

The Netherlands Institute for Southern Africa (Niza) & Co.¹ raised the issue how the OECD Guidelines for Multinational Enterprises (the Guidelines) should have been implemented by Chemie Pharmacie Holland BV (CPH) in relation to ore mining in the Democratic Republic of the Congo (DRC). The Netherlands National Contact Point (NCP)² consulted with both Niza & Co. and CPH separately as well as jointly. Despite these efforts, the parties involved could not agree upon a joint statement.

NATIONAL CONTACT POINT STATEMENT

The NCP found that in this specific instance there is no investment nexus. Since the application of the Guidelines rests on the presence of an investment nexus, the Guidelines are not applicable to this specific instance. Nevertheless, the NCP formulated a statement on the basis of the common values for responsible business conduct that are reflected in the Guidelines.

1. The issue

In July 2003 Niza & Co. asked the NCP whether CPH's involvement in ore mining in the DRC was in conformity with the Guidelines³ (see Annex II for background information). Niza & Co. based its question on the "UN-Panel of Experts Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC (see <http://www.niza.nl/docs/200210221013213047.pdf>).". This report listed a number of

¹ Milieudefensie (Friends of the Earth Netherlands), Pax Christi, Novib, the NC-IUCN, CENADEP, RECORE and PAL.

² The NCP is the government body that promotes the effectiveness of the Guidelines, i.e. a set of recommendations by governments to multinational enterprises to operate in a socially responsible manner.

companies that supposedly behaved in an irresponsible manner in the DRC. These companies were accused of doing business with rebel movements operating in the north-east of the DRC, thereby contributing to the illegal exploitation of the natural resources of the DRC and the financing of the conflict.

CPH was one of the companies mentioned in the report, as was its American business partner Eagle Wings Resources International (EWRI)⁴.

2. The relationship between CPH and EWRI

At the beginning, it was not clear what the business connection had been between CPH and EWRI. CPH explained in its meeting with the NCP that EWRI owned offices in Bukavu (DRC), Bujumbura (Burundi) and Kigali (Rwanda). Suppliers brought small shipments of ore to EWRI's offices to be inspected by a controller, after which the suppliers were paid accordingly. EWRI sent the shipments of ore to the office in Kigali for the attention of CPH. CPH provided the following services:

- Logistics: responsible for transporting ore from Kigali via Rotterdam to the final destination.
- Finance: responsible for financing individual transactions by wiring money to financial institutions in Kigali and Bujumbura by order of EWRI. EWRI subsequently paid the suppliers. After payment by the end-user, usually within 3 months after disbursement, CPH received the original amount plus commission. EWRI retained sole ownership as well as entrepreneurial risk over the commodities.
- Controller: advising EWRI on hiring a controller agency to inspect the ore. CPH hired the company Alex Stewart by order of EWRI.

The relationship between CPH and EWRI lasted from October 1999 until March 2002.

³ Chapter IV, Employment and Industrial Relations (section 1, b and c, section 4,b) Chapter V, Environment (introduction and section 2 and 3), Chapter II, General Policies (section 10).

⁴ Despite a formal request of the NCP, the UN panel never provided background information, nor clear arguments as to why CPH was mentioned in the report. CPH regrets never responding to the accusations. A final report of October 2003 cleared EWRI from all accusations, again without traceable arguments.

3. Investment nexus

The OECD Committee on International Investment and Multinational Enterprises (CIME)⁵ issued a statement that the Guidelines have been developed in the specific context of international investment by multinational enterprises and that their application rests on the presence of an investment nexus (see Annex III.). The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances. A case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The statement links the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship.

4. Applicability of the Guidelines

On the basis of information made available during the procedure, the NCP concludes that in this specific instance, there is no investment like relationship between CPH and EWRI or EWRI's suppliers. The NCP notes that the business relationship between CPH and EWRI lasted 2,5 years and that CPH acted as a facilitator, who at no stage became owner of the goods and who worked on a commission basis.

CPH agrees with this conclusion. Niza & Co. is of the view that there was an investment nexus.⁶

Since the Guidelines are only applicable to issues concerning an investment nexus, the NCP-procedure cannot formally be pursued in this specific instance. Since this conclusion was drawn after already having met extensively with the parties involved, the NCP decided to sum up lessons learned and future activities (Annex I.).

⁵ The OECD CIME is the body for clarifying the meaning of the Guidelines and overseeing the activities of the NCPs with a view to enhancing the effectiveness of the Guidelines.

⁶ Niza & Co.: "The sheer fact of embarking, over an extended period, upon a regular stream of business transactions - as was the case between CPH and EWRI - involves a conscious investment in the development of commercial relations and the establishment for itself of a stable line of business. CPH was explicitly taking the risk of not being able to access alternative sources of supply. In so doing, CPH was taking a commercial business risk in creating dependency.

ANNEX I.

Lessons learned and future activities

- The NCP procedure raised the awareness of CPH of its own responsibility throughout the business chain, from supplier and producer to consumer. Following the common values for responsible business conduct that are reflected in the Guidelines, CPH could have conducted more enquiries to find out the origin of the ore and the circumstances that surrounded ore mining. Companies should be proactive in asking these questions, particularly in a conflict zone. CPH noted that although it is most willing to implement the Guidelines, this is not always possible in practise.
- At the time when CPH started its business relations in East-Africa, the Netherlands government did not have a policy on doing business in the DRC. CPH was not aware of the Guidelines. The NCP will continue its effort to raise awareness of the Guidelines. Governments and international organisations should advise companies clearly and consistently on doing business in conflict zones.⁷
- The NCP welcomes that CPH now acknowledges the importance of the Guidelines and that it will introduce the Guidelines with its business partners abroad.
- The NCP appreciates CPH's effort to introduce certificates of origin in current business abroad.

⁷ Recently the OECD CIME made a statement about business activities in the DRC (see website http://www.oecd.org/document/6/0,2340,en_2649_201185_27217798_1_1_1_1,00.html). The Netherlands Ministries of Foreign and Economic Affairs explained their policies in a document "Doing business in Conflict Zones" (see website [www.minbuza.nl/notas/ "Ondernemen in Conflictgebieden"](http://www.minbuza.nl/notas/Ondernemen%20in%20Conflictgebieden)).

ANNEX II.

Background document

Introduction

In July 2003 Niza & Co. asked the NCP whether CPH's involvement in ore mining in the DRC was in conformity with the OECD Guidelines for Multinational Enterprises. In this specific instance, two main questions were raised:

1. Is it possible to conduct business in conformity with the Guidelines in an area occupied by rebel groups, i.e. the East of the DRC?
2. If so, how does a company achieve that?

Niza & Co. referred to the following chapters of the Guidelines:

Environment, Chapter V, introduction and section 2 and 3:

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

- Taking in account concerns about costs, business confidentiality, and the protection of intellectual property rights:
 - Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance;
 - Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by the implementation.

- Assess, and address in decision-making, the foreseeable environmental, health and safety-related impacts associated with the processes, goods and services of the enterprise over the full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to the decision of a competent authority, prepare an appropriate environmental impact assessment.

Employment and Industrial Relations, Chapter IV, section 1, b and c, section 4, b:

Enterprises should, within the framework of applicable law, regulations and prevailing relations and employment practices:

- Contribute to the effective abolition of child labour;
- Contribute to the elimination of all forms of forced or compulsory labour.

Take adequate steps to ensure occupational health and safety in their operations.

General Policies, Chapter II, section 10 and section 11:

- Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles or corporate conduct compatible with the Guidelines.
- Abstain from any improper involvement in local political activities.

Since there is no investment nexus in this specific instance, CPH's responsibility refers to the business chain. CPH could have asked its business partner EWRI which activities it undertook to respect the Guidelines. Therefore, the main chapter of the Guidelines applicable to this specific instance is Chapter II., section 10.

ANNEX III.

OECD CIME statement on investment

Scope of the Guidelines

The question of the scope of the Guidelines – the definition of the activities to which the Guidelines are thought to apply – was raised during the NCP meetings, the consultations and the 2002 Roundtable. The issue was also raised and discussed in all subsequent consultations held during the reporting period. The CIME and its Working Party held several exchanges of views and surveyed delegates' positions on this issue. At the end of its April 2003 meeting, the CIME issued a draft statement on the issue, which was subject to additional comment by written procedures and to final approval at the June 2003 NCP meetings. The draft statement reads as follows:

In considering this issue, the CIME has sought to protect and enhance the credibility and effectiveness of the Guidelines and to remain true to the agreement reached among adhering governments at the 2000 Review after extensive consultations with the business, trade union and NGO communities.

The Guidelines are a multifaceted instrument and the Committee found it useful to consider this issue with reference to the following, which does not aim to change the balance reached during the 2000 Review:

- First, the Guidelines are an Annex of the OECD Declaration on International Investment and Multinational Enterprises. The fact that they are part of the Declaration and that oversight responsibility for them has been assigned by the Council to the CIME -- the body charged with responsibility for the Organisation's work on investment and multinational enterprises – indicates the investment intent of the drafters of the instrument.
- Second, the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with

responsible business conduct. These principles reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines. As such, these values are relevant to the activities of multinational enterprises. Thus, as it has already done in a number of areas, the international community may continue to draw on the values underlying the Guidelines in other contexts.

- Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.