August 2001, <<http://www.ftd.de/ub/in/1077197.html>>.

<sup>157</sup> *UN Panel Report*, 12 April 2001, op. cit., Annex 1 - Sample of companies importing minerals from the Democratic Republic of the Congo via Rwanda.

<sup>158</sup> Audition de MM. Cuvelier et Raeymaekers, auteurs du rapport IPIS, Sénat de Belgique, Session ordinaire 2001-2002, Commission d'enquête parlementaire "Grands Lacs", Auditions, Vendredi 15 mars 2002, Réunion du matin, Compte rendu, GR 15, p.4. Translated from: 'Selon nous, les activités de M. Albers dans le commerce de coltan ne sont certainement pas minimales. Pendant la période de hausse des prix du coltan, il exportait 50 tonnes par mois vers l'Allemagne, par le biais de l'entreprise de transport néerlandaise Steinweg et Handelsveem. Ces exportations étaient destinées à l'entreprise H.C. Starck, une filiale de Bayer, qui prétend ne pas importer de coltan du Congo. Nous avons demandé une enquête supplémentaire au gouvernement allemand à ce sujet. Je pense qu'il serait intéressant d'examiner plus avant les activités d'Albers.'

<sup>159</sup> Von Nikolaus Förster, 'Bayer: Der Teufelskreis,' *Financial Times Deutschland*, 29 August 2001, <<http://www.ftd.de/ub/in/1077197.html>>.

<sup>160</sup> *Supporting the War Economy in the DRC: European Companies and the Coltan Trade – Five Case Studies*, op. cit., p.5.

<sup>161</sup> *Ibid.*, p.18.

<sup>162</sup> Reaction No. 33, op. cit..

<sup>163</sup> *Idem*.

<sup>164</sup> Audition de MM. Cuvelier et Raeymaekers, auteurs du rapport IPIS, Sénat de Belgique, Session ordinaire 2001-2002, Commission d'enquête parlementaire "Grands Lacs", Auditions, Vendredi 15 mars 2002, Réunion du matin, Compte rendu, GR 15, p.4.

<sup>165</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p.22.

<sup>166</sup> *Idem*.

**SDV Transintra** is another OECD-based transport company listed by the Panel in annex III of its October 2002 report. SDV Transintra is a subsidiary of the French **Bolloré Group**, a multinational holding extensive interests in logistical services, transport and the paper and plastics industries.<sup>167</sup> The Panel lists SDV Transintra as based in France/Uganda, although the subsidiaries sharing the Transintra name are listed by the Bolloré Group as based in Rwanda and Belgium.<sup>168</sup> Another SDV subsidiary, SDV Transami Ouganda Ltd (ex-Transami Ouganda) is listed as based in Kampala, Uganda. The Panel, in its report of April 2001, states that ‘SDV of the Bolloré [sic] group [has] been among the key companies in this chain of exploitation and continuation of war.’<sup>169</sup> In its November 2001 report, the Panel details the continued role played by SDV Transintra in transporting coltan from Kigali to Mombasa and Dar-es-Salaam, from where the Panel alleges it was shipped by another French company, Safmarine, to Antwerp and Ostend.<sup>170</sup> SDV Transintra has not replied to the Panel and is listed category V of the Panel’s October 2003 report. Safmarine does not appear in any annexes of the Panel’s reports.

Panel’s  
allegation

The Panel listed **Cogecom** in annex III of its October 2002 report. Cogecom is a Belgian trading company, establishing the import-export business Cogecom Sprl in 1992 to bring goods into and out of Zaire (now DRC).<sup>171</sup> In an earlier report, Cogecom is described by the Panel as a company importing coltan and cassiterites from the DRC into Belgium via Rwanda.<sup>172</sup> The Panel alleged that the company was a client of Mrs Aziza Kulsum Gulamali, the RCD-Goma-backed general manager of SOMIGL.<sup>173</sup> The commission of inquiry established by the Belgian Senate stated that ‘an analysis of the transactions and the movements of capital appear to confirm the direct participation of COGECOM in the financing of the rebel movement of RCD-Goma’.<sup>174</sup> It also confirmed that COGECOM was the principal commercial partner of SOMIGL.<sup>175</sup> Furthermore,

Panel’s  
allegation

Although several Belgian companies withdrew after the publication of the first UN panel report (SOGEM, for example), others (such as Cogecom) justify the continuation of their activities or their arrival into the market on the grounds of economic survival.<sup>176</sup>

Cogecom asserts, in its reply to the Panel, that letters referred to by the Panel from the then Secretary General of RCD-Goma (Mr Azarias Ruberwa Manywa) to the then Head of the Department of Finance of the DRC (Mr Jean-Marie Emungu Ehumba) and the latter’s reply – establishing that SOMIGL traded to support the war effort of RCD-Goma – contained anomalies and were at complete odds (‘contradiction flagrante’) with the information and documents it had supplied to the Panel.<sup>177</sup> Moreover, the company sought the response of the RCD-Goma authorities and cites their reply: ‘The document [the letter] produced by the Experts constitutes a gross forgery’.<sup>178</sup> Cogecom provided the Panel with what it says is an authentic copy of the reply from Mr Emungu Ehumba, given to the company by the same authorities. According to Cogecom, Mr Ruberwa told them that he was not the author of the letter produced by the Panel, which was ‘un faux en écritures manifeste’ (‘an obvious forgery’). The company asks for damages from the United Nations because of the harm done to its business and its reputation. It makes reference to the fact that, following the Panel’s report, Cogecom’s manager was facing a judicial investigation in Belgium. The Belgian Senate Commission of Inquiry drew attention to the same ongoing investigation by a magistrate.<sup>179</sup>

Cogecom’s  
response

The Panel listed Cogecom in Category III of its October 2003 report for investigation by the Belgian NCP.

<sup>167</sup> *Bolloré Group 2002 Annual Report*.

<sup>168</sup> *Ibid.*, List of consolidated companies, p.64. See SDV Transami NV (ex-Transintra NV) and SDV Rwanda (ex-SDV Transintra Rwanda). The Bolloré Group lists interests of between 99.99 and 100 percent in all three subsidiaries. A company called Transintra Soudan also appears in the list.

<sup>169</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 182.

<sup>170</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 21.

<sup>171</sup> In Annex III of the Panel’s October 2002 report, Cogecom is listed as based in Belgium. IPIS reports on the activities of Cogecom Sprl: see *Supporting the War Economy in the DRC: European Companies and the Coltan Trade – Five Case Studies*, op. cit., p.11.

<sup>172</sup> *UN Panel Report*, 12 April 2001, op. cit., Annex I - Sample of companies importing minerals from the Democratic Republic of the Congo via Rwanda.

<sup>173</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 92.

<sup>174</sup> Translated and cited from: ‘Cependant, une analyse des transactions et des mouvements de capitaux semble confirmer la participation directe de la Cogecom au financement du mouvement rebelle RCD-Goma comme l’écrivent les récents journaux à propos de l’enquête judiciaire lancée en Belgique par le juge d’instruction Claise sur les activités de la Cogecom et de Kulsum.’ *Belgian Senate Inquiry*, op. cit., 3. FILIÈRE COLTAN, 3.5.3 Rôle des taxes de la Somigl dans le financement du mouvement rebelle.

<sup>175</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D’ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 1. Le Coltan, 4.

<sup>176</sup> *Ibid.*, 8. Translation of: ‘Alors que plusieurs entreprises belges se sont retirées suite à la parution du premier rapport de l’ONU (Sogem, par exemple), d’autres (dont Cogecom) justifient la poursuite de leurs activités ou leur arrivée sur le marché par des considérations de survie économique.’

<sup>177</sup> Reaction No.31, written statement from Coudert Brothers LLP, Coppens Van Ommeslaghe & Faurès on behalf of Cogecom, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>178</sup> *Ibid.*, translated from: ‘LE DOCUMENT PRODUIT PAR LES EXPERTS CONSTITUE UN FAUX GROSSIER’.

<sup>179</sup> See *intra*, fn 174.

### Compliance with the Guidelines

Given the involvement of the RCD-Goma rebel force in resource exploitation and perpetuation of the conflict in the DRC described by the Panel, then the allegations made by the Panel that SOMIKIVU benefited from protection by RCD-Goma soldiers and paid taxes to the regime and that a former RCD-Goma official was a partner in SOMIKIVU's parent company, engages both the human rights (II.2) and sustainable development (II.1) provisions of the *Guidelines*. KHA International, as the parent company, and Masingiro, as an importer of Congolese coltan, must account for their actions. Likewise, the same provisions are engaged in respect of Cogecom which the Panel alleges was a client of the RCD-Goma backed SOMIGL coltan trading monopoly. Recalling the supply-chain provision II.10, the transport and freight-handling companies SDV Transintra and Steinweg N.V., ought to have ascertained the provenance of the coltan that they were shipping and handling. The failure of the latter two companies to disclose information to the Panel or to account for their actions further brings into effect provisions III.1 on disclosure, including high quality standards for social reporting under provision III.2 and performance in relation to value statements on social and ethical conduct under provision III.5.a.

<b>KHA International AG/Masingiro GmbH, C. Steinweg N.V., SDV Transintra and Cogecom</b>	<i>Provisions potentially at issue</i>
<p style="text-align: center;"><i>Questions that the Panel reports leave publicly unanswered</i></p>	
<ul style="list-style-type: none"> <li>▪ How does KHA International account for its markedly different portrayal of SOMIKIVU's relationship with RCD-Goma compared to that detailed by the Panel?</li> <li>▪ What quantity of niobium did SOMIKIVU produce during the second Congolese war? How was this transported out of the DRC and to whom was it sold?</li> <li>▪ Can Steinweg explain why it was named as the final destination for coltan shipments from the DRC?</li> <li>▪ Can Masingiro provide full details of the origin of the coltan exports which IPIS suggests came from former RCD-controlled SOMIGL stocks? What steps did Masingiro take to establish the provenance of this coltan?</li> <li>▪ What steps did Steinweg N.V. and SDV Transintra take to ensure that they were not involved in the transport of coltan from rebel-held areas of the DRC?</li> <li>▪ Can Steinweg N.V. and SDV Transintra explain why they did not reply to the Panel? Do they endorse or reject the call for accountability and disclosure under the <i>Guidelines</i>?</li> </ul>	<p>II.10 supply chain</p> <p>II.1 sustainable development</p> <p>II.2 human rights</p> <p>III.1, III.2, III.5.a disclosure</p>

#### iv. Alex Stewart (Assayers) Ltd.

**Alex Stewart (Assayers) Ltd.** is listed in Annex III of the Panel's October 2002 report. It is a privately owned, independent company, providing professional inspection, sampling, assaying and consultancy services to, among others, the metals and minerals industry.<sup>180</sup> The Group's head office is based in Merseyside, UK.<sup>181</sup>

Panel's allegation Although the Panel does not state its detailed allegations against Alex Stewart in the text of its published reports, it is apparent from the company's own published reactions that it was accused by the Panel of acting as an assayer for Eagle Wings, a company that Panel alleges was trading in coltan from Rwanda-controlled eastern DRC.<sup>182</sup>

Alex Stewart's response In its reply to the Panel, Alex Stewart denies that its ASIC (Alex Stewart International Corporation) Congo subsidiary analysed products other than concentrates of copper/cobalt or metals/alloys produced by Gécamines – one of DRC's state-owned mining companies – and other well established companies in Katanga province.<sup>183</sup> It states that it has ceased all activities in Uganda, Rwanda, Burundi and Eastern Congo, although this appears only to have happened following the Panel's October 2002 report.<sup>184</sup> While denying a client relationship with Eagle Wings, the company does confirm that Alex Stewart International Corporation B.V., located in Rotterdam, worked for Chemie Pharmacie Holland

<sup>180</sup> <<http://www.alexstewart.com/About%20ASA.htm>> (visited 29 January 2004).

<sup>181</sup> *Idem*.

<sup>182</sup> Reaction No.20, Statement from Alex Stewart (Assayers) Ltd. to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit., paragraph 3. It should be noted that the company, in its reply to the Panel, uses the header Alex Stewart International Corporation (and the company's Merseyside address) while the letter is signed by K. Alex Stewart, Chairman and Chief Executive, Alex Stewart (Assayers) Ltd. An attached e-mail of 13 May to the Panel is signed K. Alex Stewart, Chairman, Alex Stewart International Corporation.

<sup>183</sup> Reaction No.20, op. cit., paragraph 3.

<sup>184</sup> *Ibid.*, paragraph 1.

and also explains that '[t]his company [CPH] had, at that time, a contractual relationship with Eagle Wings Resources International'.<sup>185</sup> Whether Alex Stewart was sub-contracted directly by CPH rather than Eagle Wings is a moot point: minimally, if Alex Stewart was aware of the contractual relationship between CPH and Eagle Wings, then would it not have been known that some of the ores it was analysing potentially came from Eagle Wings?

### *Compliance with the Guidelines*

If the ores assayed by Alex Stewart were supplied by a company characterized by the Panel as a 'Rwandan-controlled *comptoir*' in eastern DRC, then Alex Stewart may have played a part in facilitating a trade ultimately based on conflict and forced labour. If these concerns are borne out, then there is a basis for examining whether a breach of provision II.10 on ensuring compliance down the supply chain and provisions II.1, II.2 and IV.1c on, respectively, sustainable development, respect for human rights and the abolition of forced labour have occurred. The degree to which Alex Stewart had knowledge of the origin of the ores it analysed needs to be fully established. However, even if it had no knowledge of provenance, this in itself may represent a failure by omission on the part of the company to apply provision II.10. Although Alex Stewart has been placed in the resolved category I of the Panel's October 2003 report, these issues have not been fully answered in public.

Alex Stewart has explicitly endorsed the *Guidelines* and stated its intention to abide by them. The company ought therefore to welcome constructive dialogue with the UK NCP to clarify any specific instances of compliance.

Alex Stewart	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ What steps did Alex Stewart take to ascertain whether the ores it was analysing in the CPH/Eagle Wings laboratory in Kigali came from eastern DRC?</li> <li>▪ Was Alex Stewart aware at the time of its contract with CPH that there was also a contract between CPH and Eagle Wings?</li> <li>▪ Did the company seek to discover (i) whether Eagle Wings or CPH had any relationship to any rebel factions or foreign armies operating in eastern DRC? (ii) The conditions under which the ores were mined?</li> <li>▪ If asked by the NCP or other interested parties, will Alex Stewart provide a list of the 'other well established companies' for whom ASIC Congo acted as an assayer?</li> </ul>	<ul style="list-style-type: none"> <li>II.10 supply chain</li> <li>IV.1.c forced labour</li> <li>IV.4.b health &amp; safety</li> <li>II.1 sustainable development</li> <li>II.2 human rights</li> </ul>

### *v. Cabot, Kemet, Vishay Sprague and A & M Minerals and Metals*

**Cabot Corporation** is a specialist chemicals and materials company, headquartered in Boston, Massachusetts, USA.<sup>186</sup> Cabot Supermetals (formerly Cabot Performance Materials) processes and produces tantalum from two integrated manufacturing facilities in the US and Japan.<sup>187</sup> Cabot is one of the world's largest refiners of coltan, with the capacity to produce over one million pounds of tantalum a year<sup>188</sup>

**Kemet Electronics Corporation** is a wholly owned subsidiary of Kemet Corporation, the world's largest manufacturer of solid tantalum capacitors.<sup>189</sup> The latter is headquartered in Greenville, California, USA.

**Vishay Sprague** is a brand of **Vishay Intertechnology**, headquartered in Malvern, Pennsylvania, USA. Vishay also manufactures tantalum capacitors.<sup>190</sup>

Kemet and Vishay both purchase processed tantalum from Cabot.<sup>191</sup> All three companies – Cabot, Kemet and Vishay – were listed by the Panel in annex III of its October 2002 report as in breach of the *Guidelines*.

<sup>185</sup> Alex Stewart International Corporation, letter to the Panel by e-mail, 13 May 2003, reproduced under Reaction No.20, op. cit.  
<sup>186</sup> <<http://w1.cabot-corp.com/controller.jsp?N=21+4294967001>>; also <<http://w1.cabot-corp.com/controller.jsp?N=21+1003+45>> (visited 25 February 2004).  
<sup>187</sup> Cabot Corporation, Quarterly Report for the period ending 31 December 2002.  
<sup>188</sup> <<http://w1.cabot-corp.com/controller.jsp?entry=product&N=23+1001+4294966876>> (visited 25 February 2004).  
<sup>189</sup> <<http://www.kemet.com/kemet/web/homepage/kehome.nsf/vabypagename/corpinfo>> (visited 17 December 2003).  
<sup>190</sup> <<http://www.vishay.com/company/brands/sprague>> (visited 17 December 2003).  
<sup>191</sup> Friends of the Earth, 'Memorandum: Panel of Experts' Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo,' 27 October 2003.



**A&M Minerals and Metals Ltd** is the administrative company of the UK-based **A&M Group Limited**, a metallurgical raw materials trading company.<sup>192</sup> It too was listed by the Panel in annex III.

Panel's concerns

Although no detailed allegations are made in the Panel's reports, it appears from either published company responses or from the entries in the Panel's October 2002 annexes that concern centres on either the purchase, trading or use by all four companies of coltan from the DRC.<sup>193</sup> The Panel, in its October 2002 report discusses the coltan supply chain solely in relation to Uganda and Rwanda-controlled areas, although, beyond their listing in the annex, the activities of the four companies are not discussed.<sup>194</sup> Neither Kemet, nor Cabot nor Vishay operate facilities in the DRC or in neighbouring countries. In its October 2003 report, the Panel states:

Panel's concerns

While the processors of coltan and other Congolese minerals in Asia, Europe and North America may not have been aware of what was happening in the DRC, the Panel's investigations uncovered such serious concerns that it was decided to raise the awareness of the international business community to those issues through Annex III in the context of the OECD (Organisation for Economic Cooperation and Development) Guidelines for Multinational Enterprises. The purpose was to bring to the attention of the companies listed in Annex III their responsibilities *vis-à-vis* the source of their raw materials.

In its November 2001 report, in its discussion of coltan trade from the eastern region of the DRC, the Panel does make reference to the fact that both Kemet and Cabot ceased importing tantalum following the House of Representatives Bill of September 2001 temporarily prohibiting coltan imports from certain countries involved in the DRC conflict.<sup>195</sup> Yet, by implication, it should be established whether both companies were importing coltan prior to that date. Cabot is reported in an article in *Fortune Magazine* to have expressed a degree of uncertainty about its sources: 'It says that to the best of its knowledge none [of its coltan] comes from environmentally sensitive areas in Africa, but it can't be sure.'<sup>196</sup> Moreover, the Belgian Senate Inquiry has noted in its final report that:<sup>197</sup>

Eagle Wings created a new network of American and Dutch interests. The company signed an exclusive analysis contract with the Alex Stewart laboratory and its clients are Starck, Ninxhia and Ulba [fn 177 in original], but also Cabot with whom the above named has agreed a long term contract for 500 tons of coltan per year.

Cabot's response

A vice-president of Cabot, in a letter to a chemical industry magazine, stated that 'Cabot has provided information regarding our initiatives to ensure that neither Cabot nor our customers knowingly receive any illegal materials from the Congo or any other country in violation of human or animal rights.'<sup>198</sup>

A&M's response

A & M, in its reply to the Panel, confirmed that it bought Congolese tantalite from merchants mainly based in Antwerp, Belgium, but also from others in Rotterdam, Holland, and Singapore.<sup>199</sup> It reiterates that it purchased 'very little if any' Congolese tantalite since 2001.<sup>200</sup> An article published in June 2001 reported that A & M was buying up to 3 tons of tantalum-bearing ore a month from Uganda.<sup>201</sup> The company's managing director is quoted:<sup>202</sup> 'I couldn't tell you for 100 percent that this material [from Uganda] didn't come from the Congo. It could have been smuggled across the border.' Furthermore, the A & M managing director is reported in the same article as saying that, at the level of peasant producers and local traders, it is very difficult to check provenance.<sup>203</sup> The company, while stating that it supports the

<sup>192</sup> <<http://www.amgroup.uk.com/tree.htm>> (visited 17 December 2003).

<sup>193</sup> In Annex III of the *UN Panel Report*, 16 October 2002, op. cit., the business of Cabot Corporation is listed as tantalum processing and that of Kemet Electronics Corporation and Vishay Sprague as capacitor manufacture. A & M Minerals and Metals Ltd.'s business is listed as trading minerals. Kemet, in its reply to the Panel (Reaction No. 21, Statement from Kemet Electronics Corporation to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.) refers to outlining its position 'in the tantalum supply chain'. A & M Minerals and Metals, again in its reply to the Panel (Reaction No. 22), confirms buying Congolese tantalite.

<sup>194</sup> See sub-heading 'Coltan' under both the Panel's description of Rwanda-controlled and Uganda-controlled areas, *UN Panel Report*, 16 October 2002, op. cit., respectively paragraphs 74 – 82 and paragraphs 108 – 111.

<sup>195</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 18. See also 'A Bill to prohibit the importation into the United States of colombo tantalite from certain countries involved in the conflict in the Democratic Republic of the Congo, and for other purposes,' House of Representatives, 107th CONGRESS, 1st Session, H. R. 2954, 25 September 2001.

<sup>196</sup> Jeremy Kahn, 'Congo's Civil War Rings Up Trouble on the Line,' *Fortune Magazine*, 4 February 2002.

<sup>197</sup> *Belgian Senate Inquiry*, op. cit., 3. COLTANCIRCUIT, 3.3.1. Impact van de Rwandese aanwezigheid in Kongo en van de plotse stijging van de internationale tantaliumkoersen op een herverdeling van de markt van ertsen en het opduiken van nieuwe circuits, pp.61 – 62. Translation of: 'Met Eagle Wings is er een nieuw circuit ontstaan, een circuit met Amerikaanse en Nederlandse belangen. De onderneming heeft een exclusief analysecontract met het laboratorium Alex Stewart afgesloten en heeft als klanten Starck, Ninxhia en Ulba [fn 177 in original], maar ook Cabot, dat met de onderneming een leveringscontract van lange termijn heeft afgesloten van 500 ton coltan per jaar.' In the French text of the same report, the final clause describing the long term 500 ton coltan contract is omitted.

<sup>198</sup> Karen Morrissey, Vice President Corporate Affairs, Cabot Corp., Letter to *Chemical Week*, 'Clearing Cabot's Name,' 11 December 2002.

<sup>199</sup> Reaction No.22, Statement from A&M Minerals and Metals Ltd to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>200</sup> *Idem*.

<sup>201</sup> Kristi Essick, 'A Call to Arms,' *The Industry Standard Magazine*, 11 June 2001.

<sup>202</sup> James McCombie, Managing Director of A & M, quoted in *idem*.

<sup>203</sup> *Ibid*.

Panel in its efforts ‘to eliminate the financing of political factions by the ruthless exploitation of the material wealth of the DRC’ also feels that ‘a way should be found to support artisanal miners’.<sup>204</sup>

Kemet, in its reply to the Panel, refers to ‘a very positive dialogue with the Panel’ and to having ‘outlined its position in the tantalum supply chain’.<sup>205</sup> No further detail about the company’s position in this supply chain is given in Kemet’s public response. However, Kemet’s director of investor relations was quoted in a magazine article in July 2001:<sup>206</sup> ‘You can’t look at it [tantalum powder] and tell whether it came from the Congo or Australia...When you buy it, you get a bag of it, and you can’t tell where in the world it comes from.’ In the same article, Vishay Intertechnology’s senior vice president of market intelligence is attributed to have said:<sup>207</sup> ‘Last year, demand was so strong I’m not sure the mines could have ramped up quickly enough, so the processors went to the open market. I have to assume that is where the illegal ore was being offered’; and ‘The processors that convert the ore to powder are very sensitive to this situation and have assured us they will do everything they can to ensure that no ore from illegal mines is used. Everybody in our supply chain is sensitized, and we will not knowingly use any materials from areas of illegal mining.’

**Compliance with the Guidelines**

Both Kemet and A & M have replied to the Panel. This public exchange is welcome, although the former provides no detailed statement on its supply-chain. A & M has explicitly endorsed the *Guidelines* and it is therefore assumed that it will cooperate fully with any action taken by the UK NCP. Kemet, as a company in an adhering country, would also be expected to do likewise. Both Kemet and A & M are listed in category I (‘resolved’) of the Panel’s October 2003 report.

Cabot and Vishay have either not responded to the Panel or else have made confidential replies. This does not further accountability. Attention is once again drawn to provisions III.1 on disclosure, including high quality standards for social reporting under provision III.2 and performance in relation to value statements on social and ethical conduct under provision III.5.a. Cabot and Vishay Sprague are also listed in category I of the Panel’s October 2003 report. However, in the case of all four companies, the question of the origin and conditions of production of the supplies they bought prior to 2001 requires clarification before compliance with the *Guidelines* can be publicly established over the entire period. Furthermore, and as noted above, Cabot, A & M and Kemet have expressed uncertainty over their ability to establish provenance and Vishay has not responded publicly to the Panel. As referred to above, the Belgian Senate Inquiry reported that Cabot was supplied by Eagle Wings.<sup>208</sup> In all four cases, it remains to be established whether monitoring systems down the supply chain were sufficient in order to ensure the compliance of suppliers under provision II.10. This applies equally to the three US companies – Cabot, Kemet and Vishay – notwithstanding the US NCP’s view that all questions raised by the Panel with respect to US companies have been satisfactorily resolved and that there is no need for further action by the US NCP.<sup>209</sup>

<b>Cabot, Kemet, Vishay and A&amp;M Minerals and Metals</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Did Cabot, Kemet or Vishay – all of whom are listed in Annex III of the Panel’s October 2002 report and appear in ‘resolved’ category I of the Panel’s final report – import coltan from DRC prior to the House of Representatives Bill of September 2001?</li> <li>▪ What controls are in place within each company – Cabot, Kemet, Vishay and A &amp; M – to enable it to ascertain the origin of the coltan it supplies or processes or the tantalum it uses?</li> <li>▪ Can Cabot and Vishay confirm whether or not they have replied to the Panel or whether they have asked for their response to be kept confidential? Do they endorse or reject the call for public accountability and disclosure under the <i>Guidelines</i>?</li> <li>▪ What is Cabot’s response to the Belgian Senate Inquiry report alleging that it was a client of Eagle Wings?</li> </ul>	<p>II.10 supply chain</p> <p>III.1, III.2, III.5.a disclosure</p>

<sup>204</sup> Reaction No.22, op. cit..

<sup>205</sup> Reaction No.21, op. cit..

<sup>206</sup> John Warner, director of investor relations, Kemet Electronics Corporation, quoted in Steven Fyffe, ‘Tantalum Carnage Continues in the Congo,’ *Electronic News*, 2 July 2001.

<sup>207</sup> Glyndwr Smith, the senior vice president of market intelligence at Vishay Intertechnology, quoted in *ibid.*.

<sup>208</sup> See *intra*, above and fn 197.

<sup>209</sup> Letter from the US NCP to Dr Brent Blackwelder, President US Friends of the Earth, op. cit..

**vi. DAS Air**

**Dairo Air Services (DAS Air)** is a privately owned cargo carrier with its main operational base at London-Gatwick in the UK and administrative offices in Crawley, West Sussex.<sup>210</sup> It has further offices in mainland Europe and North America and uses Entebbe, Uganda as its main hub for routes into Africa.<sup>211</sup>

Panel's allegation: DAS Air was listed in annex III of the Panel's October 2002 report. According to the Panel, DAS Air has been involved in the transport of coltan from Bukavu and Goma to Europe via Kigali, although local representatives of the company deny that DAS Air flew to Bukavu and Goma.<sup>212</sup> According to IPIS, DAS Air confirms transporting minerals from Eastern DRC, but defends the legality of this trade.<sup>213</sup> The same local representatives of DAS Air in Kigali and Entebbe, in interviews with IPIS, confirmed that consignments of coltan were flown from Kigali until February 2002, although the route out of DRC is unclear.<sup>214</sup> IPIS states that the flight log of outgoing flights from Entebbe records DAS Air flights into DRC between 1998 and August 2001,<sup>215</sup> although DAS Air's managing director states in a fax message to IPIS that 'for the duration of the conflict DAS Air has never operated into the DRC or in and out and out of the military airport at Entebbe.'<sup>216</sup>

Based on IPIS's interview with an employee of DAS Air's Gatwick head office, the destination airport in Europe was probably Ostend, but the company's refusal to release cargo manifests made it impossible for IPIS to determine further details, including the volume of coltan transported.<sup>217</sup> IPIS further cites four independent sources, including interviews with a Congolese rebel leader and a Rassemblement Congolais pour la Démocratie — Mouvement de Liberation (RCD-ML) representative, which identify the station manager of DAS Air in Entebbe, Uganda, as one of the 'close collaborators' of the RCD-ML rebel force,<sup>218</sup> IPIS reports how the same station manager firmly denied any involvement in business activities in the DRC.<sup>219</sup>

**Compliance with the Guidelines**

DAS Air has acknowledged transporting coltan. According to the Panel, 'no coltan exits from the eastern Democratic Republic of the Congo without benefiting either the rebel group or foreign armies' and that 'by contributing to the revenues of the elite networks, either directly or indirectly' companies 'contribute to the ongoing conflict'.<sup>220</sup> Hence DAS Air's activity appears to be incompatible with those provisions under the *Guidelines* requiring respect for human rights and contributions to economic progress and sustainable development.

Either the company has not replied to the Panel or else it has asked for its response to be kept confidential. This absence of a public response does nothing to further accountability. DAS Air was listed by the Panel in category III of its October 2003 report and a dossier on its activities has been forwarded to the UK NCP for further investigation.

<b>DAS Air</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ How much coltan originating in the DRC has DAS Air transported into Europe, North America and other global markets?</li> <li>▪ Who were the recipients of the ores it transported? Did the company seek to establish the ultimate buyers of these consignments?</li> <li>▪ Who were the company's consignors in the DRC? What steps did the company take to ascertain whether the ores it was transporting came from mines controlled by rebel factions or foreign armies operating in eastern DRC?</li> </ul>	II.10 supply chain II.1 sustainable development II.2 human rights III.1, III.2, III.5.a disclosure

<sup>210</sup> <<http://www.dasairusa.com/intlofc.htm>> (visited 17 December 2003).  
<sup>211</sup> Ibid. See also *European Companies and the Coltan Trade*, part 2, op. cit., fn 65.  
<sup>212</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 20. IPIS refers to interviews with local representatives of DAS Air in Entebbe and Kigali. See *European Companies and the Coltan Trade*, part 2, op. cit., p. 20 and fn 68.  
<sup>213</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p.20.  
<sup>214</sup> See *idem*.  
<sup>215</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p. 21.  
<sup>216</sup> *Idem*.  
<sup>217</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p. 20 and fn 71.  
<sup>218</sup> Ibid., pp. 20 and fn 76. The four sources cited by IPIS are: Interview with a Congolese rebel leader (24 March 2002), interview with an RCD-ML representative in Kampala (28 March 2002), interview with a Ugandan journalist (24 March 2002), interviews with Congolese trader (24, 6 April 2002).  
<sup>219</sup> *European Companies and the Coltan Trade*, part 2, op. cit., p. 20 and fn 75.  
<sup>220</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraphs 80 and 175.

## 2. The exploitation of diamonds

The UN understands conflict diamonds ‘to be rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments’.<sup>221</sup> All diamonds mined within the areas of eastern Congo formerly held by rebel forces would be ‘conflict diamonds’ within this definition. However, under the Kimberley Process – the international certification scheme agreed by producing, exporting and importing countries, the diamond industry and civil society – rebel forces must also be subject to UN Security Council resolutions imposing sanctions against them.<sup>222</sup> As no such sanctions were ever imposed on rebel forces in the DRC, then diamonds from areas formerly under their control were never technically conflict diamonds according to the Kimberly Process definition. The position adopted here *vis-à-vis* the *Guidelines* is that the conduct of companies involved in the mining or trading of diamonds from areas controlled by armed rebel groups responsible for human rights violations is incompatible with the provision requiring respect for human rights. The trade in conflict diamonds does not benefit the Congolese people and undermines the provision on sustainable development.

### i. Nami Gems

**Nami Gems BVBA** is a diamond trader with its registered office in Antwerp, Belgium.<sup>223</sup> It is listed in Annex III of the Panel’s October 2002 report. The Panel, in its account of the trade in diamonds from the former Ugandan-controlled areas of the DRC, refers to the role played by Nami Gems in this trade.<sup>224</sup>

The Panel describes how the Ugandan elite network coordinated all diamond elements of the diamond under the aegis of a front company called the Victoria Group,<sup>225</sup> believed by the Panel to have been registered in Kampala, Uganda, but which the Ugandan judicial commission describes as La Société Victoria, a company registered in Goma, Rwanda, dealing in diamond, gold and coffee.<sup>226</sup> The Panel alleges that the founder, director and mastermind of the Victoria Group’s operations was Lieutenant General Salim Saleh, a top ranking commander of the Uganda People’s Defence Force (UPDF, Ugandan army) in DRC.<sup>227</sup> The Ugandan judicial commission of inquiry, although it did not reach a definitive conclusion on the real ownership of the Victoria Group, and although it found no evidence to connect Lt. General Salim Saleh with the company, did conclude that there was ‘every indication’ of a link between Victoria and Jovial Akandwanaho – the wife of Lieutenant General Salim Saleh – and referred to information confirming her participation in the smuggling of diamonds.<sup>228</sup> The judicial commission concluded that the activities of the Victoria Group were facilitated by another senior UPDF soldier, General James Kazini, who used his position in the Ugandan military to ensure that the company was able to do business ‘uninterrupted’.<sup>229</sup> It places Kazini ‘at the beginning of a chain as an active supporter in the Democratic Republic of Congo of Victoria, an organization engaged in smuggling diamonds through Uganda’.<sup>230</sup> The fact that General Kazini copied correspondence to Victoria was characterised by the

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<sup>221</sup> United Nations General Assembly, ‘The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts,’ Resolution 55/56, adopted by the General Assembly, 55<sup>th</sup> session, 79<sup>th</sup> plenary meeting, 1 December 2000, A/RES/55/56, 29 January 2001.

<sup>222</sup> In the final document of the Kimberley Process, an essentially similar definition of a conflict diamond is used: ‘CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future...’ (‘Essential elements of an international scheme of certification for rough diamonds, with a view to breaking the link between armed conflict and the trade in rough diamonds,’ Kimberley Process Working Document nr 1/2002, 20 March 2002, Section I, Definitions).

<sup>223</sup> The registered office of Nami Gems BVBA is given as Hoveniersstraat 53 box 34, 2018 Antwerp. See Reaction 27, written statement from Nami Gems to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>224</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 112 ff.

<sup>225</sup> *Ibid.*

<sup>226</sup> Ugandan Judicial Commission, *Final Report*, op. cit., 18.5.1, p.82.

<sup>227</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 112.

<sup>228</sup> Ugandan Judicial Commission, *Final Report*, op. cit., respectively, paragraph 40.3, p.188 and paragraph 21.3.5, p.123 and paragraph 44.9, p.207. The judicial commission concluded that the Victoria Group had no Ugandan connections, although it did find that the Victoria was ‘facilitated secretly by General Kazini and Jovial Akanwanaho, possibly Salim Saleh’ (*Ibid.*, p.150). Overall, the judicial commission concluded that it had ‘no evidence to prove that Salim Saleh is a key figure in any of the networks described, nor has the reconstituted panel provided any such evidence’ (paragraph 3.7.1.1, p.177).

<sup>229</sup> The cooperation of the allied MLC rebel force was secured by the pre-payment of taxes. A letter from MLC commander Jean-Pierre Bemba informed civil and military authorities that Victoria was authorised to do business in the towns of Isirio, Bunia, Bondo, Buta, Kisangani and Beni (Ugandan Judicial Commission, *Final Report*, op. cit., 21.3.4, p.119). This letter was counter-signed by Kazini who further instructed his commanders in the same towns to allow Victoria to conduct its business ‘uninterrupted by anybody.’ The exception was Kisangani town itself, administered by an RCD-Goma backed Governor, although the UPDF controlled areas to the north of the town. Kazini issued a veiled threat to the Governor to cooperate with Victoria and later conspired to appoint Adele Lotsove as Governor of the new Province of Ituri in order to take control of the mineral producing areas, including those previously administered by Kisangani (*ibid.*, 21.3.4, p.122). In his reply to the Panel, Kazini stated: ‘In some cases, as in the case of Madame Adele Lotsove, in Ituri Province, our duty was confined to supporting existing administration (the Panel report concedes that Madame Lotsove had been appointed by Mobutu and was continued in office by Kabila).’ (See Reaction No.47, written statement from Major General James Kazini to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.).

<sup>230</sup> Ugandan Judicial Commission, *Final Report*, op. cit., p.124.

judicial commission as his reporting that ‘he had obeyed his instructions, and done what he had been asked to do by Victoria.’<sup>231</sup> The Panel asserts that the company was ultimately controlled by high-ranking Ugandans,<sup>232</sup> although the Ugandan judicial commission found no evidence of this.

Panel’s allegation Khalil Nazeem Ibrahim is named by the Panel as the focal point in Kampala for the Victoria Group’s diamond operations, although he denies taking part in criminal activities or dealing in conflict diamonds.<sup>233</sup> The Panel refers to ‘credible evidence’ that Khalil Nazeem Ibrahim used the capital and marketing services of Nananal Shah, proprietor of Nami Gems.<sup>234</sup> Khalil Nazeem Ibrahim, replying to the Panel through his lawyer, rejects the Panel’s allegation, stating that he ‘never did anything to that nature’ and that he was ‘wrongfully mentioned’ in the Panel’s report.<sup>235</sup> However, according to the Ugandan judicial commission, Khalil Nazeem Ibrahim confirmed buying diamonds in the DRC, principally in Kisangani, Buta and Bunia, either directly himself or through associates.<sup>236</sup> The judicial commission concluded that ‘[t]he preponderance of the evidence is that Khalil’s operations in Kisangani were under the name Victoria’.<sup>237</sup> In June 2000, he set up an agent in Kampala to buy Congolese diamonds through a company called Piccadilly Import and Export Ltd., which was financially supported by Nami Gems.<sup>238</sup> Details of the smuggling operation came to light when one of the couriers was robbed on the way back to Kampala from Entebbe airport and reported the incident for investigation by the local police. According to the judicial commission, the proprietor of Nami Gems had contacted the Piccadilly agent to notify him that a courier would be arriving on a Sabena flight on 14 July 2000.<sup>239</sup> The agent met the courier at Entebbe airport and was given US\$550,000 in payment for a packet of diamonds.<sup>240</sup> The courier then caught the next flight back to Belgium.<sup>241</sup>

Nami’s response Nami Gems acknowledges ‘very limited purchases’ from the DRC, which it says stopped completely before publication of the Panel’s third report, presumably that published in November 2001. Furthermore, it asserts that this trade was completely legal and that its imports went through the Diamond High Council and Diamond Office in Antwerp, a controlling and service organisation which takes care of all formalities for diamond imports and exports, including customs clearance.<sup>242</sup> The company denies dealing in conflict diamonds. In its reply to the Panel, Nami Gems does not address the central allegation that it provided capital and marketing services to part of the network smuggling diamonds out of DRC via Uganda.

During the Belgian Senate Commission of Inquiry, the Nami Gem company representative confirmed the details of the robbery.<sup>243</sup> He added that the company had had dealings with Khalil Nazeem Ibrahim in 2000 and 2001, each time for a short period of time of about two months, but after that it had ceased to have contact with him.<sup>244</sup> The representative claimed not to know the ‘Victoria group’.<sup>245</sup>

In her reply to the Panel, Jovial Akandwanaho referred to the Panel’s ‘unfounded allegations’, describing them as ‘false, malicious and ill motivated’.<sup>246</sup> She stated that she conducts her business ‘transparently, legally and on a fair commercial basis’. She declared to have no interest in La Société Victoria nor any company called the Victoria Group, adding that ‘[t]he fact that I, at one time participated in business with Khalil [running a Lebanese restaurant] does not necessarily mean that I am associated with him in all his other business ventures including the alleged diamond smuggling’.<sup>247</sup> Jovial Akandwanaho denied ever having been in the DRC and denied dealing in diamonds in Kisingani or anywhere else. In a reference to the Ugandan Judicial Commission of Inquiry, she noted that ‘the findings of the Commission are a subject of further investigation and we are in the process of responding specifically to some of the allegations contained therein’.<sup>248</sup> All references to the work of the Commission within this report relate to its final report dated November 2002. Lieutenant General Salim Saleh, in his reply to the Panel, denied ever having been a member of

<sup>231</sup> In a note referred to by the Ugandan Judicial Commission, and copied to the Victoria Group, Kazini reported that he had obeyed instructions and had done what he had been asked to do by Victoria (Ugandan Judicial Commission, *Final Report*, op. cit., 21.3.4, p.122).

<sup>232</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraphs 98 – 99.

<sup>233</sup> *Ibid.*, paragraph 112; see also Reaction No.44, written statement from Khalil Nazeem Ibrahim to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>234</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 112.

<sup>235</sup> Reaction No. 44, op. cit..

<sup>236</sup> Ugandan Judicial Commission, *Final Report*, op. cit., 21.3.2, p.116.

<sup>237</sup> *Ibid.*, 21.3.3, p.119.

<sup>238</sup> *Ibid.*, 21.3.2, p.117.

<sup>239</sup> *Idem.*

<sup>240</sup> *Idem*; also p.113.

<sup>241</sup> In order to smooth the passage of the courier through Entebbe airport, Jovial Akandwanaho ensured that a Civil Aviation Officer in the VIP lounge would assist him through customs (Ugandan Judicial Commission, *Final Report*, op. cit., 21.3.5. pp. 122 – 123).

<sup>242</sup> Reaction 27, op. cit., section 2; also section 11(a). For information on the work of the Diamond High Council and Diamond Office, see <<http://www.hrd.be>>.

<sup>243</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D’ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.4.

<sup>244</sup> *Idem.*

<sup>245</sup> *Idem.*

<sup>246</sup> See Reaction No.51, written statement from Jovial Akandwanaho to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.

<sup>247</sup> *Idem.*

<sup>248</sup> *Idem.*

the Victoria Group or having owned any interests in it.<sup>249</sup> He also stated that he had never been a member of any criminal network.<sup>250</sup> Likewise, in his reply, Major General James Kazini denied being part of the elite network described by the Panel nor to having business relationships with the individuals mentioned.<sup>251</sup> In respect of the findings of the Uganda Judicial Commission of Inquiry referred to by the Panel, Kazini stated:<sup>252</sup> ‘the findings were based on erroneous assumptions. It was an attempt to address the conduct of a military commander without addressing both his position and rights under National Military Law and under the Law of Nations.’ Kazini reiterated his continued willingness to cooperate with the Panel.

### *Compliance with the Guidelines*

The Panel and the Ugandan judicial commission of inquiry implicate Nami Gems in the smuggling of diamonds from foreign and rebel controlled north-eastern DRC. The Panel’s allegation that Nami Gems provided capital and marketing services to Khalil Nazeem Ibrahim and the Ugandan commission of inquiry’s allegation that Nami Gems sent a courier to exchange money for diamonds originating from Victoria’s operations in Ugandan and rebel-controlled DRC would raise questions about: (1) whether the company was thereby indirectly funding perpetuation of the conflict and failing to respect the human rights of those caught up in the hostilities under provision II.2 of the *Guidelines*; (2) whether it was engaged in smuggling, an activity incompatible with the principle of sustainable development under provision II.1 and in contravention of the tax laws and regulations of the countries of origin, transit and destination, matters covered by chapter X of the *Guidelines*; and (3) whether it was doing business with an enterprise, the Victoria Group, which used its contacts in the UPDF to facilitate access to and protect its business in north east DRC. Though the notion of anti-competitiveness under chapter IX of the *Guidelines* hardly captures the use of force and intimidation in such a trade, provision 1 (d) which warns against the division of markets by the allocation of suppliers, territories or lines of commerce is pertinent. Recalling provision II.10 on supply-chain compliance, it would have been the responsibility of Nami Gems to ensure that it did not conduct any business with such a company.

The Belgian Senate Commission of Inquiry concluded that it ‘does not have any information available to allow it to assert that the Kampala operation was not carried out in accordance with the existing legal regulations’ adding ‘[t]he information available to the commission does not permit it to assess to what extent this diamond company is in fact a front spoken of by the UN report, behind which inadmissible practices are carried out on behalf of an elite Ugandan network.’<sup>253</sup>

Nami Gems is listed by the Panel in category I (‘resolved’) in its October 2003 report.

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<sup>249</sup> See Reaction No.48, written statement from Hon. (Lt. Gen) Caleb Akandwanaho Salim Saleh to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.

<sup>250</sup> *Idem.*

<sup>251</sup> Reaction No.47, op. cit..

<sup>252</sup> *Idem.*

<sup>253</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.4. Translation of: ‘La commission ne dispose d’aucun élément qui lui permette d’affirmer que l’opération de Kampala n’a pas été effectuée dans le respect de la réglementation légale en vigueur. Les informations dont la commission dispose ne lui permettent pas d’apprécier dans quelle mesure cette entreprise diamantaire est effectivement le paravent dont parle le rapport des Nations unies, derrière lequel se déroulent les pratiques inadmissibles du réseau qu’une élite a organisé en Ouganda...’

Nami Gems	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ How does Nami Gems respond to the evidence presented by the Ugandan Commission of Inquiry implicating it in the smuggling of diamonds from DRC?</li> <li>▪ How does Nami Gems respond to the Ugandan Commission of Inquiry’s allegation that it provided finance to Piccadilly Import and Export? How does the company respond to the Panel’s allegation that it provided capital and marketing services to Khalil Nazeem Ibrahim?</li> <li>▪ How does Nami Gems respond to the Ugandan Commission of Inquiry’s allegation that it contacted Piccadilly Import and Export to inform them that a courier would be arriving on a Sabena flight on 14 July 2000? How does it respond to the same Commission’s allegation that it provided this courier with US\$550,000 to pay for diamonds at Entebbe airport?</li> <li>▪ Did the same courier deliver diamonds to Nami Gems after returning to Belgium? Were these diamonds declared at customs and notified to the Diamond High Council and Diamond Office in Antwerp?</li> <li>▪ The Ugandan Commission of Inquiry concluded that Khalil’s operations were under the name Victoria and the Panel stated that Khalil was a focal point for Victoria in Kampala. What steps did Nami Gems take to ascertain whether or not Mr Khalil was supplied with diamonds from Victoria’s operations in the former Ugandan and allied rebel-controlled areas of the DRC?</li> </ul>	<p>II.10 supply chain</p> <p>II.1 sustainable development</p> <p>II.2 human rights</p> <p>X taxation</p> <p>IX.1.d anti-competitive allocation</p>

## ii. Asa Diam NV

**Asa Diam NV** is a diamond trader based in Antwerp, Belgium. It was listed in annex III of the Panel’s October 2002 report and also in annex I as a company on which the Panel recommended the placing of financial restrictions.

Panel’s allegation The Panel alleges that the company is ‘associated’ with ‘three “clans” — Ahmad, Nassour and Khanafer’ described by the Panel as ‘distinct criminal organizations’ whose activities include ‘counterfeiting, money-laundering and diamond smuggling’.<sup>254</sup> The company, represented by Ali Ahmad in its response to the Panel, confirms buying diamonds from a Mr Aziz Nassour, but asserts that the consignments were imported into Belgium with official invoices having been declared at E.C. airports in a correct way.<sup>255</sup> Asa Diam maintains that it was not its responsibility to search out whether Mr Nassour was dealing in any incorrect way whatsoever.<sup>256</sup> The Panel alleges that Aziz Nassour was given the first monopoly over exclusive diamond exports rights by the RPA-backed RCD-Goma administration in Kisangani, obliging all local diamond traders to sell to Nassour.<sup>257</sup>

### *Compliance with the Guidelines*

Asa Diam NV confirms buying diamonds from Aziz Nassour, the comptoir named by the Panel as operating the first diamond monopoly in rebel-held Kisangani. The company says that it was not its responsibility to determine incorrect dealing. This potentially represents a failure, under provision II.10, to ensure that the company’s suppliers complied with the *Guidelines*. One strategy of the Rwandan elite network described by the Panel was the use of Aziz Nassour’s monopoly as a source of revenue during the conflict, activity irreconcilable with provision II.1 on sustainable development and provision II.2 on respect for human rights.

The Belgian Senate Commission of Inquiry stated that the Panel’s allegations concerning the clan associations Asa Diam had been rejected, under oath, by the company.<sup>258</sup> The Commission added:<sup>259</sup> ‘Trade with countries and companies that are not subject to an embargo is of itself legally permissible. The particular question that arises is to

<sup>254</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 34.

<sup>255</sup> See Reaction No.37, written statement from Asa Diam to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>256</sup> *Idem*.

<sup>257</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraphs 83 – 84.

<sup>258</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D’ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaires, 3.2.3.

<sup>259</sup> *Ibid.* Translation of: ‘Le commerce avec des pays et des entreprises qui ne sont pas visés par l’embargo est légalement admis en soi. La question se pose en particulier de savoir si ce commerce s’inscrit dans le cadre d’un réseau dissimulant des pratiques illégales.’

know whether this trade is part of a network masking illegal practices.’ The Commission concluded:<sup>260</sup> ‘that it does not have sufficient information to allow it to come to any conclusion as regards these allegations.’ It asked the Panel to communicate any evidence it had to the Belgian authorities.

Asa Diam is listed by the Panel in category III of its October 2003 report for investigation by the Belgian NCP.

<b>Asa Diam NV</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Asa Diam confirms buying diamonds from Aziz Nassour. What was the value of this trade and when did these transactions take place? What steps did the company take to establish the provenance of the diamonds it was buying from this source?</li> <li>▪ Asa Diam confirms that it was not its responsibility to determine incorrect dealing: how does the company reconcile this with the supply chain provision under the <i>Guidelines</i>?</li> </ul>	II.10 supply chain II.1 sustainable development II.2 human rights

## B. Government controlled areas

Although diamonds mined in government-controlled parts of the DRC do not fall within the UN and Kimberley definitions of ‘conflict diamonds’, since they are not used to benefit rebel movements, it does not follow that the way in which they are mined or traded accords with provisions under the *Guidelines*. Diamonds from areas experiencing conflict may still be mined in a non-sustainable way with little benefit to the Congolese people and they may originate in concessions guarded by armies or security forces implicated in human rights violations. The Panel details how, in government-controlled areas, an elite network of Congolese and Zimbabwean political, military and commercial interests sought to maintain its grip on the main mineral resources, including diamonds: ‘This network has transferred ownership of at least US\$ 5 billion of assets from the State mining sector to private companies under its control in the past three years with no compensation or benefit for the State treasury of the Democratic Republic of the Congo.’<sup>261</sup>

### 1. Diamond traders

#### *i. De Beers and the Diamond Trading Company*

The **Diamond Trading Company (Pty) Ltd (DTC)** is headquartered in London, UK. It is the rough diamond marketing arm of the **De Beers Group**. The De Beers Group is a wholly owned subsidiary of the Luxembourg registered and privately owned DB Investments.<sup>262</sup> DTC sources, sorts and values about two thirds of the world’s annual supply of rough diamonds by value.<sup>263</sup>

DTC sells its diamonds to sightholders, in this instance dealers in rough diamonds who meet throughout the year to inspect or ‘sight’ diamonds supplied by DTC. It is the purchasing activities of certain sightholders, and not the purchasing activities of DTC/De Beers itself, that has caused the Panel concern, although this is only apparent from De Beers’s reply to the Panel because the latter did not give details of the allegations against the company in its published reports.<sup>264</sup> De Beers, in its reply to the Panel, summarised the Panel’s allegations: ‘De Beers was named in Annex III of its Report on the basis of information and documentation received by the Panel indicating that the three Sightholders have purchased rough diamonds from sources that encourage and contribute to the conflict in the DRC. The Panel was of the view that by maintaining its business relationship with these Sightholders through the Diamond Trading

Panel’s allegation

<sup>260</sup> Ibid. Translation of: ‘qu’elle ne dispose d’aucun élément lui permettant de se prononcer sur les plaintes en question’.

<sup>261</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 22.

<sup>262</sup> De Beers was acquired by DB Investments (DBI) in early 2001. The formerly public company officially delisted from the JSE Securities Exchange, South Africa and the London Stock Exchange on 1 June 2001. It is now privately owned. The DBI consortium comprises the Oppenheimer family interests via a subsidiary of Central Holdings Limited (45%), Anglo American plc (45%) and Debswana, a company jointly owned by the Government of the Republic of Botswana and De Beers (10%). Debswana, in addition, holds an approximate 11% interest in the Central Holdings Limited subsidiary (see <<http://www.debeersgroup.com/deBeers/dbProfile01.asp>> (visited 17 December 2003)).

<sup>263</sup> <<http://www.debeersgroup.com/dtc/dtcProfile.asp>> (visited 17 December 2003).

<sup>264</sup> DTC purchases diamonds from De Beers Group mines in Botswana, Namibia, Tanzania and South Africa. It also buys from the Russian mining company Alrosa: ‘As a proactive response to the issue of conflict diamonds, the DTC ceased buying diamonds on the so-called outside market in December 1999.’ (<<http://www.debeersgroup.com/dtc/dtcProfileDiamPurchases.asp>> (visited 17 December 2003)).



Company (DTC), De Beers has allegedly indirectly provided support to entities that are directly or indirectly involved in fuelling the conflict in the DRC.<sup>265</sup>

### *Compliance with the Guidelines*

Interpreting the Panel's allegations *vis-à-vis* the *Guidelines*, the sourcing generally by any party of diamonds from an area experiencing conflict could be viewed as engaging the provision on human rights and the purchase of stones from concessions assigned without competitive tendering and with little or no benefit to the Congolese people would undermine the provision on sustainable development. At issue is whether or not DTC/De Beers should have taken steps, under the supply-chain provision, to discover whether or not the sightholders with whom it did business were also in receipt diamonds from areas experiencing conflict; and whether or not it should have maintained its business relationship with any sightholders who were in receipt of such diamonds.

De Beer's response In its reply to the Panel, De Beers rejected the allegation made in the Panel's October 2002 report that the company was in breach of the OECD *Guidelines* as 'unfounded' stating that it was 'supported neither by any evidence nor explanation of the nature of any alleged breach.'<sup>266</sup> Following the publication of the Panel's October 2002 report, De Beers reports that its requests to the Panel for clarification elicited no response until it was invited to meet with the Panel in Nairobi on 12 May 2003.<sup>267</sup> De Beers confirms that, as a result of this meeting, the Panel's concerns relating to the alleged activities of DTC sightholders were made apparent.<sup>268</sup> De Beers responded to the Panel in writing on 28 May 2003.

The relationship of DTC to its sightholders represents a reversal of the usual direction of application of the supply-chain provision II.10, i.e., enterprises have a responsibility for encouraging compliance not only 'upstream' among suppliers, but also 'downstream' towards the market. The Panel implies that *suppliers* themselves – in this case DTC/De Beers – should encourage such downstream compliance. Such an interpretation is supported by the fact that provision II.10 applies to 'business partners' in general and is not limited to the supplier/sub-contractor relationship. Furthermore, the commentary affirms that 'the market position of the enterprise *vis-à-vis* its suppliers or other business partners' impacts on the ability of an enterprise to influence the conduct of the latter.<sup>269</sup> This is instructive in two ways: firstly, market position is relevant to dealings with other business partners, in this case the sightholders; and, secondly, market influence increases the ability of an enterprise to ensure compliance with the *Guidelines*. Given that DTC sources, sorts and values two thirds of the world's rough diamonds by value, it is the dominant player in the supply market and is therefore in a position to influence the conduct of the sightholders to whom it sells.

Indeed, De Beers/DTC recognises this influence: it makes it a condition of supplying its sightholders that they too agree to comply with the company's Diamond Best Practice Principles.<sup>270</sup> These determine, *inter alia*, that 'the injury and hardship suffered by local populations (and the potential for it) when conflicts arise in diamond producing areas are unacceptable, as is seeking to profit from such conflicts.'<sup>271</sup> They also are unequivocal in that De Beers Group is 'committed to operating our businesses in such a way that we neither engage in, nor encourage in any manner...buying and trading rough diamonds from areas where this would encourage or support conflict and human suffering.'<sup>272</sup>

De Beer's response DTC/De Beers, in its reply to the Panel and in response to the question '[t]o what extent was De Beers aware of the activities of the Sightholders and what remedial action will be taken?', states that it

'notified the Sightholders who were the subject of the Panel's findings once the Panel had explained its concerns to us. Moreover, we were concerned to do so in view of the commitment by both the DTC and its Sightholders to the Diamond Best Practice Principles, which we developed in order to take account of unacceptable practices....It is important to note in addition that we underpin this ethos by promoting the development of sophisticated systems by our clients precisely in order that they can minimise the likelihood of unwittingly acquiring diamonds from such sources [i.e., from areas where trading rough diamonds would encourage or support conflict].'<sup>273</sup>

De Beer's response In its reaction to the panel, De Beers/DTC maintained that the sightholders in question assured it that their buying activity was accompanied by official government documentation.<sup>274</sup> The company confirmed that it does not exercise management control or supervision of its sightholders and also that it had<sup>275</sup>

<sup>265</sup> Reaction 29, written statement from De Beers to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>266</sup> Ibid..

<sup>267</sup> Ibid..

<sup>268</sup> Ibid..

<sup>269</sup> *Commentary on the Guidelines*, op. cit., Commentary on General Policies, paragraph 10.

<sup>270</sup> DTC, Diamond Best Practice Principles, June 2003, cover page.

<sup>271</sup> Ibid., 1. Consumer Confidence, bullet 5.

<sup>272</sup> Ibid., 2. Business Practices, bullet 1.

<sup>273</sup> Reaction 29, op. cit., under question 1.

<sup>274</sup> *Idem*.

<sup>275</sup> Reaction 29, op. cit., under question 1 (i) and (ii).

'no knowledge of the rough diamond purchasing activities of its clients beyond their purchases from DTC. Indeed, under DTC's agreement with and undertakings provided to the European Commission (pursuant to the consideration by the Competition Directorate of DTC's formal supply arrangements), there are strict limits upon the ability of DTC to require information about those aspects of its' customers commercial plans and operations which are viewed, under competition laws, as irrelevant to DTC's supply decisions.'<sup>276</sup>

De Beers/DTC was therefore relying on the assurances of its sightholders. It is understood that De Beers has maintained its relationship with the sightholders in question. One of the sightholders has conveyed its views:<sup>277</sup> it did not trade in conflict diamonds and purchased only a limited number of stones from suppliers within the government-controlled areas of DRC in full compliance with export regulations; that it stopped even these legitimate purchases; that its activities were, at all times, in compliance with the OECD's *Guidelines*. The diamonds purchased by this sightholder are not, therefore, conflict diamonds as defined by the UN, i.e., those rough diamonds used by rebel movements to finance their military activities.

De Beers's position, as outlined in its reply to the Panel at the time, gave rise to an apparent contradiction. On the one hand, the company acknowledged that it had influence upstream in the supply chain over its sightholders in that it required their adherence to the company's Diamond Best Practice Principles. There is complementarity between this position and provision II.10 under the *Guidelines*.<sup>278</sup> On the other hand, De Beers/DTC confirmed, in the case of any sightholders who may also have independently brought diamonds from areas experiencing conflict, that it had no management control or supervision of them; lacked knowledge of their wider rough diamond purchasing activities; and that its ability to require information from its sightholders was subject to strict limits because of undertakings given to the European Commission.

De Beers was listed by the Panel in its October 2003 report in category III as unresolved and information has been forwarded to the UK NCP for further investigation. Although not referring to De Beers by name, the Panel in its final October 2003 report stated that category III 'also includes companies that do not appear to have met their own self-imposed best practices principles. Given that the OECD Guidelines are codes of good business ethics, the Panel believes it is important for such apparent failures or lapses to be investigated further.'<sup>279</sup>

In a press release issued in response to the Panel's October 2003 report, De Beers expressed its disappointment that the Panel had persisted in suggesting that it was in breach of the *Guidelines* as a result of the buying activities of two sightholders.<sup>280</sup> The company said that it had made it perfectly clear that 'it does not – and cannot legally – exercise any form of management control or supervision of Sightholders' purchases of rough diamonds on the open market,' describing it as 'entirely inappropriate for the Panel to continue to tarnish De Beers' reputation on the basis of third party actions.' De Beers pledged to work with the UK NCP 'to resolve this issue once and for all.'

De Beers, through the offices of the UK NCP and through direct contact with RAID, has sought to further clarify its position. De Beers has confirmed that (i) all Sightholders, including those doing business in the DRC, were formally made aware of the requirements of the BPPs in July 2000. The company has reaffirmed (ii) that Sightholders were *expected* to adhere to the principles, which were 'mandatory'; but that (iii) Sightholders were not *legally or contractually bound* by them at the time. This was because implementation of the company's Supplier of Choice initiative – of which the BPPs were one part – was suspended after the European Commission adopted a statement of objection on 25 July 2001 to DTC's application for exemption under Article 81(3) of the EC Treaty. The Commission did so because of its concern that the wider initiative would give De Beers the possibility to restrict the commercial behaviour of its sightholders.<sup>281</sup> Only after the issue was resolved with the EC were binding Supplier of Choice contracts signed with sightholders in July 2003, to be implemented through a self-assessment workbook audited by an independent third party.

While this clarification helps to explain the apparent contradiction in the company's public reply to the Panel, it does raise other questions. First among these is the degree to which EC competition law prevented and may still prevent compliance with a company's own due diligence principles and, ultimately, the supply chain provision of the *Guidelines*. This and other questions now need to be addressed by the NCP, the Committee on International Investment

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<sup>276</sup> Ibid.

<sup>277</sup> These views were conveyed to RAID in a meeting, at the Sightholder's request, held in London on 10 December 2003.

<sup>278</sup> Overall, 'the *Guidelines* both complement and reinforce private efforts to define and implement responsible business conduct.' (*Guidelines*, Preface, paragraph 7).

<sup>279</sup> *UN Panel Report*, 23 October 2003, op. cit., paragraph 30.

<sup>280</sup> De Beers, 'De Beers and the UN Panel Report on the DRC,' Press Release, 29 October 2003, <<http://www.debeersgroup.com/archive/press/MR20031029-1.asp>> (visited 17 December 2003).

<sup>281</sup> European Commission, 'Notice pursuant to Article 19(3) of Council Regulation No 17 concerning Case COMP/E-3/38.139 – DTC 'Supplier of Choice'', *Official Journal of the European Communities*, C 273/2, 9 November 2002.

De Beer's  
response

and Multinational Enterprises and the European Commission. For its part, De Beers has confirmed that it did not, at the time it became aware of the Panel's allegations, approach the Commission to clarify whether it was entitled under Article 81 to investigate the Panel's findings relating to DTC's sightholders, i.e., whether it was permitted to pursue due diligence in respect of the BPPs per se even while the wider Supplier of Choice strategy remained in suspension. According to De Beers, the reason it did not seek clarification on this matter was because the Panel had not informed the company that it was dissatisfied with its written response nor with the action that it had taken *vis-à-vis* the sightholders in question. De Beers now acknowledges that EC competition rules *may not* have prevented it from exercising due diligence if, for example, it had used an independent third party to act as an intermediary.

De Beers and the Diamond Trading Company	Provisions potentially at issue
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ According to De Beers, it did not clarify with the Commission whether or not it was permitted to pursue due diligence enquiries because the Panel's outstanding concerns had not been communicated to it. Despite the company's recent acknowledgement that it <i>may</i> have been possible to exercise due diligence through a third party over its sightholders' alleged DRC-related transactions, the wider question of the influence of EC competition rules remains: are there any circumstances under which European Commission competition law may prevent a company's attempt to exercise due diligence? A response is needed from other interested parties, including the Commission.</li> <li>▪ In its Best Practice Principles, De Beers seeks to eliminate the buying and trading of rough diamonds 'from areas where this would encourage or support conflict and human suffering'. This is a broader definition of a 'conflict diamond' than that arrived at under the Kimberly process and would appear to encompass diamonds produced in both government and rebel-controlled areas, even where sanctions are not in force. In implementing the Supplier of Choice initiative, will De Beers apply its BPPs and thereby move beyond the Kimberly definition?</li> <li>▪ Does De Beers recognise and endorse the complementarity between its BPPs and the downstream as well as upstream application of the supply-chain provision under the <i>Guidelines</i>?</li> <li>▪ The length of time which it took for the Panel's allegations against De Beers to be publicly clarified is of concern to all parties. Does the company, for its part, therefore endorse the call for the establishment of a permanent UN body, with clear and transparent procedures, to monitor the role of business in conflict?</li> </ul>	<p>II.10 supply chain</p> <p>II.1 sustainable development</p> <p>II.2 human rights</p>

## ii. Belgian diamond traders - Diagem, Komal Gems, Jewel Impex, Abadiam, Sierra Gem Diamonds, Triple A Diamonds, Echogem and Ahmad Diamond Corporation

Panel's  
allegation

With the exception of Abadiam, all of the above named diamond trading firms, based in Antwerp, Belgium, were listed in Annex III of the Panel's October 2002 report. Abadiam, although it did not appear in any of the annexes, was referred to in the main body of the same Panel report and has subsequently replied publicly to the Panel.<sup>282</sup> In the Panel's October 2002 report, Ahmad Diamond Corporation, Sierra Gem Diamonds and Triple A Diamonds were also listed in annex I as companies on which the Panel recommended the placing of financial restrictions.

Companies'  
responses

Some of the companies named confirm buying diamonds from the DRC, principally, it seems, from government-controlled areas: specifically, **Diagem BVBA** acknowledges three imports from DRC in 2001, totalling US\$710,696.<sup>283</sup> It denies importing diamonds from Africa before or since that date. **Komal Gems NV** confirms two transactions in respect of DRC diamonds, the first on 18 May 2001 for US\$151,288 and the second on 3 July 2001 for US\$353,857.<sup>284</sup> It too states that, with the exception of these two imports, it never imported any other good from the DRC nor from Africa. **Jewel Impex BVBA** records five imports from the DRC between 10 March 2001 and 25 May 2001. It does not give the value of these shipments, but states that they were a negligible part of its turnover.<sup>285</sup> All three companies are

<sup>282</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 58.

<sup>283</sup> This figure is negligible in comparison to the total turnover of company, US\$15,878,564.61 in 2001. See Reaction No.39, written statement from Diagem BVBA to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>284</sup> These figures are also small in comparison to the total turnover of the company, €2,868,252 in 2001. See Reaction No.40, written statement from Komal Gems NV to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>285</sup> The total turnover was US\$4,674,352.94 in 2001. See Reaction No.41, written statement from Jewel Impex BVBA to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

named by the Panel as buying Congolese diamonds via the Minerals Business Company (MBC).<sup>286</sup> The latter is a company described by the Panel as a ‘Congo-Zimbabwe joint venture’ which ‘represents Zimbabwe’s interests in the lucrative diamond trade of the Democratic Republic of the Congo’ and which uses ‘Zimbabwe’s military and political influence to evade the legal requirements of the Democratic Republic of the Congo and to avoid paying the costly licensing fees.’<sup>287</sup> All three companies confirm the MBC-related transactions, explaining how the diamonds were purchased by a client in DRC and how the consignments were accompanied by invoices from MBC. Each trader admits to having no knowledge of MBC and to being unacquainted with the political climate in DRC.<sup>288</sup> All three maintain that they acted in good faith. Each one of the companies states that they have invoices for the consignments and Diagem and Komal Gems declare that they were legally imported through the Diamond High Council and Diamond Office in Antwerp.<sup>289</sup> Representatives of Jewel Impex, Komal Gems and Diagem have stated under oath before the Belgian Senate Commission of Inquiry: that they mainly obtained supplies on the Antwerp market; that they only occasionally bought from MBC (infrequently and for limited periods); that their MBC transactions were made indirectly through an intermediary and only concerned a limited part of their turnover; that their MBC transactions ceased before the publication of the third report of the United Nations.<sup>290</sup>

The Panel asserts that Oryx Natural Resources (a company with mining interests in the DRC: please see next section) markets its diamonds directly to its agent **Abadiam**, based in Antwerp Belgium.<sup>291</sup> In its written response to the Panel, Abadiam confirms that it acted as an agent for Oryx, receiving goods on consignment.<sup>292</sup> It did so for a period of 18 months a year and a half previously, i.e., until circa the end of 2001/beginning of 2002.<sup>293</sup> The Panel refers to bank records of a transfer in September 2001 of more than \$1 million from the Belgian account of Oryx Natural Resources to Abadiam.<sup>294</sup> Abadiam denies that this transfer ever took place and states that it never received such an amount from Oryx via any Belgian or other bank account.<sup>295</sup> However, Oryx sheds light on this matter: rather than paying the money to Abadiam, it makes reference to receipts of over \$1 million from Abadiam for diamonds paid into Oryx’s Banque Belgoise account in September 2001.<sup>296</sup> The Panel also reports that Abadiam was one of the most important trading partners of MBC buying diamonds from MBC and also directly from Sengamines.<sup>297</sup> However, Abadiam denies that it has ever bought goods from MBC.<sup>298</sup> Under oath before the Belgian Senate Commission of Inquiry, Abadiam stated that it obtained its supplies on the South African and Brazilian markets; that it never bought from MBC; that during a year and a half the company had been the agent of Oryx-Sengamines from which it received its merchandise on commission and then sold on the market on the basis of a contract that was rescinded a year previously.<sup>299</sup> Oryx itself rejects the assertion that it has ever had a commercial relationship with MBC.<sup>300</sup>

The Panel refers to documents in its possession which it alleges show that ‘three “clans” of Lebanese origin, who operate licensed diamond businesses in Antwerp, purchased diamonds from the Democratic Republic of the Congo worth \$150 million in 2001’.<sup>301</sup> It names the clans – all of Lebanese origin – as Ahmad, Nassour and Khanafer and asserts that their ‘counterfeiting, money-laundering and diamond smuggling’ activities are known to intelligence services and police organisations.<sup>302</sup> The Panel alleges that **Sierra Diamonds** and **Triple A Diamonds** are ‘associated’ with the clans.<sup>303</sup> It lists Imad Ahmad of **Ahmad Diamond Corporation NV**, Nazem Ahmad of **Sierra Gem Diamonds** and Ahmad Ali Ahmad of **Triple A Diamonds** in Annex II of its October 2002 report, recommending the placing of a travel ban and financial restrictions on them. In respect of Ahmad Diamond Corporation, the Belgian Senate Commission of Inquiry stated that it ‘has not found any explanation [why restrictions were proposed] and requests the UN to provide its reasons to the competent authorities. The commission does not have any information that would allow it to impute illegal or unacceptable practices to the company in question.’<sup>304</sup> In their replies to the Panel, all three parties

<sup>286</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 58.

<sup>287</sup> *Ibid.*, paragraph 57.

<sup>288</sup> Reactions No.39, 40 and 41, op. cit..

<sup>289</sup> *Ibid.*

<sup>290</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.2.

<sup>291</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 41.

<sup>292</sup> See Reaction No.28, written statement from Abadiam to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit., section 2.

<sup>293</sup> *Idem*. The date of the agent relationship with Oryx is calculated from the date of response, i.e., 27 May 2003.

<sup>294</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 58.

<sup>295</sup> Reaction No.28, op. cit..

<sup>296</sup> <<http://www.oryxnaturalresources.com/UNissues/>> (visited 17 December 2003).

<sup>297</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 58.

<sup>298</sup> Reaction No.28, op. cit..

<sup>299</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.2.

<sup>300</sup> Reaction No.28, op. cit.; <<http://www.oryxnaturalresources.com/UNissues/>>.

<sup>301</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 34. Operations were conducted in the Government controlled areas.

<sup>302</sup> *Idem*.

<sup>303</sup> *Idem*.

<sup>304</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.6. Translation of: ‘La commission n’a trouvé à ce fait aucune explication et demande par conséquent au panel des Nations unies qu’il communique à cet égard ses raisons aux instances compétentes. La commission, sur la base des informations en sa possession, ne dispose d’aucun élément lui permettant d’imputer des pratiques illégales ou inacceptables à l’entreprise en question.’

Panel’s allegation

Abadiam’s response

Panel’s allegation

Abadiam’s response

Abadiam’s response

Panel’s allegation

Companies’ responses

deny being conflict diamond dealers and deny being members of any clan or having associations with such clans, criminal organisations or criminal activities.<sup>305</sup>

Companies' responses Sierra Gem Diamonds denies the existence of the Ahmad clan as a criminal organisation and both Sierra and Triple A Diamonds reject as 'unbelievable' the implication that everyone with the name Ahmad is part of a clan.<sup>306</sup> Moreover, Nazem Ahmad of Sierra Gem Diamonds denies any relationship with the Nassour and Khanafer clans.<sup>307</sup> Both Sierra Gem Diamonds and Triple A Diamonds indicate that independent audits of their imports of rough and polished diamonds between January 2001 and September 2002 have concluded that all legal regulations were followed and that there is no proof of illegal or illegitimate behaviour.<sup>308</sup> However, in both cases, the trade in diamonds with the DRC is neither confirmed nor denied. No details of imports are provided.

Panel's allegation **Echogem** is also listed by the Panel as having clan associations.<sup>309</sup> Echogem has not responded to the Panel's allegations.

### *Compliance with the Guidelines*

The Belgian Senate Commission of Inquiry noted that the *Guidelines* were non-binding and, in its view, were not applicable to the diamond companies concerned as they are not multinationals.<sup>310</sup> Most of the companies cited concur with this interpretation and refer to it in their replies to the Panel. However, the definition of an MNE given in the *Guidelines* is very broad: please refer the supplement to this report. Hence their conduct is assessed accordingly.

Diagem, Komal Gems, Jewel Impex, and Abadiam all confirm buying diamonds from DRC, mainly, it appears, from sources in Government controlled areas. The first three companies say that they did not have knowledge of the activities of their suppliers. This potentially represents a failure, under provision II.10, to ensure that their suppliers complied with the *Guidelines*. The same suppliers – such as MBC, representing Zimbabwe's interests – are implicated in the Panel's reports for profiting from resource exploitation during the conflict in the DRC, activity irreconcilable with provision II.1 on sustainable development. Diagem, Komal Gems and Jewel Impex all confirm MBC-related transactions Abadiam, though it denies dealing with MBC, did act as the agent for Oryx (please see next section), a fact that is established irrespective of the direction of bank transfers between the two enterprises. Diagem, Komal Gems and Jewel Impex are all listed by the Panel in category I ('resolved') of its October 2003 report. Abadiam, even though it has responded to the Panel, does not appear in the October 2003 report in any category.

Both Sierra Gem Diamonds and Triple A Diamonds neither confirm nor deny purchasing diamonds from DRC. Their denial of criminal activity or being members of 'clans' is in response to the Panel's assertion that both companies were 'associated' with the clans, described by the Panel as 'distinct criminal organizations'.<sup>311</sup> The Belgian Senate Commission of Inquiry stated that the Panel's allegations concerning the clan associations of Sierra Gem Diamonds, Triple A Diamonds and Echogem, had been rejected, under oath, by the companies concerned.<sup>312</sup> The Commission added:<sup>313</sup> 'Trade with countries and companies that are not subject to an embargo is of itself legally permissible. The particular question that arises is to know whether this trade is part of a network masking illegal practices.' The Commission concluded:<sup>314</sup> 'that it does not have sufficient information to allow it to come to any conclusion as regards these allegations.' It asked the Panel to communicate any evidence it had to the Belgian authorities.

It is both in the public interest and in the interests of both Sierra Gem Diamonds and Triple A Diamonds for the Belgian NCP to ascertain compliance with the *Guidelines* by establishing the extent of their diamond trading with the DRC and the source of any gems supplied to them. Echogem is likewise called upon to furnish detailed information, which should be considered by the Belgian NCP alongside any submissions received from other interested parties. For unexplained reasons, only Ahmad Diamond Corporation and Sierra Gem Diamonds appears in category III of the Panel's October 2003 report as unresolved for further investigation. Triple A Diamonds appears in category I ('resolved'), and Echogem in category V ('parties that did not react').

<sup>305</sup> See Reaction 36, written statement from Ahmad Diamond Corporation NV to the Panel; Reaction No.42, written statement from Sierra Gem Diamonds to the Panel; and Reaction No.43, written statement from Triple A Diamonds to the Panel, all reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>306</sup> Respectively, Reaction No. 42 and Reaction No. 43, op. cit..

<sup>307</sup> Reaction No. 42, op. cit..

<sup>308</sup> Reactions No.s 42 and 43, op. cit..

<sup>309</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 34.

<sup>310</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.1.

<sup>311</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 34.

<sup>312</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.3.

<sup>313</sup> *Ibid.* Translation of: 'Le commerce avec des pays et des entreprises qui ne sont pas visés par l'embargo est légalement admis en soi. La question se pose en particulier de savoir si ce commerce s'inscrit dans le cadre d'un réseau dissimulant des pratiques illégales.'

<sup>314</sup> *Ibid.* Translation of: 'qu'elle ne dispose d'aucun élément lui permettant de se prononcer sur les plaintes en question'.

The Belgian Senate Commission of Inquiry concluded:<sup>315</sup> '[n]o legal framework (European or international) prevents or prohibits the trade with companies like MBC or Oryx-Sengamines. Consequently, the trade with these companies is legally authorized. If, for whatever reason, it is believed that any trade with such companies should be banned, because they support the conflict directly or indirectly, such a ban can only be put in place by means of a definite legal ruling from the EU or the UN. In this context and on the basis of the information available to it, the commission concludes that no legally aggravating circumstance can be held against the diamond companies in question and that they acted in good faith.' However, the benchmark used by the Panel, and the one therefore referred to here, is the *Guidelines*. The Belgian Senate Commission of Inquiry did not seek to apply the *Guidelines* and did not reach any conclusions on compliance or non-compliance.

Putting aside the issue as to whether a trade in diamonds from government-controlled areas in a conflict (as opposed to areas held by foreign or rebel forces) is acceptable (the Panel's view, in the case of the DRC, was that it was not acceptable); and irrespective of whether the diamonds were legally exported, all the Belgian diamond houses should have considered whether their conduct was in keeping with the requirements under the *Guidelines* to contribute to sustainable development and to respect human rights.

Belgian Diamond Traders	Provisions potentially at issue
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Diagem BVBA, Komal Gems and Jewel Impex all confirm MBC-related transactions: what steps did each company take to ascertain the ownership of MBC and to establish the provenance of the diamonds supplied by MBC?</li> <li>▪ What was the value of diamonds imported by Abadiam from either Oryx or from other sources within the DRC? When did these imports take place?</li> <li>▪ Sierra Gem Diamonds and Triple A Diamonds refer to audits of their diamond imports: if asked by the NCP or by other interested parties, will they provide details of these audits? What mechanisms are in place within each company to determine the provenance of the diamonds that it buys?</li> <li>▪ Ahmad Diamond Corporation neither confirms nor denies purchasing diamonds from the DRC: if asked by the NCP or by other interested parties, will the company provide details of any transactions in DRC diamonds?</li> <li>▪ Diagem, Komal Gems and Jewel Impex all confirm that they did not have knowledge of the activities of their suppliers: how do they reconcile this with the supply chain provision under the <i>Guidelines</i>?</li> <li>▪ Can Echogem confirm why it did not respond to the Panel? Does the company endorse or reject the call for accountability and disclosure under the <i>Guidelines</i>?</li> </ul>	<p>I.3 definition MNE</p> <p>II.10 supply chain</p> <p>II.1 sustainable development</p> <p>II.2 human rights</p> <p>III.1, III.2, III.5.a disclosure</p>

## 2. Mining companies

### i. Oryx Natural Resources

**Oryx Natural Resources Ltd** is a private mining company incorporated in the Cayman Islands.<sup>316</sup> It is a member of the **Oryx Group**, registered in Oman. Oryx Natural Resources was listed in annex III of the Panel's October 2002 report. It also appeared in annex I of the same report, as a company on which the Panel recommended the placing of financial restrictions.

Beginning in mid-1999, 11,000 Zimbabwean soldiers were deployed in Kasai Oriental and Katanga provinces to protect rich mineral resources, including diamonds, from the rebel force of RCD-Goma.<sup>317</sup> The Panel, in its November 2001

<sup>315</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.2. Entreprises diamantaire, 3.2.2: 'Aucun cadre légal (européen ou international) n'empêche ou n'interdit les relations commerciales avec des sociétés comme MBC ou Oryx-Sengamines. En conséquence, le commerce avec ces sociétés est légalement autorisé. Si l'on estime, pour une raison ou pour une autre, que tout commerce avec de telles entreprises doit être interdit, parce qu'elles soutiennent le conflit de manière directe ou indirecte, on ne peut décréter une interdiction qu'au moyen d'une réglementation légale définie au niveau de l'Union européenne ou des Nations unies. Dans ce contexte et sur la base des informations dont elle dispose, la commission conclut qu'aucune circonstance légalement aggravante ne peut être retenue contre les entreprises diamantaires en question et qu'elles ont agi de bonne foi.'

<sup>316</sup> <<http://oryxnaturalresources.com/company/>> (visited 17 December 2003).

<sup>317</sup> Transparency International Zimbabwe, *New Scramble for Africa*, April 2002.

report, described how the bulk of Zimbabwean forces were in the rich Kasai and Katanga regions where almost all of the country's industrialized mineral production is located.<sup>318</sup> The Panel reported that rights to exploit two of the state-owned Société Minière de Bakwanga's (MIBA) richest diamond concessions, respectively, the kimberlite deposits in Tshibua and the alluvial deposits in the Senga Senga River, were transferred to the Zimbabwean Defence Force (ZDF) by the late President Laurent Kabila as a barter payment for ZDF military assistance.<sup>319</sup> According to court papers, Oryx-Zimcon (Pvt.) Ltd. was established on 16 July 1999.<sup>320</sup> Financial statements for Oryx Natural Resources confirm that Oryx-Zimcon was 'a joint venture company registered in Harare, Republic of Zimbabwe which is equally owned by the Company [Oryx Natural Resources] and the Government of the Republic of Zimbabwe.'<sup>321</sup> According to the Panel in its November 2001 report, the joint venture of Oryx-Zimcon held 90 percent of the diamond concession mining rights.<sup>322</sup> Company documents relating to a planned but aborted floatation of a new entity on the London Stock Exchange (see below) confirmed Oryx-Zimcon's share of the mineral rights, adding that Oryx-Zimcon was entitled to 100 per cent of the distributable profits from the concession.<sup>323</sup>

On 23 September 1999, the Zimbabwean Defence Minister Moven Mahachi announced the formation of the Congo-Zimbabwe joint stock company COSLEG.<sup>324</sup> COSLEG was incorporated in Kinshasa on 8 November 1999.<sup>325</sup> COSLEG represented the partnership between COMIEX – a company owned by the late DRC President Laurent Kabila and some of his close allies in government<sup>326</sup> – and the Zimbabwean OSLEG (Private) Ltd., a company incorporated in Harare on 11 December 1998, which the Panel described as ZDF's 'military company.'<sup>327</sup> According to the Panel, 'OSLEG represents the commercial side of the Zimbabwe Defence Forces in the Democratic Republic of the Congo. Its directors are predominantly top military officials.' The Panel, referring to OSLEG's agreement with COMIEX, stated that.<sup>328</sup>

The role of OSLEG was defined as that of the partner with "the resources to protect and defend, support logistically, and assist generally in the development of commercial ventures to explore, research, exploit and market the mineral, timber, and other resources held by the State of the Democratic Republic of the Congo". While President Kabila provided the concessions, the Zimbabweans supplied the muscle to

<sup>318</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 82.

<sup>319</sup> *UN Panel Report*, 12 April 2001, op. cit., paras 159 ff.

<sup>320</sup> See Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice. Oryx Natural Resources and two co-claimants sued the *Independent Newspaper* and two journalists for libel in the British High Court of Justice (see Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, 26 – 27 November 2003). The defendants applied to the court for disclosure of documents by Oryx and the other claimants: see *intra*, below. An out of court settlement was reached at the end of March 2004: 'Oryx, Mr Al Shanfari and Mr White have strenuously denied the truth of the allegations in the article and those in the UN Report. The newspaper, in its defence, has maintained that the allegations it published were true.' (The agreed statement was published in *The Independent*, 26 March 2004).

<sup>321</sup> 'Oryx Natural Resources Financial Statements for the period from inception on 14 May 1999 to 31 December 1999,' Notes to the Financial Statements – 31 December 1999, note 4. This financial statements, audited by Arthur Anderson & Co., are reproduced in Part IV of Petra Diamonds Limited, document issued in connection with the application for admission to trading of the whole of the Enlarged Issued Share Capital of Petra Diamonds Limited on AIM, p.8 [hereafter '*Petra AIM document*'].

<sup>322</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 40.

<sup>323</sup> '*Petra AIM document*', op. cit., p.8.

<sup>324</sup> *New Scramble for Africa*, op. cit..

<sup>325</sup> Defendants' skeleton argument: for hearing before Eady J on Wednesday 26th November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, 26 – 27 November 2003, 3.3.

<sup>326</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 30; also *UN Panel Report*, 13 November 2001, op. cit., paragraph 79.

<sup>327</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 159. Members of COSLEG, cited by the Panel, include: The Minister of Defence and former Security Minister, Sidney Sekeramayi, who coordinates with the military leadership and is a shareholder in COSLEG (*UN Panel Report*, 16 October 2002, op. cit., paragraph 28); Former Deputy Defence Minister, General Denis Kalume Numbi, a stakeholder in the lucrative Sengamines diamond deal and in COSLEG (*ibid.*, paragraph 25); Frédéric Tshineu Kabasele is a director of three joint ventures with Zimbabwe using the COSLEG platform (*ibid.*, paragraph 26); The Technical Director of COSLEG, Mfuni Kazadi, specializes in the writing of joint venture contracts to accommodate the private interests of the elite network (*ibid.*, paragraph 26); General Vitalis Musunga Gava Zvinavashe, Commander of ZDF and Executive Chairman of COSLEG (*ibid.*, paragraph 27); Brigadier General Sibusiso Busi Moyo is Director General of COSLEG (*ibid.*, paragraph 28); Air Commodore Mike Tichafa Karakadzai [sic] is Deputy Secretary of COSLEG (*ibid.*, paragraph 28); Colonel Simpson Sikhulile Nyathi is Director of defence policy for COSLEG (*ibid.*, paragraph 28). Shareholders of OSLEG, cited by the Panel, include: Lieutenant General Vitalis Musungwa Zvinavashe, Job Whabira, former Permanent Secretary in the Ministry of Defence, Onesimo Moyo, President of Minerals Marketing Corporation of Zimbabwe, and Isaiah Ruzengwe, General Manager of Zimbabwe Mining Development Corporation (*UN Panel Report*, 12 April 2001, op. cit., paragraph 159). The Zimbabwean government, in its reply to the Panel, states: 'The fact that Honourable Sekeramayi may be a shareholder in COSLEG does not make him a beneficiary of the joint ventures, as is, in fact, the case with all other officials of the Zimbabwe and DRC Governments who are named as enjoying the same status.' (See Reaction No.58, Official Response of the Government of the Republic of Zimbabwe, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.). It admonishes the Panel for failing to reveal that General Zvinavashe is a 'well-established businessman', stating that 'if at all one or some of his companies have conducted business in the DRC, the fact that he is an executive director of COSLEG, an ally of the Speaker or the Commander of Defence Forces does not render such business automatically criminal or corrupt under the mandate of the present inquiry.' Likewise, the Zimbabwean government maintains that 'regular contacts' and the negotiation of 'one or two contracts' by Brigadier SB Moyo with his counterpart in the DRC were not 'automatically criminal' but were part of his official function. (See also the individual replies to the Panel of General V.M.G. Zvinavashe and Brigadier General S.B. Moyo, respectively reactions No.s 53 and 54, in which the same points are made). Moreover, The Zimbabwean government accuses the Panel of suffixing 'for COSLEG' to the positions of Air Commodore MT Karakadzayi and Colonel SS Nyathi which they held as members of the Secretariat of the Implementation Committee for the DRC-Zimbabwe Memorandum of Understanding (see fn 329, below).

<sup>328</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 79. The same quotation from the COMIEX-OSLEG agreement is also reproduced in *Africa Confidential*, Volume 41, Number 11, 26 May 2000.

secure the commercial activities. Third party investors have been brought in to furnish needed capital and expertise. Attracting the third party has not been a difficult task, since Zimbabwe's added leverage on the Democratic Republic of the Congo has allowed it to obtain very favourable terms for its deals. The prevailing business environment is another incentive. The constraints of governmental controls and regulations and a functioning legal system to enforce them are often absent. As a result, the Zimbabwean army has been successful in enticing investors, often with off-shore companies, to bankroll and make operational its joint ventures. This pattern now characterizes all of the Zimbabwean exploitation activities, whether with MIBA, Gécamines, SOCEBO or the relatively recent SCÉM.

The Zimbabwean government, in its reply to the Panel, expressed the view that the DRC government initiated the idea of joint economic ventures in order to use its own natural resources to sustain its defensive war, with both governments signing a Memorandum of Understanding on Joint Military and Economic Cooperation on 8 December 2000.<sup>329</sup> However, by then OSLEG, COSLEG and COMIEX were already well established.

The Panel maintained that Oryx Natural Resources was advised by senior COSLEG military and government figures.<sup>330</sup> It reported that Oryx-Zimcon joined with COSLEG in October 1999 to provide the technical expertise to exploit the concessions, resulting in the formation of the joint venture Sengamines.<sup>331</sup> Sengamines was incorporated in Kinshasa at the same time as COSLEG. In proceedings in the British High Court of Justice in November 2003, where Oryx pursued a libel action against *The Independent* newspaper before settling out of court, the defendants submitted that, at the time of incorporation, COSLEG owned 988 out of 1000 founders' shares in Sengamines.<sup>332</sup> In its November 2001 report, the Panel refers to a document in its possession which divided up the 'distributable profits' from Sengamines: '40 per cent to the Oryx group, 20 per cent to OSLEG and 20 per cent to COMIEX-COSLEG.'<sup>333</sup> The defendants in the Oryx versus *The Independent* case submitted that there appeared to be 'a profit-sharing agreement, whereby Oryx and the Government of Zimbabwe were each to take 40% of the net cash inflow from the mine'.<sup>334</sup>

Oryx, on its company website, provided the following breakdown of equity holdings in Sengamines: Oryx 49 percent; DRC Government 33.8 percent; MIBA 16 percent; and Congolese partners 1.2 percent.<sup>335</sup> This breakdown is markedly different to the ownership at the time of incorporation when COSLEG was purported to have owned 988 out of 1000 founders' shares. In respect of this reconfiguration of equity, the Panel alleged: 'The Panel has learned that this purported buyout never happened. It was a device to disguise the close association between Sengamines and ZDF, and to deceive international investors. ZDF, through OSLEG, owns the 49 per cent of Sengamines that is publicly claimed by Oryx.' The Panel indicated that it had 'documentary evidence' showing that Oryx was being used as 'a front for ZDF and its military company OSLEG'.<sup>336</sup> The Panel referred to a meeting, held on 1 August 2000, at which the COSLEG shares in Sengamines were transferred and at which 'OSLEG nominated Oryx to hold its 49 per cent interest in Sengamines'.<sup>337</sup>

The reconfiguration followed a failed attempt in June 2000 to list a new entity, Oryx Diamonds Ltd., on the Alternative Investment Market (AIM) of the London Stock Exchange, in order to raise investment for the DRC operations.<sup>338</sup> This was to have been achieved by a £50 million 'reverse takeover' by a company already listed on the AIM, the Bermuda registered and South African managed Petra Diamonds Ltd. Petra was to acquire Oryx Natural Resources, after which

<sup>329</sup> Reaction No.58, op. cit.. The Zimbabwean government describes how a Steering Committee, made up of Ministers from both its own and the DRC government, was appointed to oversee the military campaign in the DRC. It maintains that the UN Panel 'elected to take all the officials who worked on the campaign management structures, in whatever capacities, and assign unsavoury labels to them...that would portray them as either criminal or corrupt.'

<sup>330</sup> Oryx Natural Resources was advised by Brigadier General Sibusiso Busi Moyo, who is Director General of COSLEG and assisted by the Minister of Defence and former Security Minister, Sidney Sekeramayi, who is a shareholder in COSLEG (*UN Panel Report*, 16 October 2002, op. cit., paragraph 28).

<sup>331</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 160. See also *New Scramble for Africa*, op. cit..

<sup>332</sup> Oryx Natural Resources and two co-claimants are suing the Independent Newspaper and two journalists for libel. The defendants applied to the court for disclosure of documents by Oryx and the other claimants. See Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, 26 – 27 November 2003; also the reporting of this case, Terry Kirby, 'Oryx ordered to disclose papers in libel action,' *The Independent*, 28 November 2003; also Terry Kirby, 'Mining group hid links with Zimbabwe army, court told,' *The Independent*, 27 November 2003. Oryx agrees that it was an equal owner of Oryx-Zimcon with the Zimbabwean Government and that Oryx-Zimcon was the vehicle through which Oryx would participate in the Sengamines concessions. However, it contests the allegation that it hid links with the Zimbabwean Government and asserts that it severed its relationship with the Zimbabwean Government in August 2000. See Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice.

<sup>333</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 40.

<sup>334</sup> Defendants' skeleton argument, op. cit., 3.4.

<sup>335</sup> The UN Panel reproduces this public breakdown in its 13 November 2001 report, op. cit., with the exception that it attributes the DRC Government's holding to COMIEX (see paragraph 40). In its 16 October 2002 report, op. cit., the Panel reports a COMIEX holding of 35 percent, incorporating the 1.2 percent stake previously attributed to Congolese partners (see paragraph 38).

<sup>336</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraphs 37 – 38.

<sup>337</sup> *Ibid.*, paragraph 38. This meeting was also referred to in the Oryx et al versus Independent et al court case, op. cit.

<sup>338</sup> For an account of this reverse takeover, see <<http://www.oryxnaturalresources.com/news/2002-12-3/>> (visited 17 December 2003).



Petra intended to change its own name to Oryx Diamonds Ltd.<sup>339</sup> Following the acquisition, existing Oryx shareholders were to have had a 60 percent holding in the new company.<sup>340</sup>

Presidential spokesman George Charamba was reported in the Zimbabwean press at the time confirming that Zimbabwe would invest both personnel and material capital in the deal, without quantifying its involvement.<sup>341</sup> Zidco Holdings (Pvt) Ltd was listed as among those who would take a stake in the new company, Oryx Diamonds. Although its interest was relatively small, two Zimbabwean ministers were listed as directors of Zidco, which was described as 'the business arm' and the 'holding company' for Zanu-PF.<sup>342</sup> Moreover, the managing director of Petra confirmed that, after the acquisition, OSLEG would be entitled to 40 per cent distributable profits from the concession.<sup>343</sup> On 9 June 2000, Oryx's nominated adviser, the accounting firm Grant Thornton, withdrew its services. This ended the attempt to list on the AIM because the rules governing admission require the participation of a nominated adviser. Grant Thornton issued a statement confirming that discussions with the regulatory authorities had led them to conclude that it could no longer act if the acquisition of Oryx Natural Resources was to proceed.<sup>344</sup> The barrister defending *The Independent* in the action brought by Oryx Natural Resources told the court that the regulatory authorities warned of the 'utter unacceptability of a London listing for a company involved with the Zimbabwean military in the exploitation of diamonds in a conflict zone'.<sup>345</sup> Oryx publicly cites on its website newspaper sources blaming the withdrawal on UK government interference.<sup>346</sup>

Oryx's response Oryx rejected the Panel's allegations that the reconfiguration of equity was 'a device' and that Oryx was being used as 'a front for ZDF', describing them as 'not true':<sup>347</sup> 'Incorporation documents of Oryx Natural Resources and a copy of the Sengamines share register were provided to the Panel. The shares issued in Sengamines was clearly explained during the meeting with the Panel members and evidenced by the subsequent disclosure of documents.' Oryx maintains that it took the decision in June 2000 to sever its relationship with the Government of Zimbabwe and that negotiations were finally concluded in August 2000.<sup>348</sup> The in-house legal adviser for Oryx Natural Resources, in a witness statement made on behalf of Oryx as claimant in its libel action against *The Independent* in the British High Court, says:<sup>349</sup> 'On 1 August 2000 COSLEG, as the owner of Sengamines, apparently held an Extraordinary General Meeting at its offices in Kinshasa. According to the "minutes" of that meeting (tab 10 of KAM1 [reference to court documents]), COSLEG agreed to transfer 49% of the shares in Sengamines to OSLEG and OSLEG nominated Oryx to hold those shares on its behalf. This was not the true position and it was never intended (at least by Oryx) that it should be.'

*The Independent* newspaper and its co-defendants in the action brought by Oryx Natural Resources were granted an order on 27 November 2003 instructing Oryx to disclose documents relating to an alleged attempt to conceal the Zimbabwean army's substantial interest in the mine.<sup>350</sup> Oryx was granted an order requiring the newspaper to disclose source material, but not the identities of its sources. Documents sought by the defendants included the complete Share Register of Sengamines showing the complete history of the ownership of shares from incorporation; all documents relating to COSLEG's ownership of 988 founders' shares in Sengamines and their subsequent transfer. An out of court settlement was reached at the end of March 2004.<sup>351</sup> 'Oryx, Mr Al Shanfari and Mr White have strenuously denied the truth of the allegations in the article and those in the UN Report. The newspaper, in its defence, has maintained that the allegations it published were true.'

Panel's allegation In its October 2002 report, the Panel stated: 'Towards the end of its mandate, the Panel received a copy of a memorandum dated August 2002 from the Defence Minister, Sidney Sekeramayi, to President Robert Mugabe, proposing that a joint Zimbabwe-Democratic Republic of the Congo company be set up in Mauritius to disguise the continuing economic interests of ZDF in the Democratic Republic of the Congo. The memorandum states: "Your Excellency would be aware of the wave of negative publicity and criticism that the DRC-Zimbabwe joint ventures have

<sup>339</sup> Ibid; also *Petra AIM document*, op. cit., p.7.

<sup>340</sup> *Idem*.

<sup>341</sup> Vincent Kahiya, 'Diamond company to pay Zimbabwe for role in Congo', *The Zimbabwe Independent*, 9 June 2000.

<sup>342</sup> Emmerson Mnangagwa (Speaker of the Parliament and former Minister of State Security and of Justice, Legal and Parliamentary Affairs) and Sidney Sekeramayi (Defence Minister). The holding was to be 237,935 shares (0.24 percent): see *Petra AIM document*, op. cit., p.78. The worth of the holding was calculated at \$181,000 (see Francesco Guerrero, Michael Holman and Andrew Parker, 'Mugabe ministers linked to diamond group', *Financial Times*, 10 June 2000. See also Transparency International, *New Scramble for Africa*, op. cit., for its characterisation of Zidco).

<sup>343</sup> Adonis Pouroulis, Letter from the Chairman of Petra, in *Petra AIM document*, op. cit., p.8.

<sup>344</sup> Statement quoted in article by Suzy Jagger, 'Exchange pressured on Petra case', *Telegraph*, 13 June 2000.

<sup>345</sup> Reoprted by Terry Kirby, 'Mining group hid links with Zimbabwe army, court told,' op. cit. (attention is drawn to Oryx's rejection of the allegation that it 'hid links' to the Zimbabwean Government: see *intra*, fn 332). British Foreign Office Minister, Peter Hain, is quoted at the time of the failed listing of Oryx Diamonds in the *Financial Times* as saying that 'No foreign office official has given any encouragement to Oryx to get involved in this diamond concession in the DRC. Quite the opposite, Oryx should not touch Congo with a barge pole in the present circumstances.' (See Guerrero et al, 'Mugabe ministers linked to diamond group', op. cit.).

<sup>346</sup> See 'Oryx Natural Resources Merger with Petra Blocked,' <<http://www.oryxnaturalresources.com/news/2002-12-3/>>.

<sup>347</sup> <<http://www.oryxnaturalresources.com/UNissues/>>.

<sup>348</sup> Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraphs 22 and 23.

<sup>349</sup> Ibid., paragraph 24.

<sup>350</sup> 'Oryx ordered to disclose papers in libel action,' op. cit.

<sup>351</sup> The agreed statement was published in *The Independent*, 26 March 2004.

attracted, which tends to inform the current United Nations Panel investigations into our commercial activities.”<sup>352</sup> Both COMIEX and COSLEG are understood by the UN Panel to have been dissolved in late 2002: ‘However, the main private commercial partners that represented the interests of a small group of Zimbabwean military entrepreneurs remain active in the original joint ventures. Revenues from them are now primarily routed through private corporate entities located offshore, with smaller percentages of the benefits flowing to DRC State enterprises.’<sup>353</sup>

In a witness statement for the defence in the Oryx versus *The Independent* case, a further extract from the August 2002 memorandum from the Defence Minister, Sidney Sekeramayi, to President Robert Mugabe, was cited.<sup>354</sup>

‘The current Sengamines share structure gives MIBA 16% and Comiex 33.8% (as nominees of the DRC Government), whilst Oryx holds 40%, ostensibly as a nominee of the Zimbabwe Government. This leaves only 9% for the Zimbabwe Government, which it has also ceded to Oryx.’

The in-house legal adviser for Oryx Natural Resources, in a witness statement made on behalf the claimants, commented on the same memorandum:<sup>355</sup>

Oryx’s  
response

‘...the first time Oryx saw it [the August 2002 memorandum] was at a meeting with the United Nations Panel on 15 April 2003. This appears to be a Zimbabwean document authored by Mr Sekeramayi dated August 2002. It fails to appreciate the reality of the Sengamines structure and makes no sense even internally (see paragraph 3 of the document that seems both to say that the Zimbabwean Government owns 49%, 9% and, impliedly, 0% in Sengamines all in one sentence). It is difficult for Oryx to comment on this document but the essence of it recognises that the Zimbabweans have no interest in the project. In any event, it has no bearing on the reality which is that Oryx now owns 80% (including shares held by the 5 nominees) in the same manner as it has always held its shares, namely for itself and unfettered.’

Furthermore, the statement continued:<sup>356</sup>

‘I believe that significant confusion exists in the outside world regarding the involvement of Zimbabwe in the company. At no time has Oryx denied its original joint venture with Zimbabwe...this association was not illegal, nor, would I submit, would such a relationship be today. In fact I believe that it is only because President Mugabe has moved from hero to pariah that this has become an issue.’

According to Oryx, this latest restructuring of Sengamines took place in January 2003:<sup>357</sup>

‘...in accordance with World Bank guidelines for mining companies, the company was taken private, moving away from its original Government joint venture. Sengamines SARL is now owned 80% by Oryx Natural Resources, a mining investment and management company, and 20% by MIBA. The restructuring of the company was ratified by Presidential Decree on the 15<sup>th</sup> July 2003.’

### ***Compliance with the Guidelines***

The positions adopted by Oryx and by the Panel on a number of key points are contradictory and even mutually exclusive. The company has asserted that it has reached ‘a minuted and formal resolution’ with the Panel.<sup>358</sup> Yet, the Oryx case is listed in category III in the Panel’s October 2003 report and has been forwarded by the Panel for updating or further investigation. Without referring to Oryx, the Panel noted in its final report that: ‘In addition, there are companies that are involved in legal actions the outcome of which is very unlikely to be known before the end of the Panel’s mandate. During such legal processes, information may come into the public domain that may be relevant to an assessment of the concerned companies’ involvement with the Democratic Republic of the Congo. Consequently, the open files have been referred to the NCPs of the countries where they are incorporated.’

Oryx’s  
response

It is not only in the public interest, but also in the interests of the company, that those matters concerning areas of conduct covered by the *Guidelines* are fully and publicly clarified. In this regard, it is encouraging to note that Oryx has

<sup>352</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 18.

<sup>353</sup> Section V of the UN Panels Report, 23 October 2003, op. cit., paragraph 43.

<sup>354</sup> Witness Statement of Keith Mathieson, 2<sup>nd</sup> Witness Statement on behalf of the Defendants, Exhibit KAM, 03 October 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraph 18.

<sup>355</sup> Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraph 35.

<sup>356</sup> *Ibid.*, paragraph 48.

<sup>357</sup> Sengamines SARL, *Information Memorandum*, Year 2003. See also Décret no. 03/009 autorisant les modifications aux status de la société dénommée “La Nouvelle Mine de Senga Senga” en abrégé “SENGAMINES”, *Journal Officiel de la République Démocratique du Congo*, numéro 14, 15 juillet 2003, col. 27.

<sup>358</sup> Reaction No. 26, written statement from Oryx Natural Resources to the Panel, Introduction and Summary, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

stated that it is fully committed to adhering to the *Guidelines* and has agreed to liaise with the relevant National Contact Point.<sup>359</sup> Given the registration of Oryx Natural Resources in the Cayman Islands – a UK dependent territory – the Panel has identified the UK NCP as the office to carry out any investigation.

Under the *Guidelines*, companies are required to refrain from entering into anti-competitive agreements, from seeking or accepting exemptions from statutory regulation, and should contribute to sustainable economic and social progress.<sup>360</sup>

Panel's allegation These provisions can be read to explain the Panel's view of the Sengamines deal. It concluded that Thamer Bin Saeed Al Shanfari, at the time the chairman and managing director of the Oryx Group, gained privileged access to the government of the DRC and to the country's diamond concessions.<sup>361</sup> Overall, the Panel determined that the Senga Senga and Tshibua concessions were awarded without due regard for DRC legal requirements.<sup>362</sup> Amnesty International has recorded its own concerns about the tendering process:

In July 1999 President Kabila signed over the exclusive rights to exploit two of the DRC's richest diamond concessions for a period of 25 years to a partly Zimbabwean-owned joint venture, which later became known as Sengamines.... This effective privatisation of largely state-owned assets does not appear to have been carried out according to any internationally recognised principles of public tendering and bidding, which might have ensured that the sale was as beneficial as possible to the Congolese state.<sup>363</sup>

Panel's allegation In the Panel's November 2001 report, it is stated that 'the concession granted to Sengamines was the last strategic diamond reserve of MIBA and that MIBA has been irreparably weakened by the loss of this concession' and that '[s]ome sources even alleged that the granting of the concession is the prelude to liquidating MIBA'.<sup>364</sup> The Panel cited estimates valuing the diamond concessions to be worth at least \$2 billion if they were to be put into full production.<sup>365</sup> The Panel was of the view that '[t]he richest and most readily exploitable of the publicly owned mineral assets of the Democratic Republic of the Congo are being moved into joint ventures that are controlled by the network's private companies'.<sup>366</sup>

Oryx's response It is important to establish how much Oryx has paid for its holdings in Sengamines and how much it has invested. According to the in-house legal adviser for Oryx Natural Resources (Mr Michael Halliday), COSLEG agreed to transfer 49% of its shareholding in Sengamines to Oryx and a management Contract was concluded between Sengamines and Oryx confirming that Oryx would manage the concession on behalf of Sengamines.<sup>367</sup> Yet no reference was made in Mr Halliday's witness statement to the payment of any consideration by Oryx in return for its acquisition of these shares. The defence for *The Independent* commented:<sup>368</sup> 'Oryx has neither disclosed its share certificates in Sengamines, nor documents evidencing its acquisition of the 49% it claims to hold absolutely, rather than as a mere nominee for Osleg. Presumably there must have been some consideration for the acquisition, whether it was from Cosleg or Osleg, and that must have been evidenced by documents. It is quite remarkable that Mr Halliday should go out of his way to express a complete lack of concern that no share certificates appear to have been issued by Sengamines...when the whole commercial basis of Oryx is based on its part-ownership of Sengamines.'

Following the dissolution of COMIEX and the subsequent restructuring of Sengamines in January 2003, Oryx acquired the 31% of COMIEX's total equity in Sengamines in full and final payment of the loan obligation of COMIEX to Oryx (approximately \$37.5 million).<sup>369</sup> As of November 2003, Oryx's total investment in Sengamines, in the form of a loan, was stated as over \$100 million.<sup>370</sup> Oryx now owns 80% of the shares in the Sengamines concessions, stated by the Panel to be valued at \$2 billion.<sup>371</sup> It should be recalled that, as reported by the Panel, the concessions were originally transferred to the Zimbabwean Defence Force (ZDF) by the late President Laurent Kabila as a barter payment for ZDF

<sup>359</sup> Ibid.

<sup>360</sup> *Guidelines*, respectively, IX. Competition, paragraph 1, II. General Policies, paragraph 5 and paragraph 1.

<sup>361</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 31.

<sup>362</sup> *UN Panel Report*, 12 April 2001, op. cit. paragraph 163.

<sup>363</sup> Amnesty International, 'Democratic Republic of Congo - Making a killing: The diamond trade in government-controlled DRC,' 22 October 2002, p.4

<sup>364</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 40. According to the Panel, the Government of Congo – presumably through MIBA – would be required to pay back a US\$25 million loan before sharing in the proceeds of the operation.

<sup>365</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 37. Other sources give a value of US\$1 billion, while Oryx, at the time of the planned Petra takeover, provided a value of US\$208 million after costs and taking into consideration political risk. See Alan Cowell, *Diamond Miner Halts Stock Listing Plans*, *New York Times*, June 13, 2000. See also *Petra AIM document*, op. cit., p.8.

<sup>366</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 36.

<sup>367</sup> Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraph 23.

<sup>368</sup> Defendants' skeleton argument, op. cit., 5.2(5).

<sup>369</sup> Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraph 37.

<sup>370</sup> Ibid., paragraphs 29 and 31. See also Sengamines SARL, *Information Memorandum*, Year 2003.

<sup>371</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 37. See *intra*, fn 365.

military assistance.<sup>372</sup> It was stated by Oryx's in-house legal adviser that, at the time when Oryx acquired its 49% holding in Sengamines in August 2000:<sup>373</sup> 'Oryx was aware that the Congolese Government and Zimbabwean Government had separately made arrangements. Oryx was not aware of the nature of these arrangements, nor did it have any involvement in the negotiations. It was not Oryx's concern then, nor has it been since.'

Oryx's  
response

Oryx defends the Sengamines joint venture as compliant with DRC law and company regulations.<sup>374</sup> However, the *Guidelines* are a supranational standard and supplement national law.<sup>375</sup> It is necessary to determine how a contract or agreement came into existence in the first place and not simply to examine whether it has been ratified after the fact or met the tolerant standards of existing law. Certainly, if the Panel's allegation that the ZDF, through OSLEG, actually owned the 49 percent of Sengamines publicly claimed by Oryx is true, then Sengamines represented a quasi-public venture exempted from normal state regulation in the DRC. This would engage provision II.5, which seeks to eliminate exemptions from the regulatory framework. Sustainable development to the benefit of the Congolese people, as provided for under provision II.1, would consequently be undermined. Moreover, the existence of an arrangement, as alleged by the Panel, whereby Oryx acted as a 'front' for OSLEG, would be difficult to reconcile with provisions III.3 and 4 on disclosure, seeking, *inter alia*, information on percentage ownership and shareholdings, board membership and remuneration.

Oryx's  
response

Oryx, while reiterating the legality of its Sengamines venture, does acknowledge that certain aspects of the project 'might be considered not to have matched the 'best practice' that the Panel is trying to encourage'.<sup>376</sup>

Provision VI.1 of the *Guidelines* prohibits enterprises from using sub-contracts and purchase orders as a means of channelling payments. The Panel alleged that revenue from joint ventures was kept 'off the balance sheet in overpriced subcontracting and procurement arrangements'.<sup>377</sup> It described how Sengamines was declaring huge losses.<sup>378</sup> The Panel also stated: 'Sengamines supplements its revenues by laundering diamonds smuggled from Angola and Sierra Leone. Sengamines also smuggles its own diamonds out of the Democratic Republic of the Congo and the Panel has learned of specific instances, times, places and persons involved.'<sup>379</sup> Provision VI.5 seeks the adoption of accounting and auditing practices that prevent "off the books transactions" or the creation of documents which do not properly and fairly record transactions. Clearly, smuggling as an activity would represent a total disregard for such requirements.

Panel's  
allegation

The Panel substantiated its allegations by reference to an incident in March 2001, describing how Oryx's security chief was instructed 'to smuggle diamonds from the Sengamines concession to Johannesburg, South Africa' and deliver them to the chief executive of Serengeti Diamonds in Johannesburg.<sup>380</sup> Oryx rejects all of the Panel's allegations concerning smuggling and laundering activities. Citing a price of US\$20 per carat for the industrial diamonds it mines, set against a minimal export tax of 3 percent and severe penalties for evasion, it suggests that it would make no sense to smuggle diamonds. Oryx denies smuggling Sengamines to Serengeti Diamonds, insisting that the stones were legally exported to the South African company from its agent, Abadiam, in Belgium.<sup>381</sup>

Panel's  
allegation

Oryx's  
response

The Panel alleged that 'Sengamines has also served as a front for illegal foreign exchange transactions using several routes into and out of the Democratic Republic of the Congo. Most of the latter involved breaking the country's foreign exchange laws and profiting from arbitrage between differential exchange rates for the United States dollar and Congolese franc in Kinshasa and the eastern Democratic Republic of the Congo, respectively'.<sup>382</sup> Two examples were cited by the Panel: on 13 March 2000, Oryx officials in Kinshasa loaded an aircraft belonging to Mr. Bredenkamp with eight crates of Congolese francs for shipment to Harare; further documentation in the Panel's possession purportedly details the regular transportation to Kinshasa of US\$500,000 sums by an Oryx employee which had been withdrawn from the Oryx account at Hambros Bank, London.<sup>383</sup> (See also *intra*, C. The Banking Sector: Belgolaise, Banque Bruxelles Lambert (BBL), and SG Hambros, section 1.iii Belgolaise and Hambros: Oryx Natural Resources account). The Panel stated: 'Oryx employees said they were asked to pay Mr. M nangagwa [the Zimbabwean Speaker of

Panel's  
allegation

<sup>372</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraphs 159 ff.

<sup>373</sup> Witness Statement of Michael Halliday, 1<sup>st</sup> Witness Statement on behalf of the Claimants, Exhibit MHI, 18 November 2003, Case No. HQ02X04337, Oryx et al versus Independent News and Media et al, High Court of Justice, paragraph 22.

<sup>374</sup> <<http://www.oryxnaturalresources.com/company/>>. A Mining Convention was signed by a 20 member inter-ministerial committee and then ratified by Presidential decree. Sengamines is registered and notarized under all DRC company regulations.

<sup>375</sup> *Intra*, Supplement, The Scope of the Guidelines, section D.

<sup>376</sup> Reaction No. 26, op. cit., A. Introduction.

<sup>377</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 42.

<sup>378</sup> *Idem*.

<sup>379</sup> *Ibid.*, paragraph 52.

<sup>380</sup> *Idem*.

<sup>381</sup> <<http://www.oryxnaturalresources.com/Unissues/>>. In respect of the transaction with Serengeti Diamonds and its chief executive, Ken Roberts, Oryx states: 'The issue was completely transparent to the extent that when Ken Roberts failed to pay for the purchase, Oryx issued proceedings for the debt against Roberts in South Africa. All relevant court papers, including import and export documentation for the diamonds concerned, are available.'

<sup>382</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 53.

<sup>383</sup> *Idem*.

Oryx's response Parliament] a commission on these transactions which contravened Zimbabwe law.<sup>384</sup> Oryx confirms the transportation of cash by its employees, but defends the practice as perfectly legal: it says that in the absence of a functioning banking system, the cash was used to pay mining and labour costs at its operations in DRC.<sup>385</sup> Mr. Mnangagwa, in his reply to the Panel, says: 'The allegation that a Mr. Al-Shanfari [the then chief executive of Oryx] ordered ORYX employees to pay me commission from the proceeds of his money laundering, illegal forex deals and arbitrage operations, traced to Harare, Kinshasa, London and so on, is ludicrous. I deny that there was ever any discussion or arrangement for me to be paid Commission by anybody.'<sup>386</sup>

Smuggling and illegal currency transactions deprive the State of export tax and revenue whereas chapter X of the *Guidelines* on taxation recognises the importance of the timely payment of tax liabilities and establishes that companies should comply with tax laws and regulations. The prospectus accompanying the reverse takeover of Petra Diamonds indicates that Sengamines is benefiting from significant exemptions *vis-à-vis* other taxes: 'Mining operations developed on the Concession benefit from the complete exemption from all import duties and corporate taxes for a period of six years commencing on the development of each production facility undertaken on a project by project basis.'<sup>387</sup> Whereas these latter exemptions are presumably specified in the Mining Convention, the question remains as to whether they (1) represent exemptions that reflect or allow 'an attempt to gain undue competitive advantage'<sup>388</sup> and (2) are contrary to the achievement of sustainable development.

Oryx's response The extent and duration of Oryx's business transactions with the Zimbabweans are disputed, not least by Oryx itself, which denies the Panel's allegations of acting as a 'a front for ZDF and its military company OSLEG'.<sup>389</sup> These denials are made in both the company's public reactions to the Panel and in the lawsuit. Moreover, in the context of the *Guidelines*, any relationship that does exist must also be shown to affect the company's record of compliance. The focus here is upon those aspects of this relationship over and above the issue of economic exploitation, which has already been addressed. In a first instance, Mr. Sekeramayi, the Zimbabwean Minister of Defence and former Security Minister, in a letter to Mr. Al Shanfari (in the Panel's possession), thanked the then chief executive of Oryx for his material and moral support during the Zimbabwean elections in 2000.<sup>390</sup> The Panel noted that '[s]uch contributions violate Zimbabwean law.'<sup>391</sup> They would also raise questions under the *Guidelines* as to whether the company abstained from improper involvement in local politics or else made illegal contributions to candidates for public office.<sup>392</sup> Oryx denies that any illegal money was given to Mr. Sekeramayi and denies financing the Minister's campaign beyond making a small donation of \$500.<sup>393</sup> In a second instance, the Panel stated that the Zimbabweans contributed strategic troop deployments in the diamond-rich Kasai region and that the concessions were granted as a payment for military support.<sup>394</sup> According to the Panel, the role of OSLEG was to protect, defend, and support logistically the development of commercial ventures through COSLEG: 'the Zimbabweans supplied the muscle to secure the commercial activities.'<sup>395</sup>

Panel's allegation

Oryx's response

Panel's allegation

Security is a responsibility of the State. However, increased security should not lead to a lessening of respect for human rights. Provision II.2 of the *Guidelines* seeks to ensure that companies respect the human rights of those affected by their activities. In the context of the DRC, Amnesty International has observed:

The Kinshasa government has allowed the armed forces of Zimbabwe to exploit the DRC's diamond fields...in return for their military support....Amnesty International examined the impact on human rights of the diamond trade in government-controlled DRC, where lethal force has routinely been used against unauthorised miners who have encroached on state-controlled mining concessions.<sup>396</sup>

Panel's concern According to testimony before the Belgian Senate of Inquiry, clashes have occurred between soldiers from the Congolese and Zimbabwean army and local villagers living near the Sengamines mine.<sup>397</sup> Given the Panel's concern over troop deployments in the region, Amnesty's concern that human rights violations have been pervasive elsewhere, and the clashes between troops and locals reported to the Belgian Senate, the NCP should investigate: (i) whether the

<sup>384</sup> *Idem*.

<sup>385</sup> <<http://www.oryxnaturalresources.com/UNissues/>>.

<sup>386</sup> See Reaction No.52, written statement from E.D. Mnangagwa to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>387</sup> *Petra AIM document*, op. cit., p.9. Although this document states that it does not constitute a prospectus under English law, it is referred to as a prospectus here meaning 'a printed document describing a commercial exercise'.

<sup>388</sup> See *Guidelines*, op. cit., Preface, paragraph 6 and *intra*, Supplement, The Scope of the Guidelines, section D.

<sup>389</sup> <<http://www.oryxnaturalresources.com/UNissues/>>. Oryx describes the Panel's allegation that it acted as a front as 'not true.'

<sup>390</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 28.

<sup>391</sup> *Idem*.

<sup>392</sup> *Guidelines*, op. cit., II. General Policies, paragraph 11; VI. Combating Bribery, paragraph 6.

<sup>393</sup> <<http://www.oryxnaturalresources.com/Unissues/>>.

<sup>394</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 41; also *UN Panel Report*, 12 April 2001, op. cit., paragraph 160.

<sup>395</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 79.

<sup>396</sup> Amnesty International, 'Our Brothers who help kill us,' op. cit., p.4.

<sup>397</sup> Audition de M. François Misser, journaliste, co-auteur de "Les gemmocraties. L'économie politique du diamant africain", Sénat de Belgique, Session ordinaire 2001-2002, Commission d'enquête parlementaire "Grands Lacs", Auditions, Vendredi 22 Février 2002, Réunion du matin, Compte rendu, GR 11, p.5.

ZDF was deployed in the area covered by the Sengamines concessions; and (ii) if it was deployed in this area, whether the ZDF committed any human rights violations during the period of its deployment.<sup>398</sup> Local NGOs have reported that Sengamines has guards to protect the mine from illegal miners. Oryx denies both using armed guards and also that the ZDF has ever, at any stage, provided security at the Sengamines concession.

As a significant differences remain, at least in the public domain, between Oryx's public defence of its conduct and the Panel's allegations, it is incumbent on the OECD and the relevant NCP to contribute to the resolution of issues arising, in accordance with implementation of the *Guidelines*.<sup>399</sup>

Oryx Natural Resources	Provisions potentially at issue
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ How does Oryx explain the memorandum in the Panel's possession that includes OSLEG and COSLEG in the distributable profits from Sengamines?</li> <li>▪ 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?</li> <li>▪ 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?</li> <li>▪ 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?</li> <li>▪ Oryx Natural Resources now owns 80% of Sengamines.<sup>400</sup> 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?</li> <li>▪ How does Oryx account for the huge losses at Sengamines referred to by the Panel? 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?</li> <li>▪ 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'?</li> <li>▪ Oryx denies both using armed guards and also that the ZDF has ever, at any stage, provided security at the Sengamines concession. The Panel has expressed concern over troop deployments in the region, Amnesty was concerned that human rights violations have been pervasive elsewhere in diamond concessions in government controlled areas, and clashes between troops and locals have been reported to the Belgian Senate. Should not the NCP be called upon to investigate these divergent accounts?</li> </ul>	<p>IX.1 anti-competitive practice</p> <p>II.5 exemption from regulation</p> <p>II.1 sustainable development</p> <p>III.3, III.4 disclosure</p> <p>VI.1, VI.5, VI.6 channelling payments/improper advantage, "off the books" accounting, political contributions</p> <p>X taxation</p> <p>II.11 political involvement</p> <p>II.2 human rights</p>

<sup>398</sup> See Amnesty International, 'Making a killing,' op. cit.. Amnesty has called for the investigations into the alleged extra-judicial killings of miners by ZDF soldiers in Mbuji-Mayi.

<sup>399</sup> *Implementation Procedures*, op. cit., Procedural Guidance, C. Implementation in Specific Instances, introductory paragraph.

<sup>400</sup> See *intra* above and fn 357.

## ii. *First Quantum*

**First Quantum Minerals** (FQM) is a mining and metals company listed on the Toronto Stock Exchange and on the London Stock Exchange's Alternative Investment Market.<sup>401</sup> First Quantum appeared in annex III of the Panel's October 2002 report.

Panel's allegation The Panel alleged that in negotiations between the company and the government of DRC to buy the cobalt-rich Kolwezi Tailings, First Quantum offered a down payment of \$100 million, together with cash payments and shares held in trust for government officials.<sup>402</sup> The Panel referred to documents in its possession showing that the payment list included the National Security Minister, the director of the National Intelligence Agency, the Director General of Gécamines, and the former Minister of the Presidency.<sup>403</sup> The premise was that the share price would rise sharply once the deal was publicly announced.

FQ's response First Quantum at first 'categorically refuted' the Panel's allegations, describing them as 'baseless'.<sup>404</sup> Later, in its reply to the Panel, although still disagreeing with the allegations, First Quantum refers to the dialogue with the Panel in which it demonstrated that the Panel's evidence was 'based on actions by independent consultants...appointed by the Company to assist in political lobbying in the DRC in late 1997, acting in breach of their contractual obligations and without the authority of the Company.'<sup>405</sup> According to First Quantum, once the problem had been recognised, it had been dealt with immediately and the relationship with the consultant severed in mid 1998.<sup>406</sup> First Quantum goes on to state that '[n]o payment to Government officials, either in the form of cash or public company shares was ever made or promised by the Company.'<sup>407</sup>

### *Compliance with the Guidelines*

Under provision VI.1 of the *Guidelines* combating bribery, enterprises should not offer promise, give or demand bribes or other undue advantage to obtain or retain business.<sup>408</sup> However, because the *Guidelines* apply to sub-contractors and business partners (under provision II.10), then an enterprise should ensure that the anti-corruption provisions extend to business conducted through these relationships.<sup>409</sup> This is confirmed in a note prepared by the Anti-Corruption Division of the OECD's Directorate for Financial, Fiscal and Enterprise Affairs:<sup>410</sup> 'They [the *Guidelines*] also encourage companies to extend their anti-corruption programmes to their subsidiaries and business partners.' Furthermore, an enterprise should adopt management control systems that discourage bribery and corrupt practices.<sup>411</sup> While First Quantum states that it never made or promised payment to Government officials, it has not adequately explained, at least publicly, how the consultancy could have made arrangements for substantial transfers, as documented by the Panel, without its knowledge.

First Quantum is listed in Category I ('resolved') of the Panel's October 2003 report. It has pledged to ensure its compliance at all times with the *Guidelines* and recognises the role of the Canadian NCP. It is therefore assumed that the company would welcome any further investigation into its conduct or the conduct of its consultants in the DRC.

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<sup>401</sup> <<http://www.first-quantum.com/s/Overview.asp>> (visited 17 December 2003).

<sup>402</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 33.

<sup>403</sup> *Idem*.

<sup>404</sup> First Quantum, 'First Quantum's Statement Regarding United Nations Report. S/2002/1146,' Press Release, 22 October 2002.

<sup>405</sup> Reaction No.4, written statement from First Quantum to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>406</sup> *Idem*.

<sup>407</sup> *Idem*.

<sup>408</sup> *Guidelines*, op. cit., VI. Combating Bribery, paragraph 1.

<sup>409</sup> *Ibid.*, II. General Policies, paragraph 10.

<sup>410</sup> Directorate for Financial, Fiscal and Enterprise Affairs, *Anti-corruption Instruments and the OECD Guidelines for Multinational Enterprises*, (Paris: OECD, May 2003), Executive Summary, second bullet point, p.3.

<sup>411</sup> *Guidelines*, op. cit., VI. Combating Bribery, paragraph .5.

First Quantum	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ When did First Quantum become aware of the cash and share payments arranged by its consultants?</li> <li>▪ If it was aware of this malpractice prior to October 2002, on what basis did it initially ‘categorically refute’ the Panel’s allegations?</li> <li>▪ What management control systems did FQM have in place to monitor the practices of its consultants in the DRC?</li> <li>▪ Can First Quantum explain how the consultancy could have made proposals for substantial transfers, as documented by the Panel, without its knowledge?</li> <li>▪ If asked by the Canadian NCP or another interested party, will First Quantum release a copy of its contract with the consultants?</li> </ul>	<p data-bbox="1106 414 1385 472">VI.1 channelling payments/ improper advantage</p> <p data-bbox="1106 548 1289 584">II.10 supply chain</p>

### iii. Forrest Group

‘Among the businessmen in the elite network, a Belgian national, George Forrest, pioneered the exploitative joint venture agreements between private companies and Gécamines.’<sup>412</sup>

George Forrest, the chairman of the Forrest Group, is a Belgian entrepreneur many of whose business activities are centred on Katanga, in the south east of the DRC.<sup>413</sup> The holding company, the **S. A. Groupe George Forrest International (GFI)**, is registered in the Grand Duchy of Luxembourg, although its main office is in Wavre, Belgium. GFI represents all the companies in the group.<sup>414</sup> In his testimony to the Belgian Senate, Jean-Claude Marcourt, then chef de cabinet of the Deputy Prime Minister and Minister of Employment, and a board member of GFI, explained that ‘GFI is a management company: that is a company that provides advice to other companies’.<sup>415</sup> (See below a diagram explaining the organisational structure of the GGF companies referred to in the UN Panel reports). In its October 2002 report, the Panel listed the Groupe George Forrest and **Entreprise Générale Malta Forrest (EMGF)** in Annex 1 for which financial restrictions were recommended; it named George Forrest individually in Annex II as meriting financial restrictions and a travel ban; EMGF and **George Forrest International Afrique** (both Congolese registered companies) were listed in Annex III as being in breach of the *Guidelines*.<sup>416</sup>

<sup>412</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 30.

<sup>413</sup> The Forrest Group includes the following companies: the Belgian registered New Lachaussée (NLC), which is active in the design, production and supply of integrated assembly units for the manufacture of machines producing ammunition and detonators; New Baron & Lévêque International (NBLI), a Belgian registered company, specialising in turnkey supplies of industrial plants and assembly of mechanical and electrical equipment; Entreprise Générale Malta Forrest (EGMF), a Congolese registered construction company involved in road building, mining and related trading activities; a Congolese registered company, George Forrest International Afrique (GFIA), which provides management advice and oversees the Congolese and other African operations of the Groupe George Forrest. See <<http://www.forrestgroup.com/uk>>.

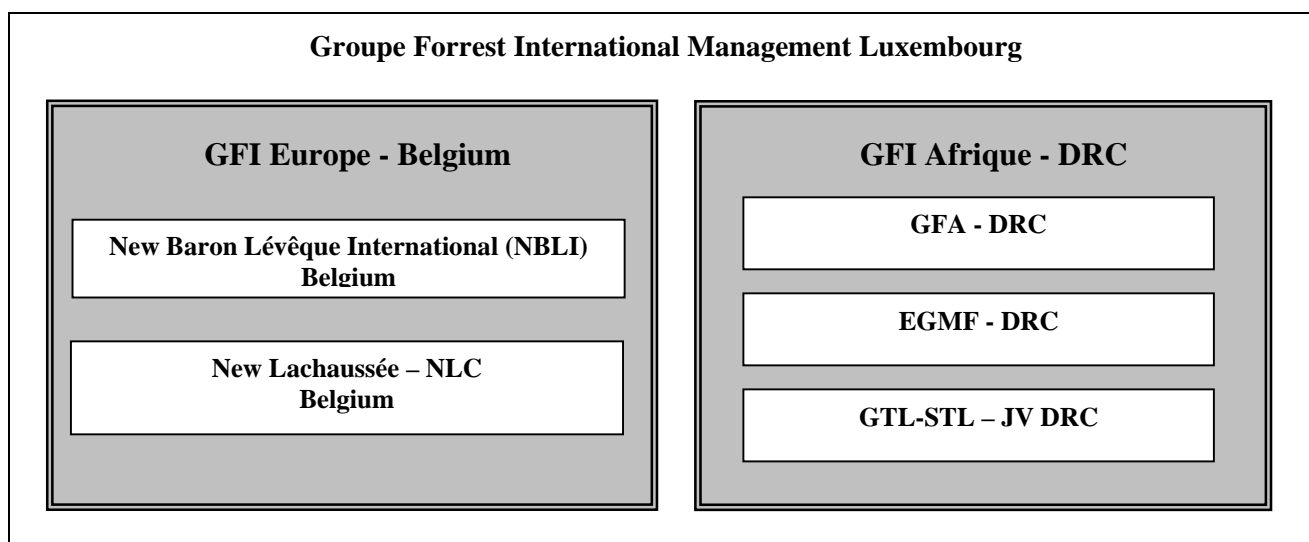
<sup>414</sup> *Ibid.*, background page (visited 7 January 2004). According to the company website, ‘Management, in the form of a holding company, represents several companies spread out over four of the five continents’.

<sup>415</sup> Audition de Jean-Claude Marcourt, chef de cabinet du vice premier ministre et ministre de l’emploi, Sénat de Belgique, Session ordinaire 2001-2002, Commission d’enquête parlementaire “Grands Lacs”, Auditions [hereafter *Belgian Senate Auditions*], 8 novembre 2002, Compte rendu.

<sup>416</sup> The activities of George Forrest and his companies have previously come under the scrutiny of the UN Security Council. In December 2000, the UN Panel on Angola identified George Forrest as a partner of the Angolan rebel movement (UNITA) in the Cuango Mining Corporation, together with the Antwerp based diamond trader, David Zollman. The UN Panel estimated that UNITA’s diamond production was raised before the major rearmament beginning in late 1996: ‘Diamonds valued at \$ 2 billion were removed from the Cuango during this period.’ UNITA had large scale industrial mines in the Cuango Valley for the five years that UNITA controlled the valley, ‘in what was effectively the world’s largest diamond smuggling operation, given that UNITA’s mining rights were based on force majeure and later negotiations to legitimise these rights failed.’ Before the imposition of sanctions, the Cuango Mining Corporation was the largest mining operation by far. ‘This consortium provided the technical expertise for running a large-scale mining operation, providing the technical skills that UNITA lacked and that Forrest’s companies could provide.’ The UN report noted that the Cuango Valley mining operations ceased six to nine months before the sanctions were imposed by the Security Council on UNITA’s diamond trade. See UN Report of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola, S/2001/1225, paragraphs 153 - 156 . M. Forrest, when questioned by the Belgian Senate about his company’s involvement in the diamond trade in Angola denied any impropriety: ‘Nous avons fourni une assistance technique sur place, durant une période autorisée; il n’y avait pas d’embargo. Nous avons quitté la région fin 1996, au moment où les activités reprenaient chez nous. Nous n’avons pas effectué aucun transport. Nous ne connaissons rien de l’utilisation des diamants dans le cadre de la guerre’. Audition de M. George A. Forrest, President de la S.A. George Forrest International, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 17.



## Groupe Forrest International Management Luxembourg



Panel's  
allegations

In its second and third reports the Panel made a number of allegations concerning the activities of Forrest Group companies.

- 'In a flagrant conflict of interest, Mr Forrest was appointed Chairman of Gécamines from November 1999 to August 2001 while his private companies negotiated new contracts with the explicit intention of using Gécamines assets for personal gain.'<sup>417</sup>
- Mr Forrest and the OM Group 'excluded Gécamines (the State owned mining company) of revenues' derived from the processing of germanium, a rare metal.<sup>418</sup>
- New Lachaussée (a Forrest Group company) 'is a leading manufacturer of cartridge casings, grenades, light weapons and cannon launchers'.

The third UN Panel report noted that George Forrest's activities 'have recently come under the scrutiny of the Belgian Senate's investigation into resource exploitation in the Democratic Republic of the Congo'.<sup>419</sup> The Belgian Senate Commission of Inquiry considered some of the allegations made against the Forrest Group by the UN Panel, in particular 'the circumstances in which two large industrial projects were concluded in 1997: the GTL-STL project for the extraction of cobalt-germanium from the Lubumbashi slag heap known as the 'Big Hill' and the project for the extraction of cobalt from the Luiswishi mine and its treatment at the Kipushi plant'.<sup>420</sup>

### a) Alleged conflict of interest – the Luiswishi Agreement and the SOFWE Project

Panel's  
allegation

The UN Panel did not publish in its reports any examples of the new contracts that M. Forrest had allegedly negotiated in what the Panel termed 'a flagrant conflict of interest' when M. Forrest was both Chairman of Gécamines and Chairman of the Forrest Group. But the Belgian Senate examined in detail allegations about the Luiswishi mine agreement, an agreement that had, according to an expert witness, been concluded when George Forrest was Chairman of Gécamines. The expert, the journalist, Francois Misser, claimed that the amendment introduced an unfair profit sharing arrangement between the Forrest Group company, EGMF, and Gécamines.<sup>421</sup> Extracts from Mr Misser's statement concerning the Luiswishi project and other 'contrats léonins' (unfair contracts) appeared in a Belgian Newspaper, *La Libre Belgique* on 23 February 2002.<sup>422</sup> George Forrest issued a denial that there was any conflict of interest between the Forrest Group and Gécamines, which was published in the same newspaper on 16 March 2002:

Forrest  
Group's  
response

'The contracts in question were concluded more than two years before I was nominated in October 1999 Chairman of Gécamines, and they were not modified during my presidency. Whenever these contracts

<sup>417</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 30. M. Forrest in his testimony to the Belgian Senate gives the dates as October 1999 to August 2001. See *Audition de M. George A. Forrest*, op. cit.

<sup>418</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 44.

<sup>419</sup> *Ibid.*, paragraph 30. S/2002/1076 paragraph 30.

<sup>420</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 2. Dossiers Katanga, paragraph 2.1.

<sup>421</sup> *Audition de M. François Misser, Belgian Senate Auditions*, op. cit., 22 février 2002, Compte rendu.

<sup>422</sup> 'la troisième forme de pillage concerne les contrats léonins. M. Misser a ainsi évoqué que 'les conflits d'intérêt' et 'les soupçons de contrats non éthiques' qui pèsent sur la personne de George Forrest, investisseur belge en Afrique central.' ('Pillage au Congo,' *La Libre Belgique*, 23-24 février 2002).

were raised in my presence at Gécamines board meetings I removed myself. These contracts do not harm Gécamines in any way, quite the contrary.<sup>423</sup>

Mr Forrest in his sworn testimony to the Belgian Senate again stated that during his tenure as Chairman of Gécamines ‘no concession was granted to the Forrest Group and that none of its contracts were changed’. He added that a preliminary agreement had also been signed with Gécamines in June 2001 for the exploitation of the Sofwe coltan ore body in Northern Katanga, but that this had never proceeded beyond the feasibility stage.<sup>424</sup>

The Belgian Senate report described how in June 2001, two months before Mr Forrest was removed from his position at Gécamines, a new preliminary agreement (*Protocole d’Accord*) was negotiated and signed which substantially changed the existing contract between Gécamines and the Forrest company, EGMF.<sup>425</sup> This agreement, according to the Belgian Senate, transferred the title of the mining site, the ‘polygone de Luiswishi’, from Gécamines to a new company of which Entreprise Générale Malta Forrest has the majority with a 51 per cent shareholding. The Government of the DRC and Gécamines hold the remaining 49 per cent jointly. The Belgian Senate noted that the agreement also ceded key installations such as the Kipushi cascade mill to the newly created company, which, according to some sources, Gécamines requires for the future operation of its mine at Kipushi.<sup>426</sup>

Although Gécamines was allocated royalty payments set at 20 per cent of the company’s turnover, a clause in the new agreement stipulated that these royalty payments should be used instead for the road building and National Reconstruction works.<sup>427</sup> According to Belgolaise Bank in its public reaction to the Panel, the Luiswishi Management Committee issued instructions for monthly payments from the joint venture’s account to be paid into accounts belonging to the Forrest Group. These funds were then allegedly used to pay EGMF for carrying out National Reconstruction projects.<sup>428</sup> (See below, section C. The banking sector).

Gécamines, according to the Panel, ‘had been transformed from a pillar of the Congolese economy’ into a ‘dilapidated enterprise with production now at only one tenth of its former capacity’ as a result of ‘embezzlement, theft and pilfering, mismanagement and a lack of re-investment’.<sup>429</sup> In early 2001 the Minister of the Portfolio, with responsibility for parastatals, supervised an audit of all State-owned enterprises, including Gécamines. ‘The audit reportedly revealed gross mismanagement and led to the firing of senior management officials at these enterprises in August 2001.’<sup>430</sup> During George Forrest’s presidency ‘Gécamines turnover continued to crumble away...from \$ 225 million in 1999 to just over \$ 160 million in 2000 and \$ 140 million in 2001’.<sup>431</sup> The Belgian Senate concluded that a new preliminary agreement for Luiswishi had been signed while Forrest was still Chairman of Gécamines, which, although it altered the existing contract, was not formally a new contract. It noted that it was the DRC government itself that had decided to allocate Gécamines’ share of the royalties to national reconstruction, which included the building of a presidential palace in Lubumbashi (this component was later changed to the construction of a mausoleum by Joseph Kabila shortly after he assumed control of the Kinshasa government following the assassination of his father, Laurent Kabila).<sup>432</sup> Mr Forrest testified that the Forrest Group had been allocated the work in Lubumbashi because it was the only company that had the technical and financial capacity to carry it out. The work in Kinshasa was awarded to the Forrest Group after an open bidding process.<sup>433</sup> While the Belgian Senate conceded that Gécamines risked being deprived of a relatively large amount of money that it needed to function, in view of the fact that at least some of the benefits were reinvested in the DRC in the form of public works, it reasoned that the agreement could not be classified as plunder. The Belgian Senate expressed surprise about the method adopted by the government, which it described as a form of prior taxation on Gécamines.<sup>434</sup>

Forrest  
Group’s  
response

<sup>423</sup> Droit de réponse, *La Libre Belgique*, <<http://www.lalibre.be>> (mis en ligne le 16 mars 2002).

<sup>424</sup> Audition de M. George A. Forrest, *Belgian Senate Auditions*, op. cit., 19 September 2002, compte rendu, p. 13: ‘Je tiens à vous faire savoir que durant ma présidence aucune concession n’a été attribuée au Groupe Forrest et qu’aucun contrat du Groupe Forrest n’a subi d’amendement. Seule un protocole a été signé; il concerne le projet Sofwe.’

<sup>425</sup> *Protocole d’accord* No 486/10332/SG/GC/2001, signed 4 June 2001, cited in the *Belgian Senate Inquiry*, op. cit., paragraph 6.7.4, p. 143, fn. 390.

<sup>426</sup> *Belgian Senate Inquiry*, op. cit., 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines, b. Répartition de la valeur ajoutée et des bénéfices entre les partenaires des projets et la Gécamines, b) Répartition des bénéfices et des coûts: conflits entre partenaires. See also *idem* footnote 390.

<sup>427</sup> *Protocole d’accord*, op. cit., paragraph 6.2 Affectation des Royalties provenant du gisement.

<sup>428</sup> Reaction No.23, written statement from Belgolaise Bank, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>429</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 30.

<sup>430</sup> *Ibid.*, paragraph 34.

<sup>431</sup> Trends.be, ‘Is Forrest Undermining the Congo?’, 25 September 2002, <<http://www.trends.be>>.

<sup>432</sup> *Idem*.

<sup>433</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 6.

<sup>434</sup> *Belgian Senate Inquiry*, op. cit., 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines, b. Répartition de la valeur ajoutée et des bénéfices entre les partenaires des projets et la Gécamines, d) Répartition et utilisation des marges et des royalties revenant à la Gécamines dans le partenariat sur le gisement de Luiswishi. Other commentators take a more critical view: ‘A survey of the costs and proceeds of the Luiswishi mine – from its start-up in 1997 through August 2001 – shows that on total revenues of \$ 129 million Gécamines only cashed 16 million and EGMF 71.5 million. On top of that, EGMF received an additional 18 million dollars for ‘social projects’ and another 9 million dollars for road works. This means that the Forrest Group was able to pocket almost 100 of the 129 million dollars. Gécamines was left with a mere 16 million dollars. Bank statements of EGMF with its home banker Belgolaise clearly mention the monthly deposits, stating ‘reconstruction national’ as the reason for the payment.’ (‘Is Forrest Undermining the Congo?’, op. cit.).

The Belgian Senate concluded that it was not appropriate ('indiqué') for Mr Forrest to hold the position of Chairman of Gécamines while he was still Chairman of the Forrest Group because this situation might give rise to a presumption of a conflict of interest. Not least because in this period an agreement between the DRC State, Gécamines and the company created a new enterprise in which the Forrest Group acquired a 51 per cent shareholding.<sup>435</sup> According to the Belgian Senate's conclusion, the National Reconstruction agreement illustrated the way in which Gécamines had been deprived of much needed revenue. Gécamines was in a very weak state, partly because of its poor financial and economic situation and partly because the Kinshasa government took decisions about the parastatal without consulting. The Belgian Senate noted that the DRC found itself in the deplorable situation of not having the means to carry out essential tasks and the Forrest Group was the only investor left still able to execute work on infrastructure.<sup>436</sup>

A number of questions arise in relation to the Luiswishi agreement. Was the Forrest Group contracted to carry out the works of National Reconstruction without a full preceding public tender in Lubumbashi?<sup>437</sup> An additional question raised by the Belgian Senate did the Luiswishi preliminary agreement set up an extra-budgetary fund that was not accountable to normal government scrutiny?<sup>438</sup> These questions are relevant given that, if true, these arrangements deprived Gécamines of much needed revenue, at a time when it had debts of \$ 1.4 billion, and had not paid its employees for months and risked losing its surface rights.<sup>439</sup>

#### b) GTL-STL's 'Big Hill' project – alleged deprivation of Gécamines' share of germanium profits

Panel's  
allegation

The **OM Group Inc.** has its headquarters in Cleveland, Ohio. The company operates manufacturing facilities in the Americas, Europe, Asia, Africa and Australia. OMG, 'through its operating subsidiaries, is a vertically integrated international producer and marketer of value-added, metal-based speciality chemicals and related materials'.<sup>440</sup> The company's base metal chemistry products are predominantly produced from cobalt, nickel and copper. OMG is one of the top three producers of speciality chemicals in the US and is a world leader in refining and production of cobalt.<sup>441</sup> In 1997, OMG Inc. formed a joint venture with the Forrest Group and Gécamines, the state owned mining company, to retrieve copper and cobalt from the Lubumbashi slag, known as the Big Hill project. According to the Panel's October 2002 report, 'OMG Inc in partnership with the Forrest Group runs one of the most profitable mining operations in the DRC with only the most marginal benefit for the State mining company, Gécamines'.<sup>442</sup> The Panel states that: 'Mr Forrest and OMG have secured access to a copper and cobalt stockpile which contains over 3, 000 tons of germanium, a rare metal used in optical fibres, infrared lenses and telecommunication satellites'.<sup>443</sup> The stockpile has a current market value of more than \$ 2 billion but, according to the Panel, 'Gécamines has been expressly excluded from the revenues derived from the germanium processing'.<sup>444</sup> OMG was listed in Annex III of the Panel's October 2002 report.

*GTL-STL Structure and contractual relationships* – The joint venture operates under the name **Groupe pour le Traitement des Scories du Terril de Lubumbashi, Ltd. (GTL)**. It has its headquarters in Jersey. IMC Group Consulting Ltd, which carried out a legal audit of Gécamines' joint ventures on behalf of the World Bank, described in detail the structure of GTL-STL.<sup>445</sup> **OMG/KOKKOLA CHEMICALS HOLDING BV** (a subsidiary of OM Group Inc) is controlled 100 per cent by OM Group Inc. OMG/Kokkola Chemicals Holdings BV (OMG BV) owns 55 per cent, the Forrest Group (GFI) 25 per cent and Gécamines 20 per cent of GTL.<sup>446</sup> GTL then established in 1997 the Congolese company, **Société pour le Traitement des Scories du Terril de Lubumbashi (STL SPRL)**, to run the Lubumbashi plant, to process slag from Big Hill and produce cobalt alloys. GTL has a 97 per cent shareholding in STL; Gécamines has 1 per cent; the Forrest Group (GFI) 1 per cent and OMG BV 1 per cent. Gécamines agreed to sell a third of its Bill Hill slag to GTL. GTL has a long-term contract to sell cobalt alloy to **OMG Kokkola Oy (OMG/KCO)**, a Finnish subsidiary of OMG Inc. STL subcontracted work to Forrest Group companies, **NBLI** and **EGMF** for

<sup>435</sup> *Belgian Senate Inquiry* op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 2. Dossiers Katanga, paragraphe 2.4: 'la commission estime que cela n'était pas indiqué, par ce que cette situation fait naître une présomption de confusion d'intérêts. Surtout aussi parce qu'a été conclu, durant cette période, un protocole prévoyant une nouvelle entreprise ayant pour partenaires l'Etat congolais, la Gécamines et le groupe Forrest, qui acquerrait 51% des parts.'

<sup>436</sup> *Ibid.*, paragraphs 2.5 and 2.6.

<sup>437</sup> *Audition de George Forrest, Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu.

<sup>438</sup> *Ibid.*, p. 28, Sabine de Béthune asked: 'Une fois les royalties prélevées par l'autorité congolaise, quels sont les mouvements de cet argent? Arrive-t-il sur le compte d'Etat congolais ou directement sur celui de votre société qui a aménagé les voiries?'

<sup>439</sup> 'In spite of its mineral wealth, Gécamines is today in technical and financial bankruptcy, as shown by: i) old equipment and abysmal productivity; ii) high production costs that translate into substantial operating losses; iii) 23, 400 employees that have not been paid for more than 12 months; and, iv) debt of about US\$ 1.4 billion dollars and arrears to most state-owned utilities. Moreover, the company is tangled in a multitude of joint venture agreements (the majority of them non-operational), logistic contacts and supply agreements that substantially reduce its ability to operate.' World Bank Group, *Memorandum of the President*, Democratic Republic of Congo Economic Recovery Credit (Cr. 3660-DRC) Release of the Mining Sector Tranche, June 20 2003 (IDA/SecM2003-0382).

<sup>440</sup> <<http://www.omg.com/aboutus>>.

<sup>441</sup> *Idem*.

<sup>442</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 43.

<sup>443</sup> *Idem*.

<sup>444</sup> *Idem*.

<sup>445</sup> IMC Group Consulting Ltd, 'La Restructuration de la Gécamines,' volume 3, *Audit Juridique*, January 2003, Annex A-22.

<sup>446</sup> Acte Constitutif, Société Congolaise pour le traitement du terril de Lubumbashi STL SPRL, 24 June 1997.

## Big Hill Project Contracts, sub-contracts and Structure of GTL-STL

### 'Big Hill' Slag Processing Company

Groupe pour le traitement du terril du Lubumbashi (GTL Ltd) Jersey 1997

Joint Venture

OM G BV (owned 100% by OM G Inc USA) 55%

GFI - Forrest Group 25%

Gécamines 20%

GTL has contract to sell copper/cobalt alloy to OMG Kokkola (Finland part of the OM G Inc)

Gécamines has long-term contract to sell slag and minerals from Luiswishi to GTL

Contract between  
Gécamines  
& OMG Kokkola  
Chemicals OY (Finland)  
for Sale of Metals

OMG covers transport  
costs from STL to  
Finland

### Lubumbashi Slag Treatment Plant

Société de traitement du terril du  
Lubumbashi (STL Sprl) DRC  
1997

GTL: 97%

Gécamines: 1%

Forrest Group: 1%

OMG BV 1%

GTL established STL to run slag  
processing plant and produce  
cobalt alloys

GTL contracted STL to process  
slag bought from Gécamines

### STL

Sub-contracts given to NBLI and  
EGMF (companies in Forrest  
Group) for construction of  
STL's plant and services.  
Financed by Belgolaise Bank  
with backing from Office  
National du Ducreire.

Transport contract between STL  
and Polytra NV sub-contracted  
via Forrest Group (GFI)\*

\*Sworn statement of Maurice Velge, Chairman of Polytra N.V to the Belgian Senate Great Lakes Commission of Inquiry, 25 November 2002. He stated that invoices for the transport costs were sent to GFI. Details of the contract with GFI and transport costs were given behind closed doors to protect commercially sensitive information.

construction of STL's plant and for other services.<sup>447</sup> The Joint Venture and its Congolese company are often referred to as GTL-STL, even though STL regards itself as a separate company and not an agent of GTL. In his testimony to the Belgian Senate, George Forrest referred to the entity GTL-STL. George Forrest was questioned about why the STL slag project had been able to proceed when the mining code in force only allowed for the development of ore bodies and efforts by other mining companies to exploit tailings in the Kolwezi concession, for example, had been blocked.<sup>448</sup> According to Mr Forrest, the legal situation between the Bill Hill and Kolwezi tailings was quite distinct because STL had acquired the rights and had been granted approval to use 4.5 million tons of the slag, but Gécamines remained the titleholder. In the other case, another company had sought to acquire unequivocal title to the Kolwezi tailings through amendments to DRC's mining code.<sup>449</sup>

Forrest  
Group's  
response

<sup>447</sup> IMC Group Consulting Ltd, 'La Restructuration de la Gécamines,' op. cit., Annex A-22. In the contracts between Gécamines and private companies there would be a number of separate agreements. The first contract was a confidentiality agreement specifying the amount that Gécamines would pay. The next contract to be signed by the partners was a preliminary agreement, which set out the principles of the relationship between the parties. In general, it would indicate the role and responsibilities of each of the parties. Finally, there was also a joint enterprise agreement (un accord de coentreprise) that would specify the parties' roles and obligations and which obliged the parties to create a company to carry out the works. This 'accord de coentreprise' did not establish a genuine joint venture as is generally understood in other countries. Usually work would be managed and carried out within the body of the joint venture. See *idem* under 'Contrats de Partenariat'.

<sup>448</sup> *Belgian Senate Inquiry* op. cit., 6.5. Exploitation des terrils et tailings sur fond de vide juridique, paragraph 6: 'In respect of the treatment of residues, the former mining code only offered a legal vacuum (*un vide juridique*), in the sense that it considered that residues, like ore bodies, belonged to the State and were not accessible. Only rights for extraction and exploitation of certain materials (copper, cobalt, germanium...) from ore bodies (like the residues and slag) were granted by the State in the latter case to Gécamines'.

<sup>449</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 36.

Panel's allegation The Panel claimed, 'OMG and the Forrest Group 'have deliberately ignored the agreed technical plan for the STL project, which provided for two electric-powered refineries and a converter to be built adjacent to the copper and cobalt stockpile'.<sup>450</sup> According to the Panel, this would have meant that all the germanium would have been processed within the DRC and Gécamines would have been entitled to a revenue share: 'Instead, semi-processed ore from the mine is being shipped to OMG's processing facility in Finland, where the germanium is extracted'.<sup>451</sup> The Belgian Senate noted that this led to a significant increase in the project's transport costs.<sup>452</sup> Baron Maurice Velge, the Chairman of Polytra NV, a Belgian company that had been given the STL transport contract, was asked by the Belgian Senate why Gécamines was being charged about \$100 more per metric ton than the Forrest Group for transporting minerals.<sup>453</sup> Baron Velge confirmed that Polytra had a contract with the Forrest Group and rejected the figures cited in the questioning as misleading. He stated that he could only respond to the question about transport costs *à huis clos*.<sup>454</sup> In November 2001 one year after the inauguration of STL, according to the Belgian Senate, Gécamines learned that OMG had announced – through the New York Metal Bulletin – that it planned to put twenty tons of germanium on the market each year, as soon as the Big Hill smelter in Lubumbashi was running at full capacity.<sup>455</sup> OMG the main shareholder in GTL-STL has developed at its Kokkola facility a technique for the extraction of germanium from minerals containing cobalt.<sup>456</sup> Germanium is a strategic material, which is used in high-tech applications, such as optical fibres, infrared lenses and the solar cells of telecommunication satellites. Gécamines had objected to this announcement on the grounds that OMG had, under the terms of the contract, no claim to the germanium from the Big Hill.<sup>457</sup>

Forrest Group's response Both the Forrest Group and OMG have responded to the Panel's allegations.<sup>458</sup> As regards GTL's alleged non-compliance with its contractual obligation, George Forrest issued a press statement following the publication of the Panel's October 2002 report. He confirmed that Gécamines had complained about the fact that the initial plan for GTL-STL had been modified, but explained that this had been duly decided upon by common agreement between the three partners in January 1998 on the basis of productivity and profitability calculations.<sup>459</sup> He reiterated this point in response to questions by the Belgian Senate about the absence of a formal, written amendment to the contract.<sup>460</sup> The Belgian Senate was also concerned that the STL project had managed to obtain a state guarantee from the Belgian export credit agency, Ducroire, even though the DRC was in the highest political risk category (category 7) which meant that it was 'off cover'. The Belgian Senate asked Jean Pierre Pauwels, the Head of the Ducroire Board, why an exception had been made in the case of STL. He stated that the Belgian government could decide on the grounds of its international relations policies to benefit a certain country whether or not it was in category 7.<sup>461</sup> The Belgian stake in the investment was limited mainly to supplies and assembly works by New Baron Lévêque International, NBLI – a branch of the Forrest Group located in Liège.<sup>462</sup> The serious potential financial implications for Gécamines of this alteration to the GTL contract was a matter of concern to the consultants commissioned by the World Bank to conduct a legal audit. The consultants state that the problem with this contract was that the joint venture was supposed to ensure that the converter the Forrest Group in Lubumbashi had contracted to build would have the equipment that would allow for the total recovery of zinc oxides and lead.<sup>463</sup> (It is possible to recover germanium in three distinct phases of the processing: one part is found in the alloy, another in the residues; and a third part can be recovered in the zinc oxides.)<sup>464</sup>

OMG's response As regards the extraction of germanium, George Forrest told the Belgian Senate that it did not concern his companies, although in January 2002 he had been approached by Gécamines to use his good offices to help resolve the dispute.<sup>465</sup> OMG and OMG/KKO submitted a reaction to the Panel's allegations stating that they did not consider they had any

<sup>450</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 44.

<sup>451</sup> *Idem*.

<sup>452</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, page 32. Senator Michiel Maertens asked about the increase in STL's transport costs.

<sup>453</sup> Audition de Baron Maurice Velge, président Polytra N.V., *Belgian Senate Auditions*, op. cit., 25 novembre 2002, Compte rendu, p. 3.

<sup>454</sup> *Ibid.*, pp. 4 – 5.

<sup>455</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 21 and 24.

<sup>456</sup> <[http://www.omgicom/buprod/recycling\\_refining](http://www.omgicom/buprod/recycling_refining)>.

<sup>457</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 21; Trends.be, 'Is Forrest Undermining the Congo?', op. cit..

<sup>458</sup> Reaction No.24, written statement from George A. Forrest, reproduced in UN Panel, Addendum, 20 June 2003, op. cit.; Reaction No 7, written statement from OMG, reproduced in *idem*.

<sup>459</sup> Forrest Group, Communiqué de presse, 'M. George FORREST, la S.P.R.L. ENTREPRISE GENERALE MALTA FORREST et la S.A. GROUP GEORGE FORREST souhaitent par le present communiqué de presse réagir face au rapport, rendu public le 21 octobre 2002 par le "panel of experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo"', <<http://www.forrestgroup.com/fr/home.html>> (Infos en ligne visited 14 April 2004).

<sup>460</sup> 'La décision a été prise entre toutes les parties qui ont assisté aux réunions: la Gécamines, OMG, le groupe Forrest.' Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 22.

<sup>461</sup> Audition de Jean-Pierre Pauwels, *Belgian Senate Auditions*, op. cit., 10 janvier 2003, Compte rendu, p. 11.

<sup>462</sup> Trends.be, 'Is Forrest Undermining the Congo?', op. cit..

<sup>463</sup> IMC Group Consulting Ltd, 'La Restructuration de la Gécamines,' op. cit..

<sup>464</sup> *Belgian Senate Inquiry*, op. cit., 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines, b. Répartition de la valeur ajoutée et des bénéfices entre les partenaires des projets et la Gécamines, b) Répartition des bénéfices et des coût: conflits entre partenaires.

<sup>465</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu.

contractual obligation to pay for the germanium contained in the Big Hill slag. In the company's view the germanium issue was 'a commercial matter'; nevertheless they explained they were engaged in negotiations with Gécamines to finalise a fair agreement'.<sup>466</sup> The World Bank consultants considered 'the contract negotiators ought to have foreseen the recovery of germanium as a by-product and negotiated the contract to this effect'.<sup>467</sup> OMG had offered to pay 5 per cent of the revenues to Gécamines, but its proposal was initially turned down.<sup>468</sup>

OMG/KCO approached the Finnish National Contact Point (NCP) to ask for an examination of this issue. The Finnish NCP took the view that 'the OECD Guidelines do not concern commercial disputes'. It concluded its preliminary assessment by stating, 'Even if it were considered that the utilisation of germanium has not been fully agreed on according to the local regulations, the company's alleged procedure violating the *OECD Guidelines* is to be regarded, on the whole, as minor'.<sup>469</sup> But the UN Panel and the World Bank consultants took a somewhat different view. After the matter had been raised in the UN Panel's report, OMG agreed to settle with Gécamines. OMG/KCO in its reply to the UN Panel gave a commitment that it would:

Retroactively apply a royalty payment to Gécamines that will at the very least correspond to any benchmark level applied in the equivalent grades and quality of germanium. This is and it has been a firm commitment of OMG/KCO already since autumn 2000 and it is dedicated to conclude the deal in favour of Gécamines as soon as possible. Furthermore, this binding commitment will be used retroactively from the date of commencing of the germanium production.<sup>470</sup>

The Belgian Senate notes that, according to Ducroire, the Lubumbashi slag contained 3,000 tonnes of germanium. GTL only had the right to use one third of the slag so the amount of germanium available to GTL would be about 500 tons.<sup>471</sup> The Belgian Senate estimated that five tons of germanium might be recovered annually which would be worth a turnover of US \$ 5 million.<sup>472</sup> Given the parlous state of the DRC economy, the sale of the slag is one of the few sources of income for Gécamines. A kilogram of germanium is sold for 600 to 800 dollars on the world market.<sup>473</sup> The Belgian Senate did not come to any definite view as to the reason why the contract between OMG and Gécamines was silent as regards the germanium, especially as OMG had advised Gécamines that its recovery would be technically feasible.<sup>474</sup> Given OMG's admission that 'it had had a firm commitment since autumn 2000' to make royalty payments to Gécamines, it would seem reasonable to ask why no contract to that effect had been signed at the outset.<sup>475</sup> OMG was listed in category 1 ('resolved') of the Panel's October 2003 report. The Belgian Senate concluded that the agreed arrangement was 'neither inequitable nor illegal'.<sup>476</sup> OMG was clearly the strongest party in the joint venture and so its interests were the best protected.<sup>477</sup>

The GTL-STL contract is an example of the type that results from the fact that there is not a State in DRC. Gécamines, a public company, is not well enough equipped to defend its interests properly. The inevitable conclusion to be drawn from this is that contracts have been signed that are not *limpides*.<sup>478</sup>

As regards the related commercial contracts ('les contrats commerciaux connexes'), the Belgian Senate concluded that it was reasonable to ask why some activities were sub-contracted to a company linked to one of the partners and were not considered part of the core activities of the joint venture to the benefit of all the parties. OMG/KCO, the Finnish subsidiary, was carrying out activities within the framework of the main STL contract, but it was not regarded as party to the joint venture: 'This way of operating in theory permits the removal of funds from the joint venture if OMG Kokkola were, for example, to pay too little for the cobalt alloy'.<sup>479</sup>

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<sup>466</sup> Reaction No. 7, op. cit..

<sup>467</sup> IMC Group Consulting Ltd, 'La Restructuration de la Gécamines,' op. cit., Section 4.1.

<sup>468</sup> Trends.be, 'Is Forrest Undermining the Congo?', op. cit..

<sup>469</sup> Finnish National Contact Point, Letter to Ambassador Kassem, 30 May 2003.

<sup>470</sup> Reaction No 7, op. cit., paragraph 3, Commitment of OMG vis-à-vis germanium.

<sup>471</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 2. Dossiers Katanga, paragraph 2.7.

<sup>472</sup> *Ibid.*, 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines, b. Répartition de la valeur ajoutée et des bénéfices entre les partenaires des projets et la Gécamines, b) Répartition des bénéfices et des coûts: conflits entre partenaires.

<sup>473</sup> Trends.be, 'Is Forrest Undermining the Congo?', op. cit..

<sup>474</sup> *Belgian Senate Inquiry*, op. cit., 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines; see also footnote 388 of *idem*: 'Accord de germanium entre la Générale des carrières et des mines et OMG Kokkola Chemicals oy du 27 novembre 2000 proposant le paiement à la Gécamines de 5 per cent de la somme facturée des produits de germanium vendu par OMG à ses clients et voir signature d'un accord entre Gécamines et OMG en décembre 2002.'

<sup>475</sup> OMG, Reaction No. 7, op. cit..

<sup>476</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 2. Dossiers Katanga.

<sup>477</sup> *Ibid.*, 2. Dossiers Katanga, paragraph 2.2.

<sup>478</sup> *Ibid.*, 2. Dossiers Katanga, paragraph 2.7.

<sup>479</sup> *Ibid.*, 2. Dossiers Katanga, paragraph 2.3: 'Cette manière d'opérer permet théoriquement de soustraire des fonds à la joint venture du fait qu'OMG Kokkola payerait, par exemple, un prix insuffisant pour les alliages de cobalt. Si le prix payé est correct, la structure telle qu'elle est conçue

Panel's concern  
Alleged radioactive contamination and other forms of pollution by STL: the Shinkolobwe uranium mine – The UN Panel reports have a number of references to the Shinkolobwe uranium mine, which is one of the sources of *hétérogénite* (cobalt hydroxide).<sup>480</sup> In April 2003, the Belgian press reported that Gécamines' Department of Occupational Health and Safety had complained to STL about its processing of radioactive minerals at its smelter in Lubumbashi, situated close to a hospital.<sup>481</sup> The Forrest Group admitted that it bought *hétérogénite* and that it had made a number of trials processing the mineral in its smelters in order to enrich the cobalt from other sources such as the Bill Hill slag. But it added that it had taken proper precautions.<sup>482</sup> George Forrest, when questioned by the Belgian Senate about pollution at the STL plant, stated that the company respected the regulations. In the past 'the emissions had been very harmful (*très nocives*), but today we have studied the problem. Analyses have been made and you [the Belgian Senate] are free to send a commission to investigate'.<sup>483</sup>

Forrest Group's response

World Bank consultants who visited the Shinkolobwe mine area and a number of processing plants in Katanga expressed concern about:

The exposure of the artisanal workers without protection against radiation and contamination of the surrounding area of the former mineral treatment plants by radioactive minerals present in the '*hétérogénite*' and which is found in the residues. It should be mentioned that in some of the plants visited which process the minerals from Shinkolobwe we were told that the residues were sometimes used for shoring up low lying ground or for repairing roads which helps disperse the material.<sup>484</sup>

The Belgian Senate noted that the hand-picking of *hétérogénite* – a mineral rich in cobalt and copper – is a desperate survival strategy for around 70 thousand artisanal miners and their families in Katanga. Usually the mineral is exported in a raw state abroad. It estimated that the exploitation of *hétérogénite* might be worth \$4 million a month. The proceeds of this activity are unequally distributed along the chain: the traders and the intermediaries obtain the greatest share, the transporters and miners the least. A hand-picker is paid about \$0.25 dollar for a kilo of cobalt although the cobalt is sold at \$6 per pound on the international market. The export of unprocessed *hétérogénite* from Gécamines concessions is strictly speaking prohibited, although in 2000 it was authorised for a limited period by the Governor of the Province of Katanga and the Kinshasa government.<sup>485</sup> This trade was supposed to come to an end in March 2003.<sup>486</sup> There are a number of consequences: Gécamines loses an important source of revenue, as it is not paid for the exploitation of its concessions. The miners are not protected and work in appalling conditions. The Government of DRC is also deprived of much needed revenue. But the most worrying aspect is that some ore bodies like Shinkolobwe are naturally radioactive which increases the health risks not only to the miners themselves and their families who live near the mine in unsanitary conditions, but also as the minerals are transported by road, to the wider community (even beyond the DRC's borders) through dust pollution.<sup>487</sup> As with coltan production, the private mining companies and traders who purchase the *hétérogénite* make large profits.<sup>488</sup> Business sources estimate that about 4,000 tons of unprocessed *hétérogénite* is exported each month from Katanga. Given the current rate for cobalt is \$25 per pound, the failure to process the mineral in the DRC (despite the fact that the technical capacity exists locally) means that Gécamines and the Congolese State is losing approximately \$1.2 million a month.

The Belgian Senate concluded that the environmental consequences of the processing of the slag at Lubumbashi had not been independently monitored and that airborne and waterborne pollution could not be discounted. This was a cause of concern to the local population. Various complaints had been received by the Belgian Senate about nocturnal emissions

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actuellement ne soulève aucune objection sur le plan juridique. Une analyse doit permettre de déterminer si l'on a abusé ou non de la structure juridique.'

<sup>480</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraphs 168- 169. In its first report, the Panel alleged that that the Government of the DRC had signed a contract with the government of North Korea 'which trains troops of the Democratic Republic of the Congo and in exchange, it is believed, has received a mining concession around Shinkolobwe very rich in Uranium'. See also *UN Panel Report*, 16 October 2002, paragraph 32: 'Mr Rautenbach told the Panel that the Government of the Democratic Republic of the Congo had offered his company, Ridgepointe International, mining rights to Gécamines concessions at Shinkolobwe, which include substantial deposits of uranium, copper and cobalt.'

<sup>481</sup> 'Pollution radioactive a Lubumbashi', *La Libre Belgique*, 5/6 April 2003: 'Conformément aux remarques formulées par la mission SNC-Lavalin travaillant pour le compte de la Banque mondiale', il est 'indiqué de limiter le traitement des minerais de Shinkolobwe à la seule ville de Likasi en vue de restreindre la zone de pollution radioactive et aussi de réduire les risques de contamination par inhalation ou ingestion pour les populations des agglomérations traversées au cours du transport.'

<sup>482</sup> *Idem*: 'Mais jamais nous ne procédons à des achats d'hétérogénite sans en tester la radioactivité'.

<sup>483</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 30.

<sup>484</sup> SNC Lavalin, Gécamines - *Environmental Audit April 2003*, paragraph 4.3.2.7 Enjeux environnementaux: 'Exposition des travailleurs artisans sans protection contre les radiations et contaminations des environs des usines de traitement de minerai par les minéraux radioactifs qui accompagnent l'hétérogénite et qui se retrouvent dans les résidus. Il faut mentionner qu'à certaines des usines visitées qui traitent le minerai de Shinkolobwe il a été mentionné que les résidus étaient parfois utiles comme matériel de remblayages de terrains bas ou pour l'entretien des routes ce qui favorise la dispersion du matériel.'

<sup>485</sup> *Belgian Senate Inquiry*, op. cit., 6.7.1. Exploitation et exportation de l'hétérogénite; according to the new Congolese Mining Code (Loi N° 007/2002 du 11 juillet 2002 portant Code Minier) Article 85: Sale of mining products).

<sup>486</sup> *Belgian Senate Inquiry*, op. cit., 6.7.1.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*

and their affect on urban areas and agricultural land, which could have a considerable impact on public health and agricultural production.<sup>489</sup>

The World Bank's environmental audit of Gécamines expressed great concern not only about the transportation of the radioactive material on the poor quality roads in Katanga without adequate safeguards, but also about its processing in plants run by a number of unspecified mining operators. According to a report by ASADHO, a Congolese human rights NGO, a US military attaché, Major Patrick O'Doyle, based in Kinshasa, visited the Shinkolobwe mining area on 24 January 2003 and made a video recording of the activities of the artisanal miners operating there. Following revelations in the Belgian Senate about mining at Shinkolobwe, the then Belgian Minister of Development Cooperation, Eddy Boutmans, proposed that the level of radioactivity in Katanga should be studied by the Belgian nuclear establishment: the Centre d'étude de l'énergie nucléaire at Mol and by ONDRAF (Organisme national des déchets radioactifs et des matières fissiles enrichies).<sup>490</sup>

In July and August 2003, RAID contacted the International Atomic Energy Authority (IAEA), the World Bank and the UN Panel to express concern about the security implications and the public health risks related to the activities of artisanal miners at the Shinkolobwe mine.<sup>491</sup>

At the end of January 2004, the DRC government announced that it would reclassify Shinkolobwe as a prohibited zone and ban mining or quarrying activities in the area.<sup>492</sup> But in March 2004, according to a BBC report, the Shinkolobwe mine was open and up to 6,000 'illegal miners' were still at work there. Melissa Fleming, a spokesperson for the IAEA, told the BBC that the IAEA was very concerned: 'Congo is obliged to report any uranium mining activities as well as exports'.<sup>493</sup> The Congolese Minister of Mines, Diomi Ndongala told the BBC that 'dangerous activities were taking place at the Shinkolobwe mine in Katanga'.<sup>494</sup>

### c) Allegations concerning the manufacture and marketing of military equipment by New Lachaussée

The Panel stated that one of Mr Forrest's companies, **New Lachaussée**, 'is a leading manufacturer of cartridge casings, grenades, light weapons and cannon launchers'.<sup>495</sup> The Forrest Group issued a press release denying this: 'It is a matter of fact, that the company New Lachaussée does not manufacture weapons. It does not commercialise such products either. It manufactures only machines for the production of small pieces at a high rhythm and with great accuracy'.<sup>496</sup> However, there seems to be ample evidence from the Forrest Group's own website that New Lachaussée is in the business of selling machines that manufacture military ammunition. New Lachaussée, on its own website, states that it is 'first of all, a builder of highly specialised machines intended for the manufacture and the processing of all types of ammunition and pyrotechnic items'.<sup>497</sup> The Belgian press reported that New Lachaussée supplied the Turkish Government with machines to manufacture weapons.<sup>498</sup> In 1992, when New Lachaussée was established, the company incorporated staff previously employed by Fabrique Nationale Herstal (including its former Chief Executive, Albert Diehl) and it developed 'a strategy to handle the military market directly'.<sup>499</sup> FN Herstal is a long-established Belgian arms company.<sup>500</sup> The Forrest Group publicly denied that it had any involvement in arms dealing: 'It is therefore incorrect to attribute to the New Lachaussée company and – through such company – to Mr George Forrest the capacity of a dealer in weapons!'.<sup>501</sup> New Lachaussée was mentioned in the main body of the Panel's October 2002 report, but it is not listed in Annex III of that report.

The Belgian Senate questioned M. Forrest about the purchase in 1998 of 75 Toyotas, which were given to President Kabila and used for transporting armed forces to Zambia. The Belgian Senate has a copy of the receipt for this purchase. M. Forrest's reply was made *à huis clos*.<sup>502</sup> But the question of the Toyotas re-emerged during the hearing of

<sup>489</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 2. Dossiers Katanga, paragraph 2.9.

<sup>490</sup> Erik Bruyland, 'Aveuglement de la commission des Grands Lacs', *Trends.be*, 20 March 2003.

<sup>491</sup> Email to Ivan Rossignol, Paulo de Sa and Onno Ruhl at the World Bank, dated 8 July 2003 and follow up email to Onno Ruhl on 26 August 2003; email to Ingrid Moesch-Kahiluoto, IAEA, dated 8 August 2003; telephone communication with Karin Wainridge, Mineralogist at IAEA, 8 August 2003; email communication to Pall Davidsson of the UN Panel of Experts in Nairobi, dated 22 September 2003.

<sup>492</sup> On 23 January 2004, at its 17th ordinary meeting, the Council of Ministers examined a draft decree: 'Projet de Décret portant classement en zone interdite aux activités minières et/ou autres travaux de carrières, de la zone de Shinkolobwe située dans le territoire de Kambove, district du Haut-Katanga, province du Katanga.' See <<http://www.digitalcongo.net>>, posting of 26 January 2004 (visited 23 April 2004).

<sup>493</sup> 'Congo wants help at uranium mine', 25 March 2004, <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/3566701.stm>>.

<sup>494</sup> *Idem*.

<sup>495</sup> *UN Panel Report*, 16 October 2002, paragraph 40.

<sup>496</sup> George Forrest, the S.P.R.L. Entreprise Générale Malta Forrest and the S.A. Groupe George Forrest, 'Reaction to the report of the panel of experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo,' *Press Release*, 24 October 2002.

<sup>497</sup> <<http://www.forrestgroup.com/uk/newlc.html>> (visited 7 January 2004).

<sup>498</sup> Roger Huisman, 'Belgische machines voor Turkse munitie', *Het Belang van Limburg*, 10 January 2001, posted on <<http://www.infocenter/tdetail.asp>> (visited 28 August 2003), referred to as: 10/01/2001 - Pag. 1: HBvL-Alg.

<sup>499</sup> 'Milestones of the Company', <<http://www.lachaussee.com/en/societe.html>> (visited 14 April 2004).

<sup>500</sup> <<http://www.fnherstal.com/html/Herstal.htm>> (visited 24 February 2004).

<sup>501</sup> Groupe George Forrest et al, *Press Release* [English version], 24 October 2002, op. cit., <<http://www.forrestgroup.com/uk/home.html>> (visited 14 April 2004).

<sup>502</sup> George Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 13.

Panel's  
allegation

Forrest  
Group's  
response

Forrest  
Group's  
response



Forrest  
Group's  
response

another witness, the Vice President of the Forrest Group, M. Pierre Chevalier, a deputy in the Belgian parliament and a former Secretary of State for External Trade. He was asked whether, before he had accepted a position on the board of the Forrest Group, he had known about the supplying of Toyotas to the Kinshasa government. There is no record of M. Chevalier's response. M. Forrest had told the Belgian Senate that the Toyotas were a kind of advance on taxes and that they could not be considered military vehicles, because they had not been covered in camouflage paint.<sup>503</sup> The Belgian deputy, Jacky Moraël, noted that in Rwanda and the DRC white Toyota 'pick ups' (4 x 4s) are used by both ministers and civil servants as well as by the armed forces.<sup>504</sup> In a Belgian television interview, M. Chevalier stated that almost none of the remarks in the third UN Panel report about George Forrest were true. There was no written evidence and the accusations were 'very unconvincing' ('vrij ongeloofwaardig'). He claimed that business competitors envious of M. Forrest's success had been behind the accusations and that the final UN report had cleared M. Forrest.<sup>505</sup>

In December 2003, New Lachaussée was awarded political insurance by Ducroire to modernise an ammunition factory in Tanzania. This decision created some controversy in the Belgian parliament and press.<sup>506</sup> According to an editorial in *Knack* magazine, Fientje Moerman, the Belgian Minister of Economic Affairs, said that Ducroire no longer seemed to investigate whether a contract was ethical or not.<sup>507</sup> Belgian NGOs questioned whether the project was appropriate given Belgium's international commitments to promote peace in Central Africa. They also asked whether the deal was in accordance with Belgium's domestic legislation on arms exports.<sup>508</sup> RAID and other international NGOs expressed fears that the construction of an ammunition factory in a country regarded by the UN Panel as the hub of illegal arms flows to the DRC would lead to a proliferation of weapons in the region and destabilize the peace process.<sup>509</sup>

Panel's  
concern

On 12 February 2004, the Wallonian regional government refused New Lachaussée's application for an export licence for the Tanzanian plant.<sup>510</sup> Pierre Chevalier was asked on Belgian television about the New Lachaussée deal. M. Chevalier explained that he was not a member of the New Lachaussée board but he defended the project on the grounds that Tanzania is a democratic African country, which has signed all the important treaties on arms reduction. He stated that New Lachaussée is not an arms manufacturer but produces machinery. The company only has contacts with official authorities abroad, for instance with the Tanzanian army.<sup>511</sup> But a US State Department report lists Tanzania as one of the principal African transit centres for weapons.<sup>512</sup> According to the UN Panel, 'weapons transit through both Zambia and United Republic of Tanzania to Molero [Moliro in Katanga] where they are stockpiled until they are transferred to different rebel groups in the Democratic Republic of the Congo'. In addition, the Panel claimed, 'all arms transiting through the United Republic of Tanzania are checked and are accompanied by military escort throughout Tanzanian territory'.<sup>513</sup>

The Belgian Senate concluded that they had no evidence of any connection between the activities of the Forrest Group and the financing or the continuation of the war in the DRC.<sup>514</sup> In relation to the delivery of the Toyota 4 x 4 vehicles, however, it should be ascertained whether they were indeed subsequently ever used for military purposes.

<sup>503</sup> Audition de Pierre Chevalier, Audition, *Belgian Senate Auditions*, op. cit., 6 novembre 2002, Compte rendu, p. 27: 'Au début de la réunion, on a dit que M. Forrest avait livré une centaine de Toyotas au gouvernement congolais. Vous objecterez, monsieur Chevalier, que cela date d'avant l'époque où vous étiez administrateur. C'est exact, mais cela illustre la manière dont le groupe Forrest travaille ou doit travailler. M. Forrest a confirmé qu'il avait livré une centaine de Toyotas mais qu'elles n'étaient pas pourvues de peinture de camouflage et qu'il ne s'agissait donc pas de véhicules militaires. Il les aurait livrées comme une sorte d'avance sur impôts.'

<sup>504</sup> Audition de M. Philippe de Moerloose, *Belgian Senate Auditions*, op. cit., 25 octobre 2002, Compte rendu: 'ces fameux pick-ups blancs par exemple, le plus souvent, au Rwanda comme au Congo, de marque Toyota, sont tantôt utilisés par des ministres parfaitement civils, des services publics, tantôt par les forces armées...'

<sup>505</sup> Interview with Pierre Chevalier by Rik Van Cauwelaert, editor of *Knack*, Belgian Business TV Channel, Saturday 20 February 2004.

<sup>506</sup> Rik Van Cauwelaert, 'New Lachaussée', Editorial, *Knack*, 28 January 2004.

<sup>507</sup> Ibid.: 'Ethische beoordelingen spelen geen rol meer'.

<sup>508</sup> Groupe de recherche et d'information sur la paix et la sécurité (GRIP), 'Exportation de matériel militaire vers la Tanzanie,' <<http://www.grip.org/bdg/g4526.html>> (posted on 13 February 2004 and visited on 6 March 2004).

<sup>509</sup> Letter to Guy Verhofstadt, Eerste Minister, Proyecto Gato and Vlaams Netwerk Lichte Wapens of 19 January 2004; Letter from a coalition of Wallonian NGOs, <<http://www.proyctogato.be/TanzaniaNat.htm>>; Letter to M. Van Cauwenberghe, Ministre-President de la Région Wallonne, CNAPD, January 2004, <<http://www.proyctogato.be/TanzanieCNAPD.htm>>. See also Letter to Guy Verhofstadt, Prime Minister of Belgium, 16 January 2004 from RAID, Friends of the Earth (US), Netherlands Institute for Southern Africa et al, <<http://www.oecdwatch.org>>.

<sup>510</sup> 'Jean-Claude Van Cauwenberghe estime que les conditions ne sont actuellement pas remplies pour octroyer la licence d'exportation à destination de la Tanzanie de l'entreprise New Lachaussée.' Communiqué de Presse, Namur 12, February 2004, Service Presse du Ministre-President Jean-Claude Van Cauwenberghe.

<sup>511</sup> Interview with Pierre Chevalier by Rik Van Cauwelaert, op. cit.

<sup>512</sup> US Department of State, 'Arms and Conflict in Africa', *Fact Sheet*, Bureau of Intelligence and Research, Washington DC, 1 July 2001, <<http://www.state.gov/s/inr/rls/fs/2001/4004.htm>> (visited 14 April 2004): 'There has been no UN action against countries like Burkina Faso, Kenya, Tanzania, and Uganda; all are major transshipment points for arms shipments to west, central and eastern Africa.'

<sup>513</sup> *UN Panel Report*, 13 November 2001, paragraphs 113 and 116

<sup>514</sup> *Belgian Senate Inquiry*, op. cit., 6.8. Filières criminelles dans l'exploitation et la commercialisation des gisements et rejets de la GCM (sur base du rapport des Nations unies): 'Cependant, en ce qui concerne le Groupe George Forrest, nous n'avons pas d'indice des liens entre ses activités et le financement de la guerre au Congo et/ou la poursuite du conflit.'

### *Compliance with the Guidelines*

In the Panel's October 2003 report, the Forrest Group was listed in category II ('resolved' subject to NCP monitoring compliance). According to Mr Forrest's sworn testimony to the Belgian Senate concerning his group's operations, 'there was not the least shadow of illegal exploitation, nor violation of national sovereignty, nor violations of the applicable laws and regulations, nor abuse or diversion of power, nor confiscation, nor plunder, nor diversion of armed forces for the benefit of private, illegitimate interests, nor violation of international law, nor activity or trade in military materials.'<sup>515</sup>

Forrest  
Group's  
response

As regards the Luiswishi agreement, the Belgian Senate concluded that the original contract was altered while George Forrest was Chairman of Gécamines. The Belgian Senate made clear that the Forrest Group company, EGMF, benefited from the new arrangements. It would be pertinent therefore for the NCP to consider whether such an agreement might have infringed the anti-competitive provisions of the *Guidelines* (Chapter IX) and to assess whether it was likely to promote sustainable economic and social progress (Chapter II,1). The National Reconstruction programme might usefully be examined in the context of Chapter II.11 which calls for abstention from any improper involvement in local political activities.

With respect to the GTL-STL germanium issue, both OMG and the Forrest Group have replied to the Panel and/or to the Belgian Senate's Commission of Inquiry. Mr Forrest states that his group of companies had always applied the *OECD Guidelines* and would continue to do so. He confirms that his organisation has put in place specific measures to prevent all forms of corruption and he states that the Forrest Group intends to have regular consultations with the Belgian NCP.<sup>516</sup> OMG states 'all OMG's subsidiaries have throughout the joint venture project in DRC, followed good ethical rules and standards as well as respected and followed the *OECD Guidelines*'.<sup>517</sup> In the UN Panel's final report OMG was listed in category I ('resolved'). Nevertheless a more thorough investigation into the UN Panel's concerns about GTL-STL is merited.

Forrest  
Group's  
response

OMG's  
response

The first question, raised by the Belgian Senate, is why was the STL slag project allowed to proceed when it was apparently in violation of the mining code then in force? Secondly, the NCP should examine the questions posed but left unanswered by the Belgian Senate: did the failure of OMG to include germanium in the contract – and the possible use of a complex legal structure as a means of denying Gécamines the benefits of future sales of a mineral with significant commercial potential – constitute a breach of anti-competitive provisions of the *Guidelines* (Chapter IX)? The preliminary views of the Finnish NCP that this was 'a normal commercial activity' is not easy to reconcile with the opinion of the World Bank's legal auditors, nor with the view of the Belgian Senate, that the contract did not sufficiently protect the interests of Gécamines and was the result of the absence of a functioning State. In view of the Panel's concern, did the failure by STL to install the converter and one of the furnaces contribute to Gécamines losses, as noted by the Belgian Senate, as processing had to be carried out in Finland, which significantly increased transport costs? Given the concerns expressed during the Belgian Senate commission of inquiry about overpricing, on what basis were these costs calculated? Did the Joint Venture 'contribute to economic, social and environmental progress' (Chapter II, 1)?

In the light of the complaints about pollution by STL received by the Belgian Senate, it is important to ascertain whether OMG and OMG/KKO were aware of the processing by STL at the Lubumbashi plant of radioactive materials. If they were, what steps did the company take with other members of the Joint Venture to ensure that supply chain provisions were respected (Chapter II, 10)? Did the GTL-STL joint venture observe 'the need to protect the environment, public health and safety' (Chapter V. Environment) and 'take steps to ensure occupational health and safety in their operations'(Chapter IV Employment and Industrial Relations, 4b)? It would also be appropriate to see what measures were taken in 2003 by the World Bank, the IAEA, the Belgian and US governments to assist the Congolese authorities to deal with the Shinkolobwe mining problem.

As for the admission by George Forrest to the Belgian Senate that he gave President Kabila a consignment of Toyota 4 x 4s, the NCP should examine whether the vehicles were ever put to a military use. Even if supplying such vehicles did not violate the EU arms embargo, it might nevertheless raise issues with the human rights provision of the *Guidelines* (II, 2). It would also be appropriate to consider whether, by supplying the Toyotas, the Forrest Group was in compliance with the need '[to] abstain from any improper involvement in political activities' (II, 11) and the provision that enterprises should not, directly or indirectly, offer, promise, or give undue advantage (Chapter VI). The December 2003 Ducroire decision in favour of the New Lachaussée deal gives rise to another important question: how seriously does

<sup>515</sup> Audition de George Forrest, *Belgian Senate Auditions*, op. cit., 19 septembre 2002, Compte rendu, p. 12: 'Il n'y a pas la moindre ombre d'exploitation illégale, ni violation de souveraineté, ni violation des lois et règlements applicables, ni abus ou détournement de pouvoir, ni confiscation, ni pillages, ni détournement des forces armées au bénéfice d'intérêts particuliers illégitimes, ni violation du droit international, ni activité ou commerce de matériel militaire.'

<sup>516</sup> Reaction No 24, op. cit..

<sup>517</sup> Reaction No 7, op. cit..

the Belgian Government take the Panel's classification of the Forrest Group in category 2, which implied further monitoring of the company's compliance with the *OECD Guidelines*?

Forrest Group – OMG	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Do the amendments to the Luiswishi contract in 2001 amount to a conflict of interest as alleged in the UN Panel's third report?</li> <li>▪ Given M. Forrest's statements to the Belgian Senate on this agreement, can the Forrest Group clarify whether it has retained any rights over the SOFWE coltan concession? Has it published a report of its activities in SOFWE?</li> <li>▪ Were the payments to EGMF for National Reconstruction, as suggested by questions in the Belgian Senate, outside the normal DRC Government's budgeting process? If so, why?</li> <li>▪ At what precise date was the decision made to cancel the construction of the converter? Was a formal amendment to the GTL-STL contract required for the cancellation of the building of the converter and one of the two smelters?</li> <li>▪ Was the STL construction contract awarded to NBLI after an open bidding process?</li> <li>▪ Why did Ducroire make an exception to provide investment insurance for the STL project when the DRC was formally 'off-cover'?</li> <li>▪ Given the concerns expressed by the Belgian Senate, was the GTL-STL transport contract awarded after an open bidding process? On what basis were transport costs calculated?</li> <li>▪ If as OMG/KKO explained in its response to the Panel that it had 'a firm commitment since autumn 2000' to make royalty payments to Gécamines for the germanium, why was a contract not signed at that time?</li> <li>▪ The Belgian Senate noted that it did not have the resources to investigate whether there was 'an abusive use of the legal structure of GTL-STL, which would in time reduce the returns to Gécamines and the DRC'. This question should be examined by the NCP.</li> <li>▪ The Belgian Senate records that it received complaints about pollution resulting from the operations of the STL plant at Lubumbashi. The Forrest Group has publicly stated that it operates the plant to the highest standards. It is important to establish what measures OMG and the Forrest Group took to ensure that adequate precautions were in place to prevent radioactive or other pollution at the STL plant?</li> <li>▪ Why were the Toyotas provided to President Kabila and were they subsequently ever put to military use?</li> </ul>	<p>I.3 MNE definition</p> <p>II.1 sustainable development</p> <p>III disclosure</p> <p>VI.1 channelling payments/ improper advantage</p> <p>IX.1 anti competitive practice</p> <p>II.10 supply chain</p> <p>V environment</p> <p>IV.4 b occupational health and safety</p> <p>II.11 improper political involvement</p> <p>II.2 human rights</p>

#### *iv. Tremalt Ltd*

**Tremalt Ltd** is a natural resources company, incorporated in October 2000 in the British Virgin Islands.<sup>518</sup> It is 100 percent owned by **Brecon Mining Limited**, a company which itself forms part of the **Breco** business group of Zimbabwean John Bredenkamp.<sup>519</sup> The shares of Brecon Mining are held in trust, the sole beneficiaries of which are Bredenkamp and his immediate family.<sup>520</sup> In January 2001, Tremalt formed a joint venture with Gécamines, called the Kababankola Mining Company Sprl. (KMC).<sup>521</sup> The share capital of KMC is split 80 percent Tremalt, 20 percent Gécamines.<sup>522</sup> Collectively, the KMC concessions are among the richest in DRC, and are estimated to contain 2.7 million tons of copper and 325,000 tons of cobalt.<sup>523</sup>

<sup>518</sup> Reaction No. 25, written statement from Tremalt to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit., paragraph 2.1; *UN Panel Report*, 16 October 2002, op. cit., Annex III, entry 80.

<sup>519</sup> See <<http://www.kababankola.com/profile.html>>; also <<http://www.breco.info>> (both visited 17 December 2003).

<sup>520</sup> <<http://www.kababankola.com/profile.html>>.

<sup>521</sup> The joint venture agreement was signed on 11 January 2001, validated by a mining convention in March 2001 and ratified by Presidential Decree on 18 June 2001 (see <<http://www.kababankola.com/profile.html>>).

<sup>522</sup> *Ibid.*

<sup>523</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 39.

Tremalt was listed in annex III of the Panel's October 2002 report and was also listed in annex I as a company on which the Panel recommended the placing of financial restrictions.

### *Compliance with the Guidelines*

Tremalt is registered in a UK dependent territory. Bredenkamp himself resides in the UK and Breco Services Limited is headquartered in Sunningdale, Berkshire.<sup>524</sup> Hence compliance of the Tremalt parties with the OECD *Guidelines* is a matter for the UK NCP. Tremalt is listed in the Panel's October 2003 report in category II as resolved subject to NCP monitoring of compliance with the *Guidelines*. Tremalt itself has already undertaken to observe the *Guidelines* and to cooperate fully with the responsible NCP.<sup>525</sup>

Recalling provision II.1, the *Guidelines* require that enterprises contribute to economic, social and environmental progress with a view to achieving sustainable development. Yet the Panel asserted that the price paid for the concessions worth US\$1 billion was US\$400,000.<sup>526</sup> Furthermore, the Panel maintained that, under a confidential profit-sharing agreement, 32 percent of the net profits from KMC is to be retained by Tremalt while it undertakes to pay 34 percent to the DRC and 34 percent to Zimbabwe.<sup>527</sup> The Panel cited a confidential memorandum from the Zimbabwe Defence Minister, Mr. Sekeramayi, to President Robert Mugabe in August 2002, in which this profit-sharing agreement was discussed.<sup>528</sup> If this were so, would not these confidential agreements as described by the Panel engage provision VI.5 of the *Guidelines* which recommends auditing practices that prevent the establishment of 'off the books' accounts or the creation of documents – presumably, including annual accounts – which do not fairly record transactions? The existence of confidential agreements would be difficult to reconcile with provisions III.3 and 4 on disclosure, seeking, *inter alia*, information on percentage ownership, shareholdings, and remuneration. According to the Panel, '[t]he ultimate owners and beneficiaries of Tremalt are hidden behind a web of trusts and private holding companies registered in the British Virgin Islands and the Isle of Man to whose records the Panel was not allowed direct access.'<sup>529</sup>

Panel's  
allegation

Panel's  
allegation

The Panel alleged that revenue from joint ventures was kept 'off the balance sheet in overpriced subcontracting and procurement arrangements'.<sup>530</sup> It described how KMC was declaring huge losses.<sup>531</sup> The Panel reported how KMC declared losses of \$13 million from February 2001 to July 2002 (i.e., over eighteen months), while previous operations at Kababankola generated a \$20 million profit over an eighteen-month period.<sup>532</sup> If this was so, would not the Panel's allegation of overpriced subcontracting and procurement fairly engage provision VI.1 which prohibits enterprises from using sub-contracts and purchase orders as a means of channelling payments?

Panel's  
allegation

The Panel stated that Tremalt was advised by Brigadier General Sibusiso Busi Moyo, who was Director General of COSLEG.<sup>533</sup> It alleged that a key role was played by Air Commodore Mike Tichafa Karakadzai, Deputy Secretary of COSLEG, in arranging the Tremalt cobalt and copper deal.<sup>534</sup> The Panel also stated that: 'A forum has been established between Tremalt and ZDF to plan strategy in the Democratic Republic of the Congo and "look after the interests of the Zimbabweans".' The Panel described the forum as meeting monthly and detailed its main members as General Zvinavashe, Brigadier Moyo, Air Commodore Karakadzai, Mr. Bredenkamp, the Managing Director of KMC, Colin Blythe-Wood, and the Director of KMC, Gary Webster.<sup>535</sup> Furthermore, according to the Panel: 'Gécamines officials told the Panel that the National Security Minister of the Democratic Republic of the Congo, Mwenze Kongolo had pressured their negotiators to agree to the joint venture contract despite its negative implications for the State company's finances.'<sup>536</sup> If true, would not the Panel's allegations that individuals in COSLEG played a key role in arranging the Tremalt deal and that the negotiators were pressured by the a Congolese minister to agree the joint venture be at odds with Chapter IX of the *Guidelines* which requires enterprises to conduct their activities in a competitive manner? Moreover, would not such allegations, if sustained, threaten compliance with provision II.11 of the *Guidelines* on improper political involvement?

Panel's  
allegation

<sup>524</sup> See the article by Antony Barnett and Paul Harris, *Sunday Observer*, 27 October 2002. Companies House in the UK lists the address of the registered office of Breco Services Limited as New Boundary House, London Road, Sunningdale, Ascot, Berkshire and the date of incorporation as 8 June 1993.

<sup>525</sup> Reaction No. 25, op. cit., paragraph 6.

<sup>526</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 39. On KMC's website, the initial paid up capital is stated as \$500,000. While the concessions run for twenty years, the joint venture arrangements run for 25 years. See <<http://www.kababankola.com/profile.html>>.

<sup>527</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 40.

<sup>528</sup> *Idem*.

<sup>529</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 41.

<sup>530</sup> *Ibid.*, paragraph 42.

<sup>531</sup> *Idem*.

<sup>532</sup> See *idem*; also paragraph 46. The previous investor in the Kababankola concessions was Ridgepointe International, run by Mr. Rautenbach.

<sup>533</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 28.

<sup>534</sup> *Idem*.

<sup>535</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 40.

<sup>536</sup> *Ibid.*, paragraph 41.

Tremalt's  
response Tremalt denies that the joint venture is exploitative and maintains that it operates on a fair commercial basis for the benefit of the Congolese people.<sup>537</sup> It furnished the Panel with, *inter alia*, the KMC Joint Venture Agreement, the Mining Convention, addenda and relevant DRC legislation.<sup>538</sup> It maintains that it complies with both its contractual obligations and DRC law.<sup>539</sup> Following an investigation of KMC by the Attorney General in the DRC prompted by Security Council Resolution 1457(2003), the Tremalt Parties state that no adverse findings were communicated to them by the Attorney General.<sup>540</sup> Furthermore, Tremalt refers to a memorandum filed by the Government of the DRC with the Panel giving a 'full and complete clearance of the KMC Joint Venture'.<sup>541</sup> Tremalt further insists that the company's relationship with Zimbabwe is in line with the 1998 Inter-Governmental Accord.<sup>542</sup>

In respect of Tremalt's defence, three points are pertinent: (1) Given the close political and commercial relationship between the DRC and Zimbabwean governments and their common interests in COSLEG, and given that the Panel alleged that a Congolese minister exerted pressure to conclude the KMC deal, these factors raise the question as to whether the DRC government would, in fact, find anything untoward in the KMC joint venture. (2) The *Guidelines* warn against prior intervention in the regulatory framework and against the seeking or accepting of exemptions:<sup>543</sup> ad hoc legislation and presidential decrees may actually be passed to reflect and legitimise prior influence. The World Bank, without referring to particular entities, has recognised this situation generally in DRC, and has supported a new mining code based on a 'non-negotiable framework' to ensure 'full transparency in the allocation of mining permits, to reduce the scope for government discretion, and to ensure a nondiscretionary treatment of all operators'.<sup>544</sup> Congolese officials have publicly recognised the need to regularise past concessions: 'In the past, concessions were sometimes granted on an ad hoc basis, and some investors took advantage of the new government and pushed them into signing agreements that were not necessarily sound.'<sup>545</sup> (3) The *Guidelines* are a supplement to national law and practice. Adherence to the *Guidelines* may necessitate that Tremalt complies with standards over and above those required in Congolese law; it does not mean that the company, by doing so, is in direct conflict with or contravenes national law.<sup>546</sup> This is precisely what is meant when the *Guidelines* are viewed as a supplement to national law and practice.

Breco  
Group's  
response The Breco Group posted a press release in response to the Panel's final report of October 2003 and the listing of Tremalt, KMC and John Bredenkamp in category II ('resolved subject to NCP monitoring compliance').<sup>547</sup> The release stated that the UN Panel's final report 'resolves all of the previously unsubstantiated allegations of unlawful activity on the part of John Bredenkamp and his group companies in the DRC.' The release continued: 'In making it clear that all matters of substance have now been resolved, and that it is "only a matter of going forward with improved controls and procedures", the Panel also accepted the voluntary undertaking of the Tremalt Parties...to adopt the OECD guidelines for Multi National Enterprises, and to submit to monitoring by the relevant National Contact Point' John Bredenkamp is cited in his capacity of KMC Chairman, describing the allegations made in previous Panel reports as 'unsubstantiated' and 'misconceived.'

<sup>537</sup> Reaction No. 25, op. cit., paragraphs 3.2 and 4.1.1.

<sup>538</sup> *Ibid.*, paragraphs 2.4 – 2.5.

<sup>539</sup> *Ibid.*, paragraph 4.1.3.

<sup>540</sup> *Ibid.*, paragraph 4.1.2 (a).

<sup>541</sup> *Ibid.*, paragraph 4.1.2 (b). The company agrees to renegotiate the KMC Joint Venture or Mining Convention if any future DRC Commission deems the former to be illegal or unfair (*idem*, paragraph 5.1).

<sup>542</sup> *Ibid.*, paragraph 3.2.

<sup>543</sup> *Guidelines*, op. cit., II. General Policies, paragraph 5.

<sup>544</sup> World Bank, 'Private Sector Development and Competitiveness Project,' *Project Appraisal Document*, Report no. 25707 ZR, 2 July 2003, p.4.

<sup>545</sup> Mr. Bene M'Poko, ambassador of the Democratic Republic of Congo to South Africa, quoted in interview with Natalie Uhlarz, 'Africa's Giant Awakes,' *Traders Magazine*, Issue 8, October 2001 - February 2002.

<sup>546</sup> *Commentary on the Guidelines*, op. cit., paragraph 2: 'While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.'

<sup>547</sup> Breco Group, 'UN Panel clears John Bredenkamp, Tremalt Limited and Kababankola Mining Company - "All matters of substance have been resolved",' Press Statement, 25 November 2003, <<http://www.breco.info/news.html>> (visited 11 February 2004).

Tremalt and John Bredenkamp	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ The Panel stated that ‘Tremalt paid the Government of the Democratic Republic of the Congo just \$400,000, but the estimated worth of the six concessions exceeds \$1 billion.’ How is the difference between the price paid for the KMC concessions and their apparent worth accounted for?</li> <li>▪ The Panel stated that ‘Tremalt insists that its operations are not linked to ZDF or the Government of Zimbabwe.’ How did the company counter or explain the Panel’s allegations that a forum was established between Tremalt and ZDF to plan strategy in the Democratic Republic of the Congo and look after the interests of Zimbabweans?</li> <li>▪ How did Tremalt respond to the Panel’s observation that the company was declaring huge losses and its assertion that revenue from joint ventures was kept ‘off the balance sheet’?</li> <li>▪ How did Tremalt explain the confidential memorandum in the Panel’s possession detailing a profit-sharing agreement with the Zimbabwean government?</li> <li>▪ How does the company account for the large losses at KMC described by the Panel?</li> <li>▪ Will Tremalt publicly explain why, in its view, the KMC concession was awarded without public tendering and bidding? How does it respond to the Panel’s allegations that individuals in COSLEG played a key role in arranging the Tremalt deal and that the negotiators were pressured by a Congolese minister to agree the joint venture?</li> <li>▪ The Panel alleged that ‘[t]he ultimate owners and beneficiaries of Tremalt are hidden behind a web of trusts and private holding companies’. Who are the ultimate owners and beneficiaries of Tremalt? If asked by the UK NCP or by other interested parties, will the company provide full details of the company’s structure, directors and share ownership?</li> <li>▪ How did Mr Bredenkamp respond to the Panel’s assertions that he was ‘far from being a passive investor’ in Aviation Consultancy Service Company and that he offered to mediate the sale of military equipment to the DRC? (See the next section below).</li> <li>▪ If asked, will Mr Bredenkamp furnish the UK NCP and other interested parties with details of the structure, ownership, directors and beneficiaries of Breco Services and provide detailed accounts? What is Mr Bredenkamp’s relationship to Raceview Enterprises and Aviation Consultancy Service Company? In what capacity, if any, has Mr Bredenkamp acted in respect of either company?</li> </ul>	<p>II.1 sustainable development</p> <p>VI.1, VI.5 channelling payments/improper advantage, “off the books” accounting</p> <p>III.3, III.4 disclosure</p> <p>IX.1.b anti-competitive practice</p> <p>II.5 exemption from regulation</p> <p>II.11 political involvement</p> <p>II.2 human rights</p>

### 3. Military procurement

#### *i. Tremalt, Aviation Consultancy Service Company (ACS), Raceview Enterprises and John Bredenkamp*

The Panel, referring to the confidential memorandum in its possession from the Zimbabwean Defence Minister, Mr. Sekeramayi, to President Mugabe in August 2002, stated: ‘Tremalt also undertakes to provide the Congolese and Zimbabwean militaries with motor vehicles, trucks, buses and cash payments as necessary. These are to be subtracted from the two countries’ part of the profit share.’<sup>548</sup> The Panel also referred to **Tremalt** procuring equipment for the ZDF and the Congolese Armed Forces.<sup>549</sup> The Panel also described **John Bredenkamp’s** investment in **Aviation Consultancy Service Company (ACS)**, which it claimed represented the defence contractors British Aerospace, Dornier of France and Augusta of Italy in Africa.<sup>550</sup> Specifically, the Panel stated that ‘[f]ar from being a passive investor in ACS as Tremalt representatives claimed, Mr. Bredenkamp actively seeks business using high-level political contacts’ and described how he offered to mediate sales of British Aerospace military equipment to the Democratic Republic of the Congo.<sup>551</sup> The Panel observed that: ‘Mr. Bredenkamp’s representatives claimed that his companies observed European Union sanctions on Zimbabwe, but British Aerospace spare parts for ZDF Hawk jets were supplied

<sup>548</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 40.

<sup>549</sup> *Ibid.*, paragraph 46.

<sup>550</sup> *Ibid.*, paragraph 56.

<sup>551</sup> *Idem.*

Panel's allegation early in 2002 in breach of those sanctions.<sup>552</sup> EU sanctions against Zimbabwe have been in place since February 2002.<sup>553</sup> The Panel refers to the military supply activities of another Bredekamp controlled company – **Raceview Enterprises** – by citing copies of invoices in its possession recording deliveries of fuels, sundries and rations worth \$3.5 million to the ZDF and aircraft spares to the Air Force of Zimbabwe worth \$3 million.<sup>554</sup>

Neither ACS nor Raceview were listed in any of the annexes of the Panel's October 2002 report. John Bredekamp was listed in annex II of the same report as a person for whom the Panel recommended a travel ban and financial restrictions, although he has subsequently been recategorised.

Bredekamp's response Mr Bredekamp, in his public reply to the Panel, makes no detailed substantive reference to military procurement transactions, other than to confirm providing the Panel with information on the activities of ACS and Raceview. A spokesperson for Mr Bredekamp, in an explanation publicly cited in a British newspaper, agreed that ACS acted as a broker for Raceview, which reached a general supply agreement with the Zimbabwean air force in August 2001.<sup>555</sup> Yet the same spokesperson maintained that the aircraft spares were legitimately exported from European manufacturers and not from BAE Systems or the UK.<sup>556</sup> Since 1999, numerous written questions have been asked in the United Kingdom House of Commons calling for information about Mr Bredekamp's role in the arms trade, his contacts with British officials and the alleged breaches of EU sanctions on Zimbabwe made by the UN Panel;<sup>557</sup> his name has been cited on many occasions in relation to these activities in debates in both the Commons and the House of Lords.<sup>558</sup> In March 2002, the US State Department barred close associates of President Mugabe from entry into the United States.<sup>559</sup> Although the US government does not publish the names of those on the list, it is understood that it includes John Bredekamp since he has been quoted as reacting to the measures taken:<sup>560</sup> 'The U.S. Department of State has tried me and judged me in a manner which affects my fundamental rights as an individual. The basis on which this judgment has been made has not been shared with me and I have been given no opportunity to be heard in this matter.'

### ***Compliance with the Guidelines***

It is essential to determine whether the alleged supply of military equipment conforms to or violates the provision to respect human rights.

The Panel asserts in respect of EU sanctions that 'British Aerospace spare parts for ZDF Hawk jets were supplied early in 2002 in breach of those sanctions.' Even if accepting John Bredekamp's arguments in respect of compliance with sanctions, it still does not automatically follow that his business conduct conformed to the *Guidelines*. Under the broad definition of a multilateral enterprise, the *Guidelines* recognise that 'according to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.'<sup>561</sup> John Bredekamp operates out of the UK and has a responsibility to ensure that his business activity in Zimbabwe and the Congo is in compliance with the *Guidelines*. In the light of the questions left publicly unanswered by the UN Panel, referred to above, further examination by the UK NCP is warranted even in the absence of any investigation launched by any other UK authorities.

Bredekamp's response In the Panel's October 2003 report, John Bredekamp is listed alongside Tremalt and KMC under category II as resolved subject to further monitoring of compliance by the UK NCP. ACS and Raceview are not listed in any category in the Panel's final report. Please see under the section on Tremalt for Mr Bredekamp's and the Breco Group's public response to the final Panel's report.

<sup>552</sup> *Idem*.

<sup>553</sup> Council Regulation (EC) No 310/2002 of 18 February 2002 concerning certain restrictive measures in respect of Zimbabwe, *Official Journal*, L 050, 21 February 2002, pp. 0004 – 0012.

<sup>554</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 56. The Panel gives a date for the former invoice of 6 July 2001.

<sup>555</sup> David Pallister and Tania Branigan, 'UK inquiry into jet parts for Mugabe,' *The Guardian*, 8 November 2002.

<sup>556</sup> *Idem*.

<sup>557</sup> See *Commons Written Answers*, 26 March 2003, col 262W in response to question 103467; 16 December 2002, col 552w in response to question 82515; 18 November 2002, col 9w in response to questions 81319 and 81320; 7 November 2002, cols 761w, 763w and 498w in response to questions 80324, 80329 and 80331; 29 October 2002, col 752w in response to question 77983; 26 February 2002, col 1151w in response to question 34903. See also House of Commons, *The Order Book*, Session 2001-02, Part 1: Written Questions for Answer on Thursday 7 November 2002, 140 (question 80330) and 229 (question 80328).

<sup>558</sup> See, for example, *Commons Hansard*, 5 March 2003, col 284WH – 286WH; 17 December 2002, col 186WH; 14 November 2002, col 138; 4 November 2002, col 10; 6 March 2002, col 301; 19 December 2001, col 280; 8 November 2001, col 408-409; *House of Lords Hansard*, 3 April 2003, col 1570 and 1575; 29 January 2003, col 1128; 1 November 2002, col 455, 461-462 and 465; 20 May 2002, col 541; 5 April 2000, col 1399.

<sup>559</sup> Zimbabwe Proclamation, 'Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Actions That Threaten Zimbabwe's Democratic Institutions and Transition to a Multi-Party Democracy,' By the President of the United States of America, 4 March 2002. Section 1(b) suspends entry into the US of 'Persons who through their business dealings with Zimbabwe government officials derive significant financial benefit from policies that undermine or injure Zimbabwe's democratic institutions or impede the transition to a multi-party democracy'.

<sup>560</sup> The International Consortium of Investigative Journalists, *The Business of War: Making a Killing*, The Center for Public Integrity, 28 October 2002, p.50.

<sup>561</sup> *Guidelines*, op. cit., I. Concepts and Principles, paragraph 3.

## ii. Avient Air

**Avient Aviation (Pvt) Ltd** is based in Harare, Zimbabwe.<sup>562</sup> It has a sister company, **Avient Ltd.**, which is registered in the UK.<sup>563</sup> The Panel refers to '**Avient Air**' in its October 2002 report and lists it in Annex III. In Mr. Smith's reply to the Panel, he responds on behalf of 'Avient' and the letterhead refers simply to 'Avient'. Avient is run by a former British Army captain, Andrew Smith, operating out of Brighmerston, Wiltshire.<sup>564</sup>

According to the Panel, Avient Air was contracted to organize bombing raids into the eastern Democratic Republic of the Congo in 1999 and 2000.<sup>565</sup> Details of the agreements relating to the bombing raids have been reproduced in press reports alongside passages from the contracts themselves: 'The crew will be advised that they will be operating along and behind the enemy lines in support of ground troops and against invading forces.'<sup>566</sup> The Panel also recorded how Avient brokered the sale of six attack helicopters to the DRC government in April 2002.<sup>567</sup> Smith denies this allegation.<sup>568</sup> The Panel referred to bank records showing several transactions between Avient and the Ukrainian arms dealer Leonid Minin.<sup>569</sup> Smith has publicly denied any relationship with Minin, stating: 'I have never met the guy, spoken to him or communicated with him.'<sup>570</sup>

Panel's  
allegation

Avient's  
response

Smith, in an interview with *The Observer* newspaper, confirmed working with the DRC and Zimbabwean governments in ferrying military equipment and personnel in the DRC: 'We have worked with the governments of Zimbabwe and the DRC who are official organised governments of countries. We certainly don't work for any rebel groups or any terrorists.'<sup>571</sup> Smith denied that his company was a private military company involved in any bombing raids, stressing that it was principally a cargo-carrying business dealing mainly with commodities like food and computers. He told *The Observer* that the Congolese 'military hierarchy' controlled the aircrews and directed operations. In his public response, reported in *The Observer*, Smith states: 'I am not denying that we carried military equipment for the end-user governments, which is a perfectly legal operation to do. We are talking about three years ago. I did check everything with the British High Commissioner at the time. We have never been involved in the sale of goods at all, nor have we carried any military hardware out of the EC, so we have not broken any UN or EU embargoes.' The EU embargo on the supply of arms to the DRC has been in force since 1993.<sup>572</sup> Are Mr Smith's publicly reported statements a direct and satisfactory response to the Panel's concerns?

Avient's  
response

The Panel described a 'close working relationship' between Oryx and Avient, providing details of payments from the former to the latter.<sup>573</sup> Oryx does not deny that it had a business relationship with Avient, but states that 'Avient is the only commercial company that operates into Mbuji-Maji that is large enough to transport mining equipment.'<sup>574</sup>

Panel's  
allegation

### *Compliance with the Guidelines*

The area of most concern under the *Guidelines* relates to the Panel's allegations that Avient contracted to organise bombing raids and brokered the sale of military hardware: at issue is whether these activities, as alleged by the Panel, can be reconciled with the provision to respect human rights. The consequences of these raids are unknown, but the public has an interest in knowing the extent of any involvement by a private company.

Avient is listed by the Panel in its October 2003 report under Category III as unresolved and requiring further investigation by the UK NCP. Avient has expressed its intention to adhere to the *Guidelines*.<sup>575</sup>

<sup>562</sup> Avient Aviation (Pvt) Ltd, Harare, is listed under Zimbabwean cargo agents/freight forwarders in an online directory: see <<http://www.azfreight.com/azworld/az28505.htm>> (visited 17 February 2004).

<sup>563</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 55.

<sup>564</sup> Antony Barnett and Paul Harris, 'How a perfect English gent in a rural idyll profits from a bloody African war,' *The Observer*, 24 November 2002.

<sup>565</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 55.

<sup>566</sup> Extract from contract with Avient, signed by President Laurent Kabila, quoted in 'How a perfect English gent,' op. cit.. It is alleged that Avient received \$30,000 a month for recruiting crew from the Ukraine to fly the aircraft behind enemy lines.

<sup>567</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 55.

<sup>568</sup> 'How a perfect English gent,' op. cit..

<sup>569</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraph 55; also paragraph 29. In a separate development, *The Observer* newspaper (ibid.) refers to bank records it obtained detailing a \$100,500 payment made by one of Minin's associate companies, the British Virgin Islands registered Engineering & Technical, to Avient on 22 June 1999.

<sup>570</sup> 'How a perfect English gent,' op. cit..

<sup>571</sup> *Idem*.

<sup>572</sup> See Council Statement on Zaire, Copenhagen, July 7, 1993, 93/148.

<sup>573</sup> The Panel indicates that it has a record of a payment of \$35,000 from Oryx's account at Bank Belgoise to Avient Ltd in UK (*UN Panel Report*, 16 October 2002, op. cit., paragraph 55).

<sup>574</sup> <<http://www.oryxnaturalresources.com/UNissues/>>.

<sup>575</sup> Reaction No. 35, written response from Avient to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..



<b>Avient</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Has Avient responded in detail to the UK NCP over the Panel’s allegation that it brokered the sale of attack helicopters to the DRC?</li> <li>▪ The Panel alleged that Avient contracted to organise bombing raids in the DRC. If correct, what was Avient’s precise involvement in these bombing raids? What did the company know about how its equipment and staff were being used?</li> <li>▪ If asked, will Avient furnish the UK NCP with details of the structure, ownership, directors and beneficiaries of all Avient companies, including those of Avient Aviation (Pvt) Ltd?</li> </ul>	<p>II.2 human rights</p> <p>III.3, III.4 disclosure</p>

## C. The Banking Sector: Belgolaise, Banque Bruxelles Lambert (BBL), and SG Hambros

‘All illegal activities in the eastern Democratic Republic of the Congo, primarily the commercial and trade operations, utilize the financial network to some extent.’<sup>576</sup>

**Belgolaise Bank**, which is part of the Belgian, **Fortis Bank Group**, has a strong presence on the ground in the DRC and works closely with the **Banque Commerciale du Congo (BCDC)**.<sup>577</sup> In the UN Panel’s October 2002 report Belgolaise was listed in Annex 3. No allegation was made in relation to the parent company, Fortis Bank. Unless explicitly stated the Panel’s allegations concerning Banque Belgolaise and other banks are taken verbatim from a document signed by Ambassador Kassem (the Chair of the Panel) dated 8 May 2003 (*Griefs formulés à l’égard de la Banque Belgolaise*), which is cited in the Belgolaise’s public response to the Panel. Belgolaise’s response contains public references to the activities of a number of other banks cited in the UN Panel reports.

Panel’s  
allegations

- ‘Belgolaise Bank is the holder of accounts for members of the elite network from Kinshasa, i.e. George Forrest and his companies and Oryx Natural Resources.’<sup>578</sup>
- ‘MIBA accounts held by Belgolaise Bank have been used to conduct financial transactions involving the purchase of armaments by the Government of the DRC.’<sup>579</sup>
- ‘through a network of correspondent banks [namely the Banque Internationale de Credit – BIC and the Bank of Kigali], Belgolaise Bank facilitates financial transactions for the elite networks of Uganda and Rwanda that are also engaged in the exploitation of natural resources and other forms of wealth of the RDC (sic).’<sup>580</sup>

The Panel queried in a document attached to Ambassador Kassem’s 8 May 2003 document,

- Belgolaise’s extension of a credit facility to COMIEX, on behalf of the Banque Commerciale du Rwanda in Kigali via its correspondent, Banque Bruxelles Lambert (BBL).<sup>581</sup>

Belgolaise’s public response also repeats the Panel’s claim that:

- ‘the Rwandan elite network (as identified in the Panel’s Report of 16 October 2002) uses the banks operating in the Kivu’s that have a relationship with the Banque de Kigali in which the Belgolaise is a major shareholder.’<sup>582</sup>

<sup>576</sup> UN Panel Report, 12 April 2001, op. cit., paragraph 77.

<sup>577</sup> In a memorandum dated 22 May 2003 in response to the UN Panel’s allegations, Belgolaise Bank (and its parent Fortis Bank) sought to refute ‘point by point’ all of the accusations that had been leveled by the Expert Panel. See Reaction No.23, written statement from Belgolaise Bank, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>578</sup> Griefs formulés à l’égard de la Banque Belgolaise, Document du 8 mai 2003 de l’Ambassadeur Mahmoud Kassem, cited in Belgolaise’s reaction to the UN Panel, Reaction No 23, op. cit., section V B) 1.

<sup>579</sup> *Idem*.

<sup>580</sup> *Ibid.*, section V B) 2.

<sup>581</sup> Belgolaise Bank, Reaction No. 23, op. cit..

<sup>582</sup> Griefs formulés à l’égard de la Banque Belgolaise, Document du 8 mai 2003 de l’Ambassadeur Mahmoud Kassem, cited in Belgolaise’s reaction to the UN Panel, Reaction No 23, op. cit..

## 1. Accounts of ‘members of the elite network from Kinshasa’

‘Belgolaise Bank is the holder of accounts for members of the elite network from Kinshasa, i.e. George Forrest and his companies and Oryx Natural Resources.’<sup>583</sup>

Panel’s  
allegation

### *i. Belgolaise: Gécamines and George Forrest Companies’ Accounts*

In Ambassador Kassem’s document, the Panel questioned three transactions from a joint account held by the heavily indebted State-owned mining conglomerate, Gécamines, and Entreprise Générale Malta Forrest (EGMF) which were transferred into private company accounts. In its reply Belgolaise defended the three payments, which transferred a total of \$1,344,644.54 out of the joint account to the account of George Forrest Afrique (GFIA) and that of Entreprise Générale Malta Forrest (EGMF) firstly on the grounds that the Forrest Group was a long established client of the bank.<sup>584</sup> (See the section on the Forrest Group above for a description of the company structure).

Belgolaise’s  
response

Belgolaise explained that one of the payments related to the Luiswishi project, a joint venture between Gécamines and EGMF. Each month signed instructions from both parties authorised payments to be debited from the joint account and transferred to EGMF’s account to cover ‘operational costs and to share profits’ from the project. The bank claims that it had no reason to be suspicious given its knowledge of the customer and the absence of any objection by the Luiswishi Management Committee to these payments.

Belgolaise’s  
response

Two instructions to the Bank authorised the transfer of the payments of \$500,000 and \$422.322.27 respectively, into the account of GFIA. Belgolaise maintained that these were earmarked for ‘National Reconstruction’ programmes in the DRC. A third instruction concerned the transfer of \$422.322.27 into EGMF’s account. Belgolaise explained that as part of Gécamines’ contribution to the Congolese State budget, President Kabila and his government, had authorised a programme of national reconstruction, which was to be financed out of Gécamines’ share of the royalties from the ore body (in 1999) and the profits (in 2000).<sup>585</sup> GFIA collected in its own account the amounts of money destined for this National Reconstruction and which were used by the company for carrying out public works for the Congolese State. Belgolaise stated that it was aware that another Forrest Group company, EGMF, often carried out public works in the DRC either after ‘an open bidding process or after designation’ because it was the only company that had the necessary technical and financial means to undertake such projects.<sup>586</sup> ‘These orders for the transfer seemed therefore to be completely in accordance with the activities and projects of our clients and did not lead to any suspicions on our part. All three bank instructions were jointly signed by both Gécamines and EGMF.’<sup>587</sup>

Belgolaise’s  
response

The NCP might wish to examine whether Belgolaise was aware of a potential conflict of interest given that the Luiswishi agreement, was signed while George Forrest was both the Chairman of the Forrest Group and of Gécamines. An arrangement that was particularly beneficial to the Forrest Group companies might be expected to arouse concern about potential anti-competitive dealing. Furthermore, as noted by the Belgian Senate, the unorthodox method of payment selected to cover works of National Reconstruction out of Gécamines share of the profits from the Luiswishi mine appears to have established an extra-budgetary fund outside the normal DRC government budgetary process. (For further details on the Luiswishi agreement see the Forrest Group Section, below). In such circumstances would not best banking practice suggest that Belgolaise should have conducted due diligence on these transactions?

### *ii. Belgolaise: MIBA accounts*

‘MIBA accounts held by Belgolaise Bank have been used to conduct financial transactions involving the purchase of armaments by the Government of the DRC.’<sup>588</sup>

Panel’s  
allegation

The Panel queried a payment order for the sum of \$ 1, 500,000 from the account of the Société minière de Bakwanga (MIBA), the State-owned Diamond Mining Company, to a **Banque Centrale du Congo** account held at the **Union de Banque Suisse** in Zurich.<sup>589</sup> Belgolaise expressed its belief that the payment was to cover tax liabilities for MIBA’s commercial activities.<sup>590</sup>

Belgolaise’s  
response

<sup>583</sup> Ibid., section V B) 1.

<sup>584</sup> Ibid., section V B) 1.1.

<sup>585</sup> Protocole d’Accord, entre La Générale des Carrières et des Mines et L’Entreprise Générale Malta Forrest, Dans le cadre de développement du projet Luiswishi, June 2001 paragraph 6.2.

<sup>586</sup> Reaction No. 23, op. cit..

<sup>587</sup> Grievs formulés a l’égard de la Banque Belgolaise, Document du 8 mai 2003 de l’Ambassadeur Mahmoud Kassem, cited in Belgolaise’s reaction to the UN Panel, Reaction No 23, op. cit., section V B) 1.2.

<sup>588</sup> Ibid., section V B) 1.

<sup>589</sup> *Idem*.

<sup>590</sup> Reaction No 23, op. cit., section V, B) 1.5.

In the Panel's November 2001 report it was noted:

Panel's  
concern

In 1999, over 30 per cent of the first semester earnings of MIBA were transferred to Government accounts. Those transfers were vaguely labelled 'payments to fiscal accounts' (*paiements acomptes fiscaux*). It is not clear who within the Government of the Democratic Republic of the Congo controls these accounts or what the funds transferred to them are used for. Another 11 per cent of the earnings from that period were funnelled directly to the Congolese armed forces. Other transfers from MIBA sales are described in official documents as 'deductions for the war effort', amounting to tens of millions of dollars. Testimony from very credible sources corroborates what these documents suggest: a pattern over the past three years of diverting a hefty percentage of MIBA earnings to high-level government officials for their personal benefit, as well as to cover war or military-related expenses.<sup>591</sup>

Panel's  
allegation

In the same report, the Panel analysed the way gems were being embezzled and smuggled out of the Congo through South Africa for sale in third countries. It alleged that 'much of the company's most valuable diamond production is being embezzled and sold for personal profit by high level MIBA and possibly other Government officials'.<sup>592</sup> Congolese officials were also said to regularly skim millions of dollars off the proceeds of MIBA sales: 'In some cases, the funds were directly transferred from the company's Brussels account at the Banque Belgoise'.<sup>593</sup> President Joseph Kabila, following the release of the Panel's third report, issued a decree stating that Jean Charles Okoto, the former chief executive officer for MIBA and the former Governor of Kasai Oriental Province had been suspended. Mr Okoto had held his post at MIBA since 1998.<sup>594</sup> According to the Belgian Senate, in the 1990s the amount of diamonds smuggled out of the DRC was three times greater than that officially exported and these illegal exports represented six times the total budget of the Congo.<sup>595</sup>

The diamond figures of [the DRC], which count some 750,000 diggers, are indeed most intriguing. In 2002, DRC's informal sector, where goods are valued at about \$ 30 per carat, was worth \$ 317 million, while production from MIBA and Sengamines in the formal sector, with industrial quality goods valued at around \$ 14 – 13 per carat, was \$ 120 million, thus bringing the total value of official exports to \$ 437 million. Last year, official exports had jumped to \$ 642 million, with the informal sector being worth \$ 520 million – a significant increase from the year before. While the value of exports increased by about 50%, the official exports in carats rose by only about 10%.<sup>596</sup>

### iii. *Belgoise and Hambros: Oryx Natural Resources account*

Panel's  
allegation  
Belgoise's  
response

Belgoise responded to questions from the Panel about an account opened on behalf of Oryx Natural Resources. It stated that it had followed compliance procedures and the 'know your customer' principle. On 20 March 2001 **Hambros Bank** in London had written to Belgoise confirming that Oryx Natural Resources was a 'properly constituted private company respectably introduced to us in May 1999'.<sup>597</sup> SG Hambros is an investment led private bank providing a comprehensive wealth management service. It has offices in Bahamas, Gibraltar, Guernsey, Jersey and London. It is part of the private banking division of the **Société Générale Groupe**, which represents one of the largest banks in the euro zone.<sup>598</sup> In the UN Panel's October 2002 report, Hambros was listed in Annex III in its final report it is listed in Category V as one of the companies that failed to make a response to the UN before the deadline expired. (For further information about the activities of Hambros' client see the section on Oryx Natural Resources).

Belgoise's  
response

According to Belgoise, the movements registered in the Oryx account appeared to fit with the stated activities of the company.<sup>599</sup> The UN Panel alleges that Oryx Natural Resources 'is being used as a front for ZDF (Zimbabwean Defence Forces) and its military company, OSLEG'.<sup>600</sup> In its April 2001 report, the UN Panel had stated how President Laurent Kabila had given the ZDF various mining concessions as barter payment for its military support. Oryx Natural Resources, which created a joint venture, Oryx Zimcon, was invited to provide the needed financial and technical expertise. 'Instead of selecting one of the various mines belonging to COSLEG [which represented senior Zimbabwean

<sup>591</sup> *UN Panel Report*, November 2001, paragraph 66.

<sup>592</sup> *Ibid.*, paragraph 37.

<sup>593</sup> *Idem.*

<sup>594</sup> UN Integrated Regional Information Network (IRIN), 12 November 2002. IRIN is part of the UN Office for the Coordination of Humanitarian Affairs.

<sup>595</sup> *Belgian Senate Inquiry*, 2.4. Financement de la guerre par le contrôle et l'accaparement des surplus économiques générés par l'exploitation et la commercialisation des ressources: concept de pillage.

<sup>596</sup> Chaim Even-Zohar, *Diamond Intelligence Briefs*, February 24, 2004 Vol.19 No. 404.

<sup>597</sup> Reaction No 23, op. cit., paragraph V, B) 1.3.

<sup>598</sup> <<http://www.sghambros.com>>.

<sup>599</sup> Reaction No 23, op. cit., paragraph V, B) 1.3.

<sup>600</sup> *UN Panel Report*, 16 October 2002, op. cit..

and Congolese military interests] to start its investment, Oryx Zimcon wanted the best mines which initially belonged to MIBA'.<sup>601</sup> (For further details on COSLEG see the section on Oryx Natural Resources).

It would be pertinent to ask Hambros and Belgolaise to clarify how they applied best practice in their due diligence in ascertaining who Oryx's ultimate beneficiary shareholders were. (See the section on Oryx Natural Resources). Belgolaise explained that it decided to put an end to its relations with Oryx Natural Resources after the publication of the third report of the UN Panel of Experts on 16 October 2002.<sup>602</sup> But what due diligence steps did Belgolaise or Hambros take when the Panel first expressed its public disquiet about Oryx's links to the Congolese and Zimbabwean military in its report of April 2001?

Belgolaise's  
response

## 2. Relations with Correspondent Banks in the DRC

'Through a network of correspondent banks [namely the Banque Internationale de Credit – BIC and the Bank of Kigali], Belgolaise Bank facilitates financial transactions for the elite networks of Uganda and Rwanda that are also engaged in the exploitation of natural resources and other forms of wealth of the RDC [sic].

Belgolaise, among at least two other internationally operating banks, had a relationship with Banque Internationale de Credit (BIC) through BIC offices located in Butembo and Beni (northeastern) DRC.

Panel's  
allegations

The Panel learned that members, companies and associates of the Ugandan elite network (as identified in the Panel's report of 16 October 2002) had used BIC to concentrate the wealth they had obtained through their commercial activities involving the exploitation of natural resources of the DRC'.<sup>603</sup>

The Panel expressed concern that all illegal activities in the eastern DRC utilise to some extent the financial networks.<sup>604</sup> In its response, Belgolaise stated that in common with all banks, it maintains relations with correspondent banks. Correspondent banking is 'the provision of a current or other liability account and related services to another institution used to meet its cash clearing, liquidity management short-term borrowing or investment needs'.<sup>605</sup> Belgolaise vehemently denies ever having used its relationship with the correspondent banks to facilitate transactions that have helped financial elites concentrate the wealth acquired through the exploitation of the DRC's natural resources. It stated that the correspondents have been used exclusively to conduct operations required by Belgolaise Bank or its clients: 'Our bank can in no way be held responsible for relations between these banks and their own clients, which might give rise to concern'.<sup>606</sup> Belgolaise admits that since 1998 it had maintained a relationship with the **Banque Internationale de Credit (BIC)** but pointed out that BIC's capital is entirely Congolese and its principal bankers are Barclays Bank and ABN AMRO Bank. ABN AMRO was not cited in the UN Panel's October 2002 report but Barclays was listed in Annex III (see below). There is no record of any correspondence between ABN AMRO and the Panel.

Belgolaise's  
response

The Belgian Senate in its conclusion provides a graphic description of the human costs of the conflict in rebel controlled areas:

The mortality rate is dramatically high in particular along the front lines, in the East and the North of the DRC, particularly among children under five years of age. In these zones, it is truly possible to speak of a humanitarian catastrophe and the mortality rates are often the highest on the planet. These levels of mortality are intolerable.

Along the front lines and in certain 'martyr' towns, like Bunia, Basankusu, Kindu and Chabunda... 10 per cent of the population and a quarter of children died each year. The scramble for coltan, diamond, cobalt and gold, as well as the requisitioning of workers by armed troops have profoundly destabilised the agrarian economy and the subsistence capacity of millions of families.<sup>607</sup>

<sup>601</sup> *UN Panel Report*, 12 April 2001, op. cit.. See Oryx Natural Resources Section: 'According to the Panel, the role of OSLEG was to protect, defend, and support logistically the development of commercial ventures through COSLEG: 'the Zimbabweans supplied the muscle to secure the commercial activities.'

<sup>602</sup> Reaction No 23, op. cit., paragraph V, B) 1.3. Belgolaise stated 'The transfer of USD 35,000 to Avient Ltd was made from Oryx's account on 16 July 2001 and not in September 2001 as claimed by the Panel. As it concerned a payment to an air transport company this payment corresponded to an activity that the bank had no reason to suspect.' Belgolaise did not notice any unusual transactions.

<sup>603</sup> Grieffs formulés à l'égard de la Banque Belgolaise, Document du 8 mai 2003 de l'Ambassadeur Mahmoud Kassem, cited in Belgolaise's reaction to the UN Panel, Reaction No 23, op. cit..

<sup>604</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 77.

<sup>605</sup> <<http://www.wolfsberg-principles.com/corresp-banking.html>>.

<sup>606</sup> Reaction No 23, op. cit., paragraph V, B) 2.1.

<sup>607</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, I. Constatations générales et recommandations, 6.2-6.3.

Belgolaise's response Panel's concern

Belgolaise states that BIC opened an account with them in November 2001 but all the contacts regarding this account took place exclusively in the BIC headquarters in Kinshasa: 'As regards the agencies in the east of the Congo, the interventions of the Belgolaise Bank have consisted exclusively between 1998 and 2002 in the opening or confirmation of lines of credit and the negotiations of the same, concerning for the most part the export of coffee and occasionally timber and in favour of companies active in these markets. The contacts concerning these credits also took place exclusively in the headquarters of BIC in Kinshasa. Our duty of professional discretion does not permit us to provide more details about these operations without the agreement of the companies concerned.'<sup>608</sup> Belgolaise insists that there was nothing in the nature of these relations to awaken its suspicions. The UN Panel has expressed its concern about how the network controlled by the Uganda People's Defence Forces (UPDF) and their associated rebel militias have used their economic influence to control the banking sector. It alleged that UPDF or militias associated with individual UPDF officers have established physical control over areas containing coltan, diamonds, timber and gold. 'They have established authority in major urban and financial centres such as Bunia, Beni and Butembo'.<sup>609</sup> The Panel's concern was that control of the banking system allowed the network to further control access to operating capital for commercial operators in the area.

Economically speaking, this region has become a captive region, where the types of commercial ventures are manipulated and the viability of local businesses is controlled. Furthermore the flow of money is regulated by the network through currency trading and the widespread introduction of counterfeit Congolese francs.<sup>610</sup>

Barclay's response

**Barclays Bank** is registered in the United Kingdom. After being listed in Annex III Barclays Bank took action. In its response to the Panel, Barclays stated that it had acknowledged the issue raised by the Panel after an internal review and had 'taken appropriate action to address the situation'.<sup>611</sup> Barclays Bank was placed in category I ('resolved') in the Panel's final report. The Financial Action Task Force on Money Laundering (FATF) is a body established by the G-7 Summit in Paris in 1989.<sup>612</sup> It sets minimum standards to guide anti-money laundering legislative efforts. FATF membership imposes an obligation to enact appropriate national legislation to curb money laundering.<sup>613</sup> Under the agreed FATF recommendations, if a financial institution 'suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing', it should be required directly by law or regulation, to report promptly its suspicions to the financial intelligence unit.<sup>614</sup>

### 3. Belgolaise's Joint Venture with the Banque de Kigali

The Panel also claimed that:

Panel's allegation

'the Rwandan elite network (as identified in the Panel's Report of 16 October 2002) uses the banks operating in the Kivu's that have a relationship with the Banque de Kigali in which the Belgolaise is a major shareholder.'<sup>615</sup>

Belgolaise's response Panel's allegation

Belgolaise admits that it owns 50 per cent of the shares of the **Banque de Kigali**. It denies that the Banque de Kigali has any relation with banks or banking subsidiaries in Kivu, other than subsidiaries of the **Banque Commerciale du Congo**. The relationship of the Banque de Kigali with the branches of the Banque Commerciale du Congo in Kivu 'are purely those of correspondent bank, the Banque de Kigali does not in any way whatsoever involve itself in managing them'.<sup>616</sup> The Panel states that when President Laurent Desire Kabila came to power he created the **Banque de commerce et du développement (BDCD)**. BDCD has 'the peculiarity of having as shareholders Tristar, COMIEX and Alfred Kalissa of the Banque de commerce, du développement et d'industrie (BCDI)'.<sup>617</sup> Both COMIEX (outlined above) and Tristar were listed in Annex I of the Panel's October 2002 report.

<sup>608</sup> Reaction No 23, op. cit., paragraph V, B) 2.2.

<sup>609</sup> *UN Panel Report*, 16 October 2002, op. cit., paragraphs 101 – 106.

<sup>610</sup> *Ibid.*, paragraph 106.

<sup>611</sup> Reaction No.8, written statement from Barclays Bank, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>612</sup> Although the FATF Secretariat is based at the OECD, the FATF itself being an independent international body, is not part of the OECD. See <<http://www.fatf-gafi.org/>>.

<sup>613</sup> FATF members: Argentina; Australia; Austria; Belgium; Brazil; Canada; Denmark; European Commission; Finland; France; Germany; Greece; Gulf Co-operation Council; Hong Kong, China; Iceland; Ireland; Italy; Japan; Luxembourg; Mexico; Kingdom of the Netherlands; New Zealand; Norway; Portugal; Russian Federation; Singapore; South Africa; Spain; Sweden; Switzerland; Turkey; United Kingdom; United States.

<sup>614</sup> FATF, Recommendation 13.

<sup>615</sup> Grievs formulés à l'égard de la Banque Belgolaise, Document du 8 mai 2003 de l'Ambassadeur Mahmoud Kassem, cited in Belgolaise's reaction to the UN Panel, Reaction No 23, op. cit..

<sup>616</sup> Reaction No 23, op. cit., paragraph V, B) 3.

<sup>617</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraphs 77-78.

Alfred Khalissa is both the Chairman of the BCDI in Kigali, Rwanda but also a shareholder and officer of the Banque de commerce et du développement (BDCD) in Kinshasa. In a meeting with the Panel Mr Khalissa confirmed that Tristar investments SARL holds 13 per cent of the shares in BCDI. Tristar according to the Panel had close ties to the Rwandan Patriotic Front (RPF).<sup>618</sup> The Panel alleges that the Rwanda has used BCDI to pay the Rwandan Patriotic Front's suppliers.<sup>619</sup> Panel's allegation

According to the Panel, the bulk of coltan exported from the eastern DRC has been mined under the direct surveillance of Rwandan Patriotic Front (RPA) mining *détachés* and evacuated by aircraft from airstrips near mining sites directly to Kigali or Cyangugu. 'A variety of forced labour regimes are found at sites that have been managed by RPA mining *détachés*, some for coltan collection, some for transport, others for domestic services. Many accounts report the widespread use of prisoners imported from Rwanda who worked as indentured labour.'<sup>620</sup>

Human Rights Watch report that 'the complex mix of local, national and regional conflicts also exists in the Kivus, where civilians have suffered from massacres and other grave abuses'.<sup>621</sup> Such a situation should prompt entities with commercial or financial links to a conflict zone to exercise particular care. Failure to do so may entail a breach of the human rights provision of the *Guidelines*.

#### 4. Relations with the Banque Bruxelles Lambert (BBL)

The Panel queried in a document attached to Ambassador Kassem's 8 May 2003 document,

Belgolaise's extension of a credit facility to COMIEX, on behalf of the Banque Commerciale du Rwanda in Kigali via its correspondent, Banque Bruxelles Lambert (BBL).<sup>622</sup>

Panel's allegation

**BBL**, one of Belgium's major banks, is part of the Dutch **ING** group. It is listed in Annex III of the Panel's October 2002 report. In April 2003 BBL switched to the ING trading banner. ING Business Principles state that it 'attaches paramount importance to upholding its reputation.' The following fundamental beliefs determine conduct throughout ING. 'ING is expressly committed to integrity and consistently high ethical standards of conduct in all our business transactions'. In its Operating Principles ING states that it expects all employees 'to avoid doing business with any individual, company or institution if that business is connected with activities which are illegal or which could be regarded as unethical.'<sup>623</sup>

The Panel questioned Belgolaise about two credit notes for BEF 1.919.281 (\$ 45,053. 54\*) and BEF 259.560 (\$6,092.9\*) respectively raised on the **Banque Commerciale du Rwanda** in Kigali through its correspondent the Banque Bruxelles Lambert (BBL) for the account of COMIEX<sup>624</sup>. Panel's allegation

BBL, according to the UN Panel handled some of the financial transactions of Mrs Aziza Kulsum Gulamali, the RCD-Goma backed general manager of SOMIGL. It is alleged by the Panel that Mrs Gulamali was involved in gold, coltan and cassiterite dealing in territory controlled by the Rwandans.<sup>625</sup> (See the section on Stark/Masingiro/Cogecom). Panel's allegation

According to Belgolaise the first credit was on the order of ENZYMASE in favour of ENRA to cover the export of a papaya based product. The second credit concerns an order from BUDIMEX in favour of ENRA to cover the export of coffee. The bank confirms that the three companies belong to Mr Bemba Saolona's Group and are long standing clients of our bank.<sup>626</sup> (Mr Bemba Saolona is the head of the Groupe Bemba and Scibe Airlift and was one of the leading Congolese businessmen in the Mobutu era. He is the father of Jean Pierre Bemba a former rebel leader of the MLC who is now a member of the Transitional Government where he holds the post of Vice President for Economic Affairs). These clients gave Belgolaise instructions to issue payments in favour of COMIEX according to agreements that had been reached. The bank defends its role in carrying out these transactions by asserting that COMIEX was not a client and, at the time, Belgolaise did not have any negative information concerning the company. There was therefore no reason for it not to comply with its clients' instructions.<sup>627</sup> Belgolaise's response

<sup>618</sup> Ibid., paragraph 197.

<sup>619</sup> Ibid., paragraph 130.

<sup>620</sup> UN Panel Report, 16 October 2002, op. cit., paragraph 15.

<sup>621</sup> Human Rights Watch, 'Ituri: "Covered in Blood"', op. cit., p.2.

<sup>622</sup> Belgolaise Bank, Reaction No. 23, op. cit..

<sup>623</sup> <<http://www.ing.com/ing>>.

<sup>624</sup> Based on conversion rate for 2001 = 42.69 BEF: \$ 1.

<sup>625</sup> UN Panel Report, 12 April 2001, op. cit., paragraph 92; also 'Trafic de coltan: la justice suisse blanchit une commerciante suisse', *Le Temps*, 4 August 2003, which reported that an investigation by the Swiss authorities into Mrs Gulamali's alleged involvement in money-laundering activities to the benefit of the RCD-Goma rebel movement was about to be dropped because of insufficient evidence.

<sup>626</sup> Reaction No 23, op. cit., paragraph V, B) 4.

<sup>627</sup> Ibid.

BBL is one of the companies listed in category III for further investigation by the Belgian National Contact Point. It is unclear whether BBL responded to the Panel or whether it requested that its response be kept confidential.

Panel's allegation Belgoise claims it did not have any reason to be suspicious about COMIEX yet according to both the UN Panel and the Belgian Senate COMIEX was known to have links to the Congolese military and that it held shares in Sengamines (a joint venture with the Zimbabwe Defence Forces containing the richest diamond deposits of the MIBA holdings), which were used allegedly to generate funds for the Kinshasa government or its military apparatus.<sup>628</sup> According to the UN Panel COMIEX, was 'owned by the late President Kabila and some of his close allies, such as Minister Victor Mpoyo'.<sup>629</sup> COMIEX 'facilitates the Zimbabwean commercial activities in the Democratic Republic of the Congo'.<sup>630</sup>

COMIEX-Congo is a State-private venture that acts as the Government's main platform for commercial deals and is reportedly linked to the Presidency (i.e. that of Laurent Desire Kabila) and senior government ministers.<sup>631</sup>

Panel's allegation The UN Panel also raised concerns about a transaction in which \$ 3.5 million was transferred from the Banque Belgoise through Citibank to BCDC for payment to COMIEX.<sup>632</sup>

In the conclusions of the Belgian Senate report it is stated that according to documents obtained during its commission of inquiry, MIBA received orders from the Kinshasa government to issue payments to certain arms manufacturers. MIBA also requested an unnamed Belgian bank and a Swiss Bank to effect a payment to an arms dealer. In its recommendations, the Belgian Senate called on the Belgian Government and the UN to investigate whether the MIBA account in the Belgian Bank did indeed transfer money in order to obtain arms and if so how much money was involved and for what precise ends.<sup>633</sup> It is not known what action, if any, the Belgian authorities have taken.

### ***Compliance with the Guidelines***

The *Guidelines* acknowledge that enterprises should 'contribute to economic, social and environmental progress with a view to achieving sustainable development' (II, 1); 'support and uphold good corporate governance principles and develop and apply good corporate governance practices' (II, 6); and, 'adopt financial and tax accounting and auditing practices that prevent the establishment of 'off the books' or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate' (VI, 5).

Although there is no explicit reference in the *Guidelines* to existing anti-money laundering regulations nor to the Basle Core Principles, it is accepted that such regulations and sector specific codes are relevant to interpreting the broader provisions of the *Guidelines*. The Preface makes clear that 'the Guidelines both complement and reinforce private efforts to define and implement responsible business conduct. (Paragraph 7). It also refers to the ways in which 'Governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted' (Paragraph 8). It would be important to establish whether the banks were sufficiently diligent in their scrutiny of transactions to and from the DRC during the period.<sup>634</sup> 'Banking supervisors must require the local operations of foreign banks to be conducted to the same high standards as are required of domestic institutions and must have powers to share information needed by the home country supervisions of those banks for the purpose of carrying out consolidated supervision.'<sup>635</sup>

The Basle Core Principles for Effective Banking Supervision state that 'banking supervisors must practise global consolidated supervision over their internationally active banking organisations, adequately monitoring and applying appropriate prudential norms to all aspects of the business conducted by these banking organisations worldwide, primarily at their foreign branches, joint ventures and subsidiaries'.<sup>636</sup> The Wolfsberg Group is an association of twelve global banks, which aims to develop financial service industry standards and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies.<sup>637</sup>

<sup>628</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 38.

<sup>629</sup> *UN Panel Report*, 12 April 2001, op. cit., paragraph 30 and *UN Panel Report*, 13 November 2001, op. cit., paragraph 82.

<sup>630</sup> *UN Panel Report*, 13 November 2001, op. cit., paragraph 18.

<sup>631</sup> *Ibid.*, paragraph 39.

<sup>632</sup> *Ibid.*, paragraph 94.

<sup>633</sup> *Belgian Senate Inquiry*, op. cit., III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3. Le diamant, 3.1. Le secteur du diamant, 3.1.7.

<sup>634</sup> *Core Principles for Effective Banking Supervision*, *Basle Committee on Banking Supervision* [hereafter '*Basle Core Principles*'] (Basle, 1997). The Principles are intended to serve as a basic reference for supervisory and other public authorities worldwide to apply in the supervision of the banks within their jurisdictions. 'Banking supervisors must determine that banks have adequate policies, practices and procedures in place, including strict 'know-your -customer' rules, that promote high ethical and professional standards in the financial sector and prevent the bank being used, intentionally or unintentionally, by criminal elements.' (Principle 15).

<sup>635</sup> *Basle Core Principles*, op. cit., Principle 25.

<sup>636</sup> *Ibid.*, Principle 23.

<sup>637</sup> The Wolfsberg Group are: ABN AMRO NV; Santander Central Hispano S.A; Bank of Tokyo Mitsubishi, Ltd; Barclays; Citigroup; Credit Suisse Groupe; Deutsche Bank A.G.; Goldman Sachs; HSBC; J.P. Morgan Chase; Société Générale; UBS A.G. <<http://www.wolfsberg-principles.com/>>.

Barclays Bank and Hambros as part of the Société Générale Groupe, are members of the Wolfsberg Group of International Financial Institutions, and have endorsed the Wolfsberg Anti-Money Laundering Principles, which were first published in October 2000.<sup>638</sup> Hambros might have been expected, given the Wolfsberg Anti-Money Laundering Principles, to ascertain who had control over Oryx's shareholding in Sengamines mine. The term 'beneficial ownership' reflects a recognition that a person in whose name an account is opened with a bank is not necessarily the person who ultimately controls such funds. The focus of anti-money laundering guidelines needs to be on the person who has this ultimate level of control or entitlement.

In November 2002, the Wolfsberg Anti-Money Laundering Principles for Correspondent Banking were released. Barclays and Belgolaise might be asked how in relation to their correspondent banks, they applied the FATF or Wolfsberg Principles for Correspondent Banking. These recommend a higher level of due diligence in cases when, for example, a correspondent banking client is a 'politically exposed person' or located in a country where other risk factors are present.<sup>639</sup>

Belgolaise has made a commitment to handle all its transactions 'in strict compliance with the business ethics and codes of conduct prevailing in international banking' despite the fact that 'this hampers the finalisation of a number of operations in the current environment of an economy that is finding its feet'.<sup>640</sup> Belgolaise has indicated its commitment to supporting the DRC's long-term development efficiently and effectively.<sup>641</sup> In its Corporate Governance Statement, Belgolaise makes explicit reference to its efforts to prevent money laundering and all types of fraud by paying special attention to the selection of customers and monitoring the origin and destination of money transfers.<sup>642</sup> Belgolaise acknowledges that almost 90 per cent of the DRC's economy is based on the unofficial economy, which makes the DRC a challenging environment in which to operate: 'Most transactions bypass the standard monetary circuits and this is detrimental to the tax revenue which the state needs'.<sup>643</sup> In the UN Panel's final report Belgolaise was listed in category 1 ('resolved').

In relation to the payments from the joint Gécamines/EGMF account to Forrest company accounts a number of questions naturally arise. Does the agreement over national reconstruction and the designation of one of the Forrest companies to carry out the works (a decision apparently made when Mr Forrest was also the Managing Director of Gécamines<sup>644</sup>) not raise a question regarding the Forrest Group's compliance with the provisions relating to Competition (Chapter IX) and those related to Chapter VI, I of the *Guidelines* which states that: '[Enterprises should] not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use sub-contracts, purchase order or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.' If so, is it not fair to expect Belgolaise to have exercised greater diligence as might be required by the policies on good corporate governance (Chapter II, 6) and its responsibilities to encourage business partners to apply principles of corporate conduct compatible with the *Guidelines* (Chapter II, 10)? With regard to the Luiswishi contract, the Belgian Senate concluded that the unfavourable terms had deprived Gécamines of royalties and its share of the profit.<sup>645</sup> It found the methods adopted by the DRC government to finance works of National Reconstruction surprising.<sup>646</sup> The National Contact Point should examine what steps Belgolaise took to ascertain the propriety of that arrangement. It would also be pertinent to enquire whether Belgolaise took steps to verify that the public works in the national reconstruction programme were properly costed and subject to an independent audit.

The UN Panel has frequently described the appalling conditions in the eastern DRC where there has been mass population displacement and repeated outbreaks of violent armed conflict. 'Children, are being conscripted and used as forced labour in the extraction of resources by some military forces in different regions.'<sup>647</sup> It has condemned the excessive taxes, revenue siphoning, seizure of local resources, forced requisitioning of assets and the deepening control over general trade by foreign and local military. And it has noted that almost no revenues are allocated for public services such as utilities, health services and schools.<sup>648</sup> Such conditions place an additional responsibility on financial intermediaries to exercise particular care in carrying out their activities, in scrutinising transactions and in monitoring the conduct and impact of correspondents operating in conflict areas.

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<sup>638</sup> <<http://www.wolfsberg-principles.com>>.

<sup>639</sup> <<http://www.wolfsberg-principles.com/corresp-banking.html>>.

<sup>640</sup> *Belgolaise Bank Bulletin*, No 23, November 2002.

<sup>641</sup> *Idem*.

<sup>642</sup> Belgolaise Bank, 'Corporate Governance Statement'.

<sup>643</sup> *Belgolaise Bank Bulletin*, No 23, November 2002.

<sup>644</sup> Mr Forrest was the Managing Director of Gécamines between November 1999 and August 2001.

<sup>645</sup> *Belgian Senate Inquiry*, op. cit., 6.7.4. Création de valeur ajoutée, investissements productifs au Congo et répartition des bénéfices au sein des partenariats avec la Gécamines, b. Répartition de la valeur ajoutée et des bénéfices entre les partenaires des projets et la Gécamines, d) Répartition et utilisation des marges et des royalties revenant à la Gécamines dans le partenariat sur le gisement de Luiswishi.

<sup>646</sup> *Ibid.*: 'la méthode utilisée par le gouvernement reste surprenante pour un observateur extérieur'.

<sup>647</sup> *UN Panel Report*, 22 May 2002, op. cit., paragraph 44.

<sup>648</sup> *Ibid.*, paragraphs 47-48.



<b>Belgolaise, Banque Bruxelles Lambert (BBL), and SG Hambros</b>	<i>Provisions potentially at issue</i>
<i>Questions that the Panel reports leave publicly unanswered</i>	
<ul style="list-style-type: none"> <li>▪ Does a failure to adhere to the Basle Core Banking Principles in such circumstances amount to a breach of the OECD <i>Guidelines</i> concerning good corporate governance?</li> <li>▪ Did SG Hambros have any reason not to respond to the UN Panel?</li> <li>▪ Did SG Hambros take any steps to report the transactions related to Oryx Natural Resources, particularly in the light of the UN Panel reports? Did it consider problematic the regular withdrawals of large sums of cash which were then transported to the DRC</li> <li>▪ Did SG Hambros obtain precise information about the ultimate main beneficiary owners of its client companies operating in the DRC?</li> <li>▪ Has Belgolaise ever reported any DRC transactions as suspicious over the period in question to the financial intelligence unit as required under anti-money laundering legislation?</li> <li>▪ Would it not be best practice for Belgolaise to have reported payments from a joint account into Forrest Company accounts arising from the Luiswishi joint venture with Gécamines?</li> <li>▪ Do not the FATF recommendations also apply to existing customers on the basis of materiality and risk, and should not Belgolaise and the other banks have been expected to conduct due diligence on such existing relationships at appropriate times?<sup>649</sup></li> <li>▪ Why, as the Panel reports, were MIBA and Gécamines revenues not routed through the Congolese Banque Centrale? Why did they go through the Banque Belgolaise instead?</li> <li>▪ Is it correct that the FATF customer due diligence measures calls on Belgolaise and other banks to verify the identity of the customer and the beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers?</li> <li>▪ Is Belgolaise's claim that it is not responsible for the relations of its joint venture Banque de Kigali consistent with the provisions of the <i>Guidelines</i> concerning good corporate governance and the supply chain or the Basle Core Principles, in particular in relation to cross border banking?</li> <li>▪ Why did ING-BBL not publish its response to the Panel?</li> <li>▪ Does ING-BBL consider that the business activities of SOMIGL and other clients described in the UN Panel reports accord with ING's own Operating Principles?</li> <li>▪ What action did the Belgian Government take to investigate whether the MIBA account in a Belgian Bank, as mentioned in the Panel report, was used to transfer money to obtain arms? Was the supporting documentation referred to in the conclusions of the Belgian Senate Report forwarded to the UN and the Belgian Government?</li> </ul>	<p>II.1 sustainable development</p> <p>II.2 human rights</p> <p>II.6 good corporate governance</p> <p>II.10 supply chain</p> <p>VI.5 management control systems/adoption financial accounting and auditing practices</p>

<sup>649</sup> OECD FATF Secretariat, *The Forty Recommendations*, Financial Action Task Force on Money Laundering, 20 June 2003.

## D. Other selected companies referred to by the Panel and falling within the purview of countries adhering to the OECD Guidelines

There are a number of other companies, falling within the jurisdiction of countries adhering to the *Guidelines*, which appear in categories IV and V of the Panel's October 2003 report, respectively, pending cases with governments and parties that did not react to the Panel's report. The majority of these cases are discussed briefly in this section.

### i. *Euromet and Mineraal Afrika Limited*

**Euromet** and **Mineraal Afrika Limited** both appeared in annex III of the Panel's October 2002 report. They are listed separately in category IV of the Panel's October 2003 report as pending cases with the UK Government. A recent information memorandum by IPIS confirms that one of the directors of Mineraal Afrika lists Euromet as his business address.<sup>650</sup> Mineraal Afrika is incorporated in the UK dependant territory of Gibraltar.<sup>651</sup> It is described by the Panel as 'trading in natural resources from DRC', while Euromet's business is described as 'coltan trading'. IPIS refers to Mineraal Afrika's own information brochure which claims that the company holds mining concessions for gold, tin, tantalum, tungsten, niobium, phosphate and diamonds in a number of (unspecified) African countries.<sup>652</sup> According to IPIS, **Track Star Trading 151 (Pty)** was created in South Africa on 12 September 2000 and that the people in charge of the company's operations are staff members of Mineraal Afrika Limited.<sup>653</sup> IPIS describes how Track Star signed two joint-venture agreements:<sup>654</sup>

'on 9 July 2001, the South African company [Track Star] signed a memorandum of association with the Congo Holding Development Company for the creation of the Congolese companies Sodemco and Arc Trading. According to the terms of the agreement, Sodemco and Arc Trading were set up with the aim of extracting, purchasing and selling various Congolese minerals including coltan, cassiterite, diamonds, cobalt and wolfram.'

Track Star was listed in Annex III and the **Congo Holding Development Company (CHDC)** was listed in Annex I of the Panel's October 2002 report and both appear in category IV of the Panel's October 2003 report. The Belgian Senate Commission of Inquiry stated:<sup>655</sup> 'The CHDC was headed by Felicien Ruchacha and Gertrude Kitembo, supporters of the Rwandan government, and it formed a joint venture with the South African company, Trackstar Trading 151 Ltd. This latter commercial alliance has without a doubt served political objectives following the negotiations at Sun City and Pretoria (April and December 2002).' Research by IPIS into the Goma-registered CHDC likewise determined that it was run by a senior member of the RCD-Goma rebel administration.<sup>656</sup>

The Belgian Senate Commission of Inquiry described how former state-owned Société Minière du Kivu (Sominki) concessions, among them the gold bearing concessions of Twangiza, were allotted to CHDC by RCD-Goma in September 2001.<sup>657</sup> IPIS has confirmed that CHDC was granted a large number of gold, cassiterite and tantalum concessions on 16 August 2001 by the RCD's Minister of Mines.<sup>658</sup> These concessions were located in the area controlled by RCD-Goma at the time. While a staff member of Mineraal Afrika has confirmed in an interview with IPIS that the main reason Track Star had entered into negotiations was to the promise of guaranteed access to the Sominki concessions, the same member of staff also informed IPIS that the deal between Track Star and CHDC was immediately cancelled when it became apparent that another international mining company (Société Aurifère du Kivu et du Maniema – Sakima) was the legal owner of the concessions.<sup>659</sup> Furthermore, according to IPIS, he insists that the negotiations only took place when the peace process in the Congo was well underway and is absolutely positive that neither Track Star nor Mineraal Afrika Limited ever bought Congolese minerals from rebel-held territory.<sup>660</sup>

<sup>650</sup> IPIS, 'Trackstar tricked by the RCD: A new episode in the scramble for the Sominki concessions,' 3 November 2003.

<sup>651</sup> Ibid.

<sup>652</sup> Ibid.

<sup>653</sup> Ibid.

<sup>654</sup> Ibid.

<sup>655</sup> *Belgian Senate Inquiry*, op. cit., 5. FILIÈRE D'OR, 5.2.2. Historique de l'exploitation de l'or dans l'Est du Congo: « descente aux enfers », d. Augmentation de la criminalité, Sud-Kivu. Translation of: 'La CHDC était dirigée par Félicien Ruchacha et Gertrude Kitembo, deux fidèles du régime rwandais et a conclu une *joint-venture* avec la société sud-africaine Trackstar Trading 151 Ltd. Cette dernière alliance commerciale a incontestablement servi des fins politiques lors des négociations à Sun City et Pretoria (avril et décembre 2002).'

<sup>656</sup> Gertrude Kitembo, a senior member of the RCD-Goma rebel movement at the time of the negotiations. See IPIS, 'Trackstar tricked by the RCD,' op. cit..

<sup>657</sup> *Belgian Senate Inquiry*, op. cit., 5. FILIÈRE D'OR, 5.2.2. Historique de l'exploitation de l'or dans l'Est du Congo: « descente aux enfers », d. Augmentation de la criminalité, Sud-Kivu.

<sup>658</sup> See IPIS, 'Trackstar tricked by the RCD,' op. cit..

<sup>659</sup> Ibid. The staff member is named by IPIS as Ivor Ichikowitz, 'a powerful businessman with interests in the defence and oil trade.'

<sup>660</sup> Ibid.

In a reply to the UN on behalf of Congo Holding Development Company, Felicien Ruchacha Bikumu denied that the company was involved in the illegal exploitation of natural resources and stated that it was engaged only in local commercial activities.<sup>661</sup> According to M. Ruchacha Bikumu, there was no evidence to support the Panel's allegation that the revenues obtained from the illegal exploitation had helped finance the war. M. Ruchacha Bikumu referred to the fact that he had personally suffered from the war.<sup>662</sup> M. Ruchacha Bikumu was listed alongside CHDC in category IV of the Panel's October 2003 report.

### *ii. International Panorama Resources, SLC Germany GmbH and Specialty Metals*

Two other OECD-based companies – **International Panorama Resources Corporation**<sup>663</sup> of Canada and the coltan transporter **SLC Germany GmbH** – both listed in annex III of the Panel's October 2002 report and not dealt with elsewhere in this memorandum, are similarly listed in category IV of the Panel's October 2003 report. Neither company has responded publicly to the Panel. Likewise, **Specialty Metals Company SA**, operating out of Belgium, appears to have failed to reply publicly to the Panel. It too was listed in annex III of the Panel's October 2002 report and appears in category III of the Panel's final report whereby a dossier of information on its activities has been forwarded to the Belgian NCP.

### *iii. Egimex, K & N and Chris Huber companies*

Three further entities falling within the jurisdiction of OECD countries – **Egimex** and the project developers **K & N**, both based in Belgium, and Switzerland/South Africa-based **Chris Huber** (grouped by the Panel in its October 2003 report with St. Kitts registered **Finmining** and **Raremet Ltd**) – all appeared in annex III of the Panel's October 2002 report and are listed in Category V of the Panel's October 2003 report as having not responded publicly to the Panel.

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<sup>661</sup> Reaction No. 32, written response from Felicien Ruchacha Bikumu and the Congo Holding Development Company to the Panel, reproduced in UN Panel, Addendum, 20 June 2003, op. cit..

<sup>662</sup> In his reply to the Panel, M. Ruchacha Bikumu tells how he had been dismissed from Gécamines without any compensation, after working for them for 15 years. Kabila's military and civilian authorities had looted his belongings. His wife and four children had been detained for eleven months. He had been detained for eleven months, five of which were spent in the high security prison of Buluo. He had been subjected to torture and other degrading forms of treatment. He had never been charged. In view of all this, M. Ruchacha Bikumu believed that the Panel should not have called for sanctions (he had been listed by the Panel in Annex II of its October 2002 report) but for compensation.

<sup>663</sup> Now known as Kakanda Development Corporation.

## Part IV

### Conclusion and recommendations

The UN Panel, by documenting the links between business, resource exploitation and conflict in its reports, and by listing companies that it considered to be in violation of the *Guidelines* in its annexes, gave rise to the expectation that governments would act to curb corporate misconduct in the DRC. The furore created by the Panel's penultimate report heightened the need to distinguish between culpable MNEs and those who acted responsibly. Yet, the Security Council, giving way to expediency, restricted the Panel's mandate and limited its powers of determination. The result has been a final categorisation of companies lacking in rigour.

The Panel has publicly delisted companies while quietly insisting that resolution should not be seen as invalidating its earlier findings. Unsurprisingly, many companies have selectively seized upon the former aspect of the Panel's final report and have publicised their total exoneration, but the suspicion of misconduct must remain. This lack of determination is unacceptable in terms of public accountability and also from the point of view of the parties concerned. In adopting an undifferentiated approach to resolution, the Panel does not specify which companies belong in any one of several 'resolved' sub-categories. Moreover, there are significant gaps in the public record. Companies who seemingly have not responded to the Panel nevertheless appear in the resolved category. Others, who have failed to cooperate with or reply to the Panel, escape scrutiny altogether. However, the most serious concern is the failure to establish in the public domain the basis upon which each decision to classify a company was reached. Certain companies are listed in the resolved category when the Panel's original allegations against them have not been publicly answered.

When considered as a whole, the Panel's work has been invaluable in examining the self-reinforcing cycle of conflict and resource exploitation in the DRC: resources fuelled the war which was perpetuated to control resources. It has successfully mapped the interconnections between Congolese parties to the conflict, foreign governments and companies. Its decision to use a benchmark against which to assess corporate conduct has given the OECD *Guidelines* a new impetus. However, and as the Panel has always recognised, the responsibility to implement the *Guidelines* rests with adhering governments. The Panel's final report reflects both the limits of its capacity and its mandate. The onus has shifted to the OECD forum.

The purpose of this report has been to identify those unanswered questions from the Panel's reports and the company's responses and to frame them in relation to specific provisions under the *Guidelines*. Adhering governments have a responsibility to ensure that the *Guidelines* are applied. It is in nobody's interest – neither that of responsible companies, nor that of the people of the DRC – to leave these questions hanging.

### Recommended action

- (1) *Prompt government investigations:* Governments must give much greater priority to the examination of the role of companies in the DRC. Governments adhering to the OECD *Guidelines* have made a commitment in their correspondence with the UN Panel to ensure their proper use and application. Governments have an obligation to launch thorough, prompt and impartial investigations into not only those specific instances where the Panel has forwarded dossiers to NCPs, but into all specific instances where questions over compliance remain unanswered, including those detailed in this report. As this report demonstrates, there is sufficient information in the public domain for NCPs to act without waiting for a submission from an interested party.
- (2) *The NCP process*
  - a. NCP investigations should be clearly timetabled. Their ultimate aim should be to issue recommendations on compliance.
  - b. Where resource constraints are an impediment to such investigations, then NCPs should be given additional support by national governments to carry out this task. This applies in almost all adhering countries.

- c. A high-ranking official or independent expert should be appointed in each adhering country to coordinate the work of the NCP and to prepare a report on progress for consideration by national parliaments. The findings of NCPs should be subject to parliamentary scrutiny.
- (3) *Domestic prosecutions:* National governments must investigate and prosecute companies where their conduct is shown to contravene domestic legislation. In particular, Government's should urgently investigate whether there have been any breaches of domestic anti-bribery laws and money laundering legislation by companies based in their jurisdictions in relation to the DRC.
- (4) *International Criminal Court:* The United Nations and governments should co-operate fully with investigations which are being launched by the International Criminal Court (ICC) into, *inter alia*, the complicity of business in war crimes in the DRC. The success of such investigations and subsequent prosecutions depends upon the willingness of State Parties to assist the ICC in its work.<sup>664</sup> Adhering governments should forward both the information they receive on misconduct and the results of any investigation by NCPs to the ICC.
- (5) *Review of existing commercial agreements:* At the inter-Congolese dialogue to agree a transition to peace and democratic government in the DRC, a resolution was adopted to establish a mechanism for the review of all commercial agreements and contracts signed during the conflict. Without a wholesale review, it is hard to see how the future prosperity, stability and well-being of the DRC can be assured. OECD member states are called upon to assist the transitional government in its implementation of this review.
- (6) *Action by the OECD*
- a. CIME should convene a special session with experts, including NGOs, to consider the relevance of the OECD *Guidelines* to conflict resolution in the Democratic Republic of Congo.
  - b. The results of any such consultation should feed into the CIME study 'On Conducting Business with Integrity in Weak Governance Zones: OECD Instruments and Examples from the Democratic Republic of Congo' (DAFFE/IME (2004)4).
  - c. CIME should prepare a commentary on the application of the *Guidelines* in conflict situations and issue a clarification to companies about the use of the *Guidelines* in determining acceptable and unacceptable corporate conduct in conflict and post-conflict situations. It should consider setting up a sub-group on conflict and the establishment of a roster of experts to advise on specific situations or to provide an annual review of activities.<sup>665</sup>
  - d. In order to clarify the interpretation of the provision on human rights in the *Guidelines*, CIME should incorporate the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights into the commentary and, once the text is revised, into the *Guidelines* themselves. This would immediately strengthen companies' understanding of what is expected of them and reinforce the existing – if unelaborated – human rights provision.
- (7) *Banking regulation*
- a. Some of the banks have admitted that at least some of their dealings identified by the Panel might have conflicted with the FATF recommendations or other banking principles (such as the Basle Core Principles). The governments within whose jurisdiction these banks fall should therefore conduct a proper audit of all transactions to and from the DRC between 1998 and 2002.
  - b. With regard to FATF and existing anti-money laundering regulations, it would be useful for NCPs to work with the relevant financial intelligence units to establish when and if the banks with operations in the DRC made any 'suspicious transactions reports' and, if so, how many reports were filed; and whether these banks drew the attention of clients (even long-established clients) to the possible risks of undertaking business agreements with 'politically exposed persons' – that is to say 'individuals who are or have been entrusted with prominent public functions in a foreign country', for example, Heads of State or of government or senior executives of state owned corporations.<sup>666</sup>

<sup>664</sup> Report by the Prosecutor of the ICC to the 2<sup>nd</sup> Assembly of the State Parties to the Rome Statute, 8 September 2003.

<sup>665</sup> There is scope for seeking and considering expert advice under the *Guidelines*: see *Implementation Procedures*, op. cit., Procedural Guidance, II. Committee on International Investment and Multinational Enterprises, 4.

<sup>666</sup> FATF, *The Forty Recommendations*, op. cit., Glossary.

- c. The Panel has drawn attention to weaknesses with correspondent banks in the DRC. Governmental Financial Intelligence Units (FIUs) should enhance their scrutiny of correspondent banking arrangements. FIUs should undertake an audit of transactions to and from the DRC between 1998 and 2002, particularly in relation to ‘politically exposed persons’.
- (8) *Call for compliance with the Guidelines within the diamond industry:* The World Federation of Diamond Bourses and the International Diamond Manufacturers Association through their respective member organizations represent well over 20,000 diamond traders and manufacturers. Both bodies should, through their affiliated organizations, ensure that diamond companies are made aware of and fully comply with the *OECD Guidelines for Multinational Enterprises*.
- (9) *Call for permanent monitoring:* A permanent UN body, with clear and transparent procedures, should be established to monitor the role of business in conflict. An important first step was signalled by the UN Secretary General who recently announced (see Security Council *Press Release SC/8058*, 493<sup>rd</sup> Meeting) the setting up of an inter-agency group, under the chairmanship of the UN Department of Political Affairs, which will make recommendations on improving the UN’s response to the political economy of armed conflict.
- (10) *Binding regulation of business?* The *Guidelines* – which can neither impose sanctions nor offer compensation – are a positive, but preliminary step, towards holding companies to account for their actions. In the absence of sufficient progress to redress corporate misconduct under the *Guidelines*, governments should consider a renewed call for the binding regulation of multinationals.

## Companies listed by the UN Panel in Annex I and Annex III or referred to in the main body of its October 2002 report and their final categorisation in October 2003

<b>UN Panel's October 2002 Report</b>	
<b>A1</b>	Annex I – Companies on which the Panel recommended the placing of financial restrictions
<b>A3</b>	Annex III – Business enterprises considered by the Panel to be in violation of the <i>OECD Guidelines for Multinational Enterprises</i>
<b>MB</b>	Referred to in the main body of the Panel's reports (but not in any annex)
<b>UN Panel's October 2003 Report</b>	
<b>R</b>	Resolved – Category I
<b>PG</b>	Pending government investigation – Category IV
<b>PR</b>	Provisional Resolution & Monitoring – Category II
<b>NR</b>	No reaction – Category V
<b>UI</b>	Unresolved & NCP investigation – Category III
<b>NC</b>	Not categorised

	OECD adhering country?	Business	Annex/Body	Category	Public Reaction to Panel?
A & M Minerals and Metals Plc	Yes – UK	Trading minerals	A3	R	Yes - 22
A.H. Pong & Sons	No - South Africa	Import-Export	A3	PG	No
A. Knight International Ltd	Yes – UK	Assaying	A3	R	No
Abadiam	Yes - Belgium	Diamond trading		MB NC	Yes - 28
African Trading Corporation SARL	No - South Africa	Trading resources	A3	PG	No
Afrimex	Yes – UK	Coltan trading	A3	R	Yes - 19
Ahmad Diamond Corporation	Yes - Belgium	Diamond trading	A3 A1	UI	Yes - 36
Alex Stewart (Assayers) Ltd	Yes – UK	Assaying	A3	R	Yes - 20
Amalgamated Metal Corporation Plc	Yes – UK	Coltan trading	A3	R	Yes - 10
American Mineral Fields	Yes - Canada	Mining	A3	R	Yes - 6
Anglo American Plc	Yes – UK	Mining	A3	R	Yes - 18
Anglovaal Mining Ltd	No - South Africa	Mining	A3	R	Yes - 16
Artic Investment	<i>See under Oryx Natural Resources</i>				
Asa Diam	Yes - Belgium	Diamond trading	A3 A1	UI	Yes - 37
Asa International	Yes - Belgium		A3	UI	
Ashanti Goldfields	No - Ghana	Mining	A3	R	Yes - 15
Aviation Consultancy Service Company (ACS)	No - Zimbabwe/ South Africa	Aviation consultancy		MB NC	No
Avient Air	Yes – UK/Zimbabwe	Military company	A3	UI	Yes - 35
Banro Corporation	Yes - Canada	Mining	A3	R	Yes - 14
Barclays Bank	Yes – UK	Banking	A3	R	Yes - 8
Bayer A.G.	<i>See under H.C. Starck</i>				
BBL (Bank)	Yes - Belgium	Banking	A3	UI	No
Banque Belgoise	Yes - Belgium	Banking	A3	R	Yes - 23
Fortis	Yes - Belgium	Banking	A3	R	
Bukavu Aviation Transport	No - DRC	Airline company		A1 NR	No
Business Air Service	No - DRC	Airline company		A1 NR	
C. Steinweg NV	Yes - Belgium	Freight forwarders	A3	NR	No

	<i>OECD adhering country?</i>	<i>Business</i>	<i>Annex/Body</i>	<i>Category</i>	<i>Public Reaction to Panel?</i>
Cabot Corporation	<b>Yes - USA</b>	Tantalum processing	A3	®	No
Carson Products	No - South Africa	Beauty Products	A3	®	Yes - 17
Chemie Pharmacie Holland	<b>Yes - Netherlands</b>	Finance & logistics	A3	NR	No
Cogecom	<b>Yes - Belgium</b>	Coltan trading	A3	UI	Yes - 31
COMIEX - Congo	No - DRC	Resource exploitation	A1	NR	No
Congo Holding Development Company Track Star Trading 151 (Pty) Ltd	No - DRC No - South Africa	Resource trading/exploitation Mineral trading/exploitation	A1 A3	PG PG	Yes - 32
Conmet	No – DRC/Uganda	Coltan trading	A1	PG	No
COSLEG	No – DRC/Zimbabwe	Resource exploitation	A1	NR	No
Dara Forest	No - Thailand	Timber exploitation	A3	NR	No
DAS Air	<b>Yes – UK</b>	Airline company	A3	UI	No
De Beers	<b>Yes – UK</b>	Diamond mining/trading	A3	UI	Yes - 29
Diagem BVBA	<b>Yes - Belgium</b>	Diamond trading	A3	®	Yes - 39
Eagle Wings Resources International Eagle Wings Resources International Trinitech International Inc	<b>Yes - USA</b> No – Rwanda [but link] <b>Yes - USA</b>	Coltan exploitation Coltan exploitation Coltan trading/exploitation	A3 A1 A3	® ® ®	No
Echogem	<b>Yes - Belgium</b>	Diamond trading	A3	NR	No
Egimex	<b>Yes - Belgium</b>	n/a	A3	NR	No
Entreprise Générale Malta Forrest Entreprise Générale Malta Forrest George Forrest International Afrique Groupe George Forrest	<b>Yes - Belgium</b> No – DRC [but link] No – DRC [but link] <b>Yes - Belgium</b>	Copper/cobalt exploitation Construction/mining/trading Management Copper/cobalt exploitation	A1 A3 A3 A1	PR PR PR PR	Yes - 24
Euromet	<b>Yes – UK</b>	Coltan trading	A3	PG	No
Exaco	No - DRC	Cobalt/copper exploitation	A1	NR	No
Finconcord SA	<b>Yes - Switzerland</b>	Coltan trading	A3	®	No
Finmining Raremet Chris Huber	No - St.Kitts [but link] No - St.Kitts [but link] <b>Yes – Switzerland/South Africa</b>	Coltan trading Coltan trading n/a	A3 A3 n/a	NR NR NR	No
First Quantum Minerals	<b>Yes - Canada</b>	Mining	A3	®	Yes - 4
Flashes of Color	<b>Yes - USA</b>	Diamond trading	A3	®	No
Fortis	<i>See under Banque Belgoise</i>				
George Forrest International Afrique	<i>See under Entreprise Générale Malta Forrest</i>				
Great Lakes General Trade	No - Rwanda	Mineral trading	A1	NR	No
Great Lakes Metals	No - Rwanda	Mineral trading	A1	NR	No
Groupe George Forrest	<i>See under Entreprise Générale Malta Forrest</i>				
H.C. Starck GmbH & Co KG Bayer A.G.	<b>Yes - Germany</b> <b>Yes - Germany</b>	Coltan processing Chemical industry	A3 A3	® ®	Yes - 3
Hambros	<b>Yes - UK</b>	Banking	MB	NR	No
Harambee Mining Corporation	<b>Yes - Canada</b>	Mining	A3	®	No



	<i>OECD adhering country?</i>	<i>Business</i>	<i>Annex/Body</i>	<i>Category</i>	<i>Public Reaction to Panel?</i>
Ibryv and Associates LLC	<b>Yes - Switzerland</b>	Diamond trading	A3	®	No
International Panorama Resources	<b>Yes - Canada</b>	Mining	A3	PG	No
ISCOR/Kumba Resources	No - South Africa	Mining	A3	®	Yes - 11
ZINCOR/Kumba Resources	No - South Africa	Mining	A3	®	
Jewel Impex BVBA	<b>Yes - Belgium</b>	Diamond trading	A3	®	Yes - 41
K&N	<b>Yes - Belgium</b>	Project development	A3	NR	No
Kababankola Mining Company	<i>See under Tremalt</i>				
Kemet Electronics Corporation	<b>Yes - USA</b>	Capacitor manufacture	A3	®	Yes - 21
KHA International AG Masingiro GmbH	<b>Yes - Germany</b>	Minerals trading/exploitation	A3	UI	Yes - 33
	<b>Yes - Germany</b>	Minerals trading	A3	UI	
Kinross Gold Corporation	<b>Yes - Canada</b>	Mining	A3	®	Yes - 5
Komal Gems NV	<b>Yes - Belgium</b>	Diamond trading	A3	®	Yes - 40
Lundin Group Tenke Mining Corporation	<b>Yes – UK/Bermuda</b>	Mining	A3	®	Yes - 2
	<b>Yes - Canada</b>	Mining	A3	®	
Malaysian Smelting Corporation	No - Malaysia	Coltan processing	A3	®	No
Masingiro GmbH	<i>See under KHA International</i>				
Melkior Resources	<b>Yes - Canada</b>	Mining	A3	®	Yes - 13
Mercantile CC	No - South Africa	Trading natural resources	A3	PG	No
Mineraal Afrika Ltd	<b>Yes - UK</b>	Trading natural resources	A3	PG	No
Minerals Business Company	No - DRC	Mineral trading	A1	NR	No
NAC Kazatomprom	No - Kazakhstan	Tantalum processing	A3	PG	No
Nami Gems BVBA	<b>Yes - Belgium</b>	Diamond trading	A3	®	Yes - 27
New Lachaussée	<b>Yes - Belgium</b>	Machines for ammunition manufacture	MB	NC	No
Ningxia Non-ferrous Metals Smelter	No - China	Tantalum processing	A3	®	No
Okapi Air – Odessa Air	No - Uganda	Airline company	A1	NR	No
OM Group	<b>Yes - Finland/USA</b>	Mining	A3	®	Yes - 7
Operation Sovereign Legitimacy (OSLEG) Pvt Ltd	No - Zimbabwe	Commercial interest resource exploitation	A3 A1	NR	No
Orion Mining Inc	No - South Africa	Mining	A3	PG	No
Oryx Natural Resources Artic Investment	<b>Yes – UK/Grand Cayman/Oman</b>	Diamond exploitation	A1	UI	Yes - 26
	<b>Yes - UK</b>	Investment	A3	UI	
Pacific Ores Metals and Chemicals Ltd	No - Hong Kong	Coltan trading	A3	®	No
Raceview Enterprises	No - Zimbabwe	Logistical supply	MB	NC	No
Raremet	<i>See under Finmining</i>				
Ridgepointe Overseas Developments Ltd.	<b>Yes – UK/Br.Vir.Is.</b>	Mining	MB	NC	Yes - 30
Rwanda Allied Partners	No - Rwanda	Mineral trading	A1	®	No
Rwanda Metals	No - Rwanda	Mineral trading	A1	NR	No
Saracen Saracen Uganda Ltd	No - South Africa	Security company	A3	PG	Yes - 34
	No - Uganda	Security company	A1	PG	
SDV Transintra	<b>Yes - France</b>	Transport	A3	NR	No
Sierra Gem Diamonds	<b>Yes - Belgium</b>	Diamond trading	A3 A1	UI	Yes - 42

	<i>OECD adhering country?</i>	<i>Business</i>	<i>Annex/Body</i>	<i>Category</i>	<i>Public Reaction to Panel?</i>
SLC Germany GmbH	<b>Yes - Germany</b>	Coltan transport	A3	PG	No
Sogem	<i>See under Umicore</i>				
Specialty Metals Company SV	<b>Yes - Belgium</b>	Coltan trading	A3	UI	No
Standard Chartered Bank	<b>Yes - UK</b>	Banking	A3	®	Yes - 9
Swanepoel	No - South Africa	Construction	A3	PG	No
Tandan Group	No – South Africa	Holding company	A1	®	No
Thorntree Industries (Pvt) Ltd	No - Zimbabwe	Capital provision	A3 A1	®	
Tenke Mining Corporation	<i>See under Lundin Group</i>				
Thorntree Industries (Pvt) Ltd	<i>See under Tandan Group</i>				
Track Star Trading 151 (Pty) Ltd	<i>See under Congo Holding Development Company</i>				
Trademet SA	<b>Yes – Belgium</b>	Coltan trading	A3	®	No
Tremalt Ltd	<b>Yes – UK/Br.Vir.Is</b>	Cobalt/copper exploitation	A3 A1	PR	Yes - 25
Kababankola Mining Company	No – Zimbabwe [but link]	Mining	A3	PR	
Trinitech International Inc	<i>See under Eagle Wings Resources International</i>				
Trinity Investment Group	No – DRC/Uganda	Resource exploitation	A1	NR	No
Triple A Diamonds	<b>Yes – Belgium</b>	Diamond trading	A3 A1	®	Yes - 43
Tristar	No - Rwanda	Holding company	A1	NR	No
Umicore	<b>Yes – Belgium</b>	Metals and materials group	A3	®	Yes - 12
Sogem	<b>Yes – Belgium</b>	Coltan trading	A3	®	
Victoria Group	No – DRC/Uganda	Resource exploitation	A1	NR	No
Vishay Sprague	<b>Yes - USA/Israel</b>	Capacitor manufacture	A3	®	No
ZINCOR	<i>See under ISCOR</i>				

## Notes

1. The Panel enters certain enterprises, which it had listed separately in Annex I or Annex III of its October 2002 report, together under one combined entry in the categories in its October 2003 report. This scheme has been adopted in the above table. The entries which the Panel has combined are:

Eagle Wings Resources International/Trinitech International Inc  
Banque Belgoise/Fortis  
Umicore/SOGEM  
Bayer AG/H.C. Starck GmbH & Co  
ISCOR/ZINCOR (Kumba)  
Kababankola Mining Company/Tremalt Ltd  
Entreprise Générale Malta Forrest/George Forrest International Afrique/Groupe George Forrest  
ASA Diam/ASA International  
KHA International AG/Masingiro GmbH  
Finmining/Raremet Ltd.  
Oryx Natural Resources/Artic Investment  
Bukavu Aviation Transport/Business Air Service  
Saracen Uganda Ltd (South Africa)/Saracen Uganda Ltd. (Uganda)  
Tandan Group/Thorntree Industries  
Congo Holding Development Company/Track Star Trading 151

2. In addition, the Lundin Group/Tenke Mining Corporation have been grouped together in the above table. This is because both entities are dealt with together in the same reply to the Panel from Tenke Mining Corporation. In its reply, Tenke Mining Corporation notes: 'Regarding company semantics, the "Lundin Group" does not exist as a formal entity. Tenke Mining Corp is a Canadian public company, which holds its ownership in the Tenke Fungurume deposit through its wholly owned subsidiary – Lundin Holdings Limited...'

3. The description under 'Business' is essentially the same as that used by the Panel in the annexes to its reports. Occasionally, the description used either by the Panel in the main body of its reports or in a company's own reply to the Panel is used instead.

# Supplement

## The scope of the Guidelines

The CIME's commitment to follow up on the Panel's work and the agreed mechanism by which NCPs are to receive dossiers of information on referred companies will place the issue of compliance with the *Guidelines* squarely within the OECD forum. Anticipating this shift in expectations, an addendum to this report seeks to address some of the issues that are likely to arise concerning the scope of the *Guidelines*. Subsections consider the need for clarification *vis-à-vis* their applicability to smaller enterprises; those companies based in non-adhering countries; the adherence to them by suppliers and their use in guiding trade as well as investment *per se*; and the supranationality of the *Guidelines*.

### A. Smaller enterprises

Many of the companies responding to the UN Panel have expressed their support for, and recognition of, the OECD *Guidelines*. This is to be regarded as a positive development. NCPs, in accordance with their responsibility to promote the *Guidelines*, might wish to write to the companies concerned to welcome their endorsement and to furnish them with any further information which they might require to improve their understanding of the *Guidelines*. However, there are also certain companies – Abadiam, Ahmad Diamond Corporation, Diagem BVBA, Jewel Impex BVBA, Komal Gems, Nami Gems BVBA, Sierra Gem Diamonds, Triple A Diamonds – who have explicitly rejected the applicability of the *Guidelines* because they do not perceive themselves as multinational enterprises. In stating their position, they rely on the opinion expressed in the Belgian Senate inquiry into conflict and resource exploitation in the Great Lakes region:<sup>1</sup>

With regard to the allegations formulated by the UN Panel against a number of diamond companies that OECD-guidelines have not been respected, the Commission states that...such guidelines are not even applicable for the diamond companies concerned because they cannot be considered as multinationals.

This interpretation represents a misreading of the *Guidelines* which, left unchallenged, could work to narrow their perceived scope and lead to the differential treatment of companies.

Firstly, it is explicitly recognised that a precise definition of what constitutes a multinational enterprise is not required for the purposes of the *Guidelines*.<sup>2</sup> Hence they 'usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.'<sup>3</sup> The diamond trading companies meet these criteria in that they have offices in adhering OECD countries and established operations in DRC and elsewhere. In this regard, it should be noted that the *Guidelines* recognise that MNEs 'encompass a broader range of business arrangements and organisational forms' and that '[s]trategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.'<sup>4</sup> In other words, close relationship with suppliers in DRC can fall within this definition. Secondly, it should also be noted that the size of an enterprise does not determine applicability of the *Guidelines*. Explicit recognition is given to the widest possible observance of the *Guidelines* and to their observance by small- and medium-sized enterprises 'to the fullest possible extent.'<sup>5</sup> Finally, and irrespective of the multinational element to the diamond traders cited, the *Guidelines* are 'not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.'<sup>6</sup>

### B. Multinational enterprises based in non-adhering countries

The Panel lists a number of business enterprises which operate out of territories other than those belonging to adhering governments. It is therefore apparent that the Panel views the *Guidelines* as a global standard. The question therefore arises as to how the CIME proposes to deal with those enterprises named in the Panel's report which operate out of territories controlled by

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<sup>1</sup> Translation of: 'En ce qui concerne les plaintes formulées par les représentants de l'ONU à l'encontre d'un certain nombre d'entreprises diamantaires, selon lesquelles les directives de l'OCDE n'ont pas été respectées, la commission constate (indépendamment du fait qu'il s'agit de directives non contraignantes) que celles-ci ne sont pas applicables aux entreprises diamantaires concernées dès lors que ces dernières ne peuvent pas être qualifiées de multinationales.' See Commission d'enquête parlementaire chargée d'enquêter sur l'exploitation et le commerce légaux et illégaux de richesses naturelles dans la région des Grands Lacs au vu de la situation conflictuelle actuelle et de l'implication de la Belgique, Sénat de Belgique, Session de 2002-2003, 20 Février 2003, 2-942/1, III. CONSTATATIONS ET RECOMMANDATIONS DE LA COMMISSION D'ENQUÊTE, II. Constatations et recommandations en ce qui concerne les secteurs, les entreprises et les personnes concernées, 3.2.1.

<sup>2</sup> *Guidelines*, I. Concepts and Principles, paragraph 3.

<sup>3</sup> *Idem*.

<sup>4</sup> *Guidelines*, Preface, paragraph 2.

<sup>5</sup> *Ibid.*, I. Concepts and Principles, paragraph 5.

<sup>6</sup> *Ibid.*, I. Concepts and Principles, paragraph 4.

non-adhering governments? Two of those enterprises in non-adhering countries named by the Panel have actively endorsed the *Guidelines*. The potential therefore exists for the CIME to capitalise on this goodwill and further the recognition of the *Guidelines* as a truly global standard applicable to all MNEs.

The OECD is committed to encouraging non-Members to adhere to the Declaration on International Investment and Multinational Enterprises, of which the *Guidelines* are one part.<sup>7</sup> General-level talks have already been initiated with, *inter alia*, Kazakhstan, Malaysia, Russia, and South Africa at a conference designed 'to provide an occasion for dialogue in view of possible future adherence of these countries to the instrument.'<sup>8</sup> All these governments have companies operating out of their territories which have been named in the Panel's reports. However, in the interim, and where formal adherence has not yet been achieved, a basis already exists for close cooperation. The Decision of the OECD Council of June 2000 on revised implementation procedures recognises that 'since operations of multinational enterprises extend throughout the world, international co-operation on issues relating to the Declaration should extend to all countries.' Furthermore, the CIME may 'hold exchanges of views on matters covered by the *Guidelines* with representatives of non-adhering countries.'<sup>9</sup> The commentary, 'reflecting the increasing relevance of the *Guidelines* to countries outside the OECD' elaborates on this. The CIME, as well as arranging periodic meetings with groups of countries, may also arrange contact with individual countries if the need arises which could deal with specific issues, as well as the overall functioning of the *Guidelines*.<sup>10</sup>

### C. Adherence down the supply chain: trade and investment

The Panel recognised that supply chains for raw materials came into sharp focus in its October 2002 report and prompted some of the companies named to reassess their activities in the DRC.<sup>11</sup> Paragraph II.10 of the *Guidelines* iterates that enterprises should: 'encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the *Guidelines*.' The commentary to the *Guidelines* recognises that compatible conduct is sought with all entities with which MNEs enjoy a 'working relationship', although established or direct business relationships are the main object of the recommendation.<sup>12</sup> It is further acknowledged that, while there are practical limitations on the ability of an enterprise to influence the conduct of business partners, companies having market power *vis-à-vis* their suppliers may be able to influence business partners' behaviour even in the absence of investment giving rise to formal corporate control:

The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise *vis-à-vis* its suppliers or other business partners.<sup>13</sup>

Certification and product tracing systems represents another way of influencing the supply-chain where the 'supplier-purchaser relationship itself does not involve investment in the traditional sense of foreign direct investment.'<sup>14</sup>

Any limitation of the applicability of the 'supply-chain' provision on the grounds that trade relationships are outside the scope of the *Guidelines* represents a partial interpretation. The OECD's Working Party on the Declaration (WPD), following a meeting on the scope of the *Guidelines*, instructed the Secretariat to prepare a background paper on this issue.<sup>15</sup>

Firstly, while the *Guidelines* form part of the OECD Declaration on International Investment and Multinational Enterprises, the latter does not define investment. The *Guidelines* recognise that MNEs encompass a broad range of business arrangements and organisational forms in which strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.<sup>16</sup> The WPD background paper asserts: 'In this context, definitions of business activities such as investment may be quite broad. This suggests that there may be room for flexibility in assessing multinational enterprises' influence and the presence of an investment relationship in the supply chain, depending on the specific circumstances.'<sup>17</sup>

Secondly, the way in which the *Guidelines* are formulated militates against their narrow application to investment activities *per se*: (1) a number of international standards – *inter alia*, the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Copenhagen Declaration for Social Development – are cited which are relevant to the application of the *Guidelines*.<sup>18</sup> These cover a broad range of relationships and areas of conduct. Several OECD instruments

<sup>7</sup> See paragraphs 26-27 of the June 2000 Ministerial Press Release 'Shaping Globalisation' at: <<http://www1.oecd.org/media/release/nw00-70a.htm>> (visited 17 December 2003).

<sup>8</sup> The OECD hosted an Outreach meeting with non-Members on the *OECD Guidelines for Multinational Enterprises* on 12 December 2000. See 'Non-Member Economies and The OECD Guidelines for Multinational Enterprises,' *OECD Proceedings*, Directorate for Financial, Fiscal and Enterprise Affairs, 12 December 2000.

<sup>9</sup> Decision of the OECD Council, June 2000, II.3.

<sup>10</sup> *Commentary on Implementation*, op. cit., paragraph 5.

<sup>11</sup> *UN Panel Report*, 23 October 2003, op. cit., paragraph 11.

<sup>12</sup> *Commentary on the Guidelines*, op. cit., paragraph 10.

<sup>13</sup> *Idem*.

<sup>14</sup> Working Party on the Declaration, 'Background paper on the scope of the Guidelines,' I.3. This paper is reproduced in *OECD Guidelines for Multinational Enterprises: 2003 Annual Meeting of the National Contact Points, Report of the Chair*, pp. 25 – 28.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Guidelines*, op. cit., Preface, paragraph 2.

<sup>17</sup> 'Background paper on the scope of the Guidelines,' op. cit., I.3.

<sup>18</sup> *Guidelines*, Preface, paragraph 8.

are also referenced in this regard.<sup>19</sup> (2) The *Guidelines* are recognised as complementing and reinforcing private efforts to define and implement business conduct.<sup>20</sup> To cite one example, the International Chamber of Commerce's (ICCs) rules of conduct and corporate practices manual on fighting bribery contain recommendations that are relevant to both trade and investment.<sup>21</sup> They adopt a broad view of the business transactions to which the rules apply.

Thirdly, the text of the *Guidelines* gives explicit recognition to the trading dimension of the activities of MNEs whereby 'their trade and investment activities contribute to the efficient use of capital, technology and human resources';<sup>22</sup> and to the promotion of sustainable development 'when trade and investment are conducted in a context of open, competitive and appropriately regulated markets.'<sup>23</sup>

## D. Supranational applicability and company influence over the regulatory regime

Based on a partial reading of the *Guidelines*, it is sometimes supposed that an enterprise need only abide by national laws. However, such an interpretation ignores both the supranational aspect of the *Guidelines* and the recognition that companies exercise prior influence over the regulatory regime. In a destabilised country, where central government is weak – as exemplified by the continuing situation in the DRC – laws, conventions and Presidential decrees may be promulgated to legitimise the de facto demands of influential companies rather than acting as a robust regulatory framework.

Attention is drawn to the supranational nature of the *Guidelines*. It is recognised in the *Guidelines* that 'Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions'; yet this right is qualified as 'subject to international law.'<sup>24</sup> Hence explicit recognition is given to the application of overarching obligations. At the same time, '[t]he entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries.'<sup>25</sup> However, the perception that companies need only comply with national laws is based on a partial interpretation of the *Guidelines*. While they are not viewed as a substitute for national law and practice, the recommendations within the *Guidelines* are perceived in *supplementary* terms and the expectation is that companies will adhere to them.<sup>26</sup> After all, their *raison d'être* is the need for standards applicable across national boundaries to mirror the organisation and operation of multinationals. The fact that there are explicit references in the text and commentary to international human rights and labour instruments itself strengthens a supranational interpretation of the *Guidelines*.

There is a clear recognition within the *Guidelines* that MNEs face a variety of legal, social and regulatory settings and that unscrupulous enterprises may exploit this circumstance.<sup>27</sup> Governments are called upon to provide 'effective domestic policy frameworks' that include, *inter alia*, non-discriminatory treatment of firms, appropriate regulation and prudential supervision, impartial law enforcement and efficient and honest public administration.<sup>28</sup> Enterprises are encouraged to co-operate in the development and implementation of policies and laws.<sup>29</sup> When they act with Government in the development of regulation, enterprises are expected to consider the views of other stakeholders, to do so in a spirit of partnership, and to use the *Guidelines* as one element in their approach.<sup>30</sup> Conversely, when companies use their influence to engineer inappropriate and anti-competitive regulation which is at odds both with the principles of sustainable development and equity, then they must do so in contravention of the *Guidelines*. The *Guidelines* warn companies against the seeking or accepting of exemptions not contemplated in the statutory or regulatory framework.<sup>31</sup>

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<sup>19</sup> *Ibid.*, Preface, paragraph 9. Listed are: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD Principles of Corporate Governance, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, the OECD Guidelines on Transfer Pricing for Multinational Enterprises and Tax Administrations.

<sup>20</sup> *Guidelines*, Preface, paragraph 7.

<sup>21</sup> 'Background paper on the scope of the Guidelines,' *op. cit.*, I.2.

<sup>22</sup> *Guidelines*, Preface, paragraph 4.

<sup>23</sup> *Ibid.*, paragraph 5.

<sup>24</sup> *Ibid.*, I. Concepts and Principles, paragraph 7.

<sup>25</sup> *Idem.*

<sup>26</sup> *Commentary on the Guidelines*, *op. cit.*, Commentary on General Policies, paragraph 2.

<sup>27</sup> *Guidelines*, *op. cit.*, Preface, paragraph 6.

<sup>28</sup> *Ibid.*, Preface, paragraph 10.

<sup>29</sup> *Commentary on the Guidelines*, *op. cit.*, Commentary on General Policies, paragraph 3.

<sup>30</sup> *Idem.*

<sup>31</sup> *Guidelines*, *op. cit.*, II. General Policies, paragraph 5.