Rights & Accountability in Development

Memorandum to the Foreign Affairs Committee

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RAID's Memorandum to the Foreign Affairs Committee

Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report

1. Rights & Accountability in Development (RAID) welcomes this opportunity for presenting written evidence to the Committee concerning the Foreign and Commonwealth Office's human rights work in 2012, taking as a starting point the Department's 2012 report on Human Rights and Democracy.

2. RAID is a research and advocacy organisation that promotes respect for human rights and responsible conduct by companies abroad. We are a longstanding contributor to the debate on corporate conduct during and after the devastating war in the Democratic Republic of Congo (DRC). RAID has participated in the work of the United Nations on business and human rights and that of the UK National Contact Point for the OECD Guidelines for Multinational Enterprises. It has examined the implementation of the OECD's Guidance for the Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas in Katanga. It was involved in drafting the International Code of Conduct for Private Security Providers. Its most recent publications Questions of compliance: The Conduct of the Central African Mining & Exploration Company (CAMEC) plc and its Nominated Adviser, Seymour Pierce Limited (2011); and Asset laundering and AIM: Congo, corporate misconduct, and the market value of human rights (2012), are available on its website: www.raid-uk.org.

3. Summary and Main Findings

   RAID's submission covers the following aspects of the Foreign and Commonwealth Office's work: foreign mining assets and the regulation of the London Stock Exchange; the functioning of the sanctions regime; and the regulation of private security providers.

   1) Poor governance issues and misconduct concerning London-listed mining companies have damaged London's reputation. Reforms introduced under the Financial Services Act (2012) do not go far enough. The rules related to London's junior Alternative Investment Market (AIM) should be strengthened to prevent assets of dubious provenance from conflict-affected countries from being laundered.

   2) There are increasing problems with the lack of transparency and consistency in the way that sanctions are applied or withdrawn which is reducing the effectiveness and credibility of the sanctions regime.

   3) In its proposals for self-regulation of the private security providers the UK government is failing in its duty to protect individuals against human rights abuses by

third parties, including business. States, as host countries, homes countries and clients of private security providers, retain the primary responsibility for regulating the industry.

Regulation of the London Stock Exchange

"Trade is most sustainable in markets characterised by good governance, the rule of law, transparency and responsible business conduct, including the protection of, and respect for, human rights… It reduces the risks and associated costs of reputational damage, disruption and litigation…" [1]

4. In May 2011, RAID submitted a complaint to the London Stock Exchange concerning the Central African Mining & Exploration Company (CAMEC).[2] The complaint related to CAMEC's conduct in the Democratic Republic of Congo (DRC) and compliance by the company and its adviser with AIM rules. These failures allowed assets of dubious provenance to be traded on the junior market without due regulation. In 2009, CAMEC's Congolese assets were acquired by Main-market-listed the Eurasian Natural Resources Corporation (ENRC).

5. There have been a number of related regulatory developments since RAID submitted its complaint to the Exchange. AIM Regulation used its October 2012 *Inside AIM* communication to AIM company nominated advisers (nomads) to set out further guidance on the requirements of due diligence on directors and on best practice in contacts between AIM companies and their nomads. RAID's report highlighted lapses in due diligence in the CAMEC case and it should be noted that AIM Regulation, in deciding to provide further guidance, refers specifically to its disciplinary notice on the nominated adviser ('nomad') Seymour Pierce, which was also CAMEC's adviser.[3] RAID was critical of the ambiguity concerning the requirement for due diligence on substantial shareholders or key figures exerting influence or control over a company: AIM Regulation now advises that 'the principles regarding due diligence on directors…can be equally applied as guidance.' RAID's report provided many instances where price-sensitive information appears to have been withheld. AIM Regulation now emphasises the need for nomads to follow-up on questions in a meaningful way and 'to consider the spirit and underlying purpose' of rules governing the notification price-

[1] Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report p. 93

[2] RAID, *Questions of Compliance: The Conduct of the Central African Mining & Exploration Company (CAMEC) plc and its Nominated Adviser, Seymour Pierce*, Submission to AIM Regulation, May 2011, available at:
< http://raid-uk.org/docs/AIM/AIM_Submission_2011.pdf>.

[3] In May 2013, Seymour Pierce went into administration after the FSA had blocked an investment by a Ukrainian businessman. It has since been bought by Cantor Fitzgerald. See Vanessa Kortekaas and Kate Burgess, 'Cantor in talks over Seymour Pierce,' *Financial Times*, 6 February 2013, <http://www.ft.com/cms/s/0/25209ea2-7093-11e2-a2cf-00144feab49a.html#axzz2Ty6FMYE8>; also Harry Wilson, 'Cantor Fitzgerald buys Seymour Pierce out of administration,' *The Telegraph*, 23 May 2013, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9858794/Cantor-Fitzgerald-buys-Seymour-Pierce-out-of-administration.html>.

sensitive information without delay. **RAID would like to see the new guidance formalised under the Rules for Nominated Advisers**.

6. Proposals under the Financial Services Bill (2012) that paralleled RAID's recommendations – to require human rights reporting by applicants to the stock exchange or annual human rights impact statements by oil, gas and mining companies – were tabled, but rejected by the government and were absent from the final Act. The government argues that the Financial Service Authority (now the Financial Conduct Authority) already has the powers to daw up such requirements, should it see fit, under the listing rules and so they should not be written into primary legislation. The government also rejected a role for the Financial Conduct Authority in fostering ethical corporate behaviour, including respect for human rights. **The Act does, however, retain additional measures referred to by RAID to increase scrutiny of the regulators themselves, although we advocate the need for thorough reform of the way in which complaints are handled.**

7. Poor governance issues and misconduct concerning London-listed mining companies – such as Eurasian Natural Resources Corporation (ENRC) and Bumi plc – have damaged London's reputation and resulted in recent proposals for more effective listing rules. RAID's report drew attention to unanswered questions surrounding ENRC's acquisition of CAMEC and our work on the regulation of AIM has been fed into our response to the FSA consultation.[4] **Whilst supportive of the tightening of listing rules curtailing and disclosing the influence of controlling shareholders, RAID remains critical of a regime that allows assets to be effectively laundered on the junior AIM market.**

8. It is our experience that failures of due diligence, misapplication of the class tests, and breaches of disclosure rules under the AIM regime have allowed assets derived from conflict and weak governance zones to be traded and attract capital investment on the junior market before being transferred (by acquisition) to the main market. **Unless the 'downstream' failings are also addressed, the message sent is that high standards in corporate conduct are only required and brought to bear after tainted assets have already been laundered under a junior market regime which is *laissez-faire* by design.**

Recommendations

9. There is a pressing need to learn the lessons of the CAMEC case, both in bringing errant or recalcitrant companies and their advisers to account and in reforming the way in which the junior market is regulated:
    i) A public determination of compliance or non-compliance in the CAMEC case.

[4] RAID, *Polishing the family silver: Response to the FSA's Consultation Paper CP12/25 Enhancing the effectiveness of the Listing Regime*, November 2012, available at: http://raid-uk.org/docs/Response_FSA_Consultation_2012.pdf>.

ii) The strengthening under AIM rules of on-going due diligence for all substantial transactions involving assets in conflict-affected or weak governance zones: checks on the validity of titles and licences, the reputation of key managers, business partners and associates and the rigour of accounting practices.
iii) Prevention of the same firm from acting as both nomad and broker at admission, so that the gatekeeper function is ring-fenced from the drive to earn commission from a successful flotation.
iv) The making of all breaches by nomads public and naming the adviser concerned.
v) Seeking to ensure that the European Union's revised Transparency and Accounting Directives requiring the publication of payments made by extractive companies to governments is extended in the UK to include AIM, which could otherwise be exempt.

Application of the sanctions regime

"When the international community seeks to respond to the abuse of human rights by a government, group or individual, sanctions can be an effective tool in constraining unacceptable activities or forcing a change in behaviour."[5]

10. In the 2008 election, ZANU-PF's Robert Mugabe retained the presidency of Zimbabwe after a campaign of horrific brutality against opposition supporters. Up to 200 people were killed, 5,000 more were beaten and tortured, and 36,000 people were displaced over the course of the election. The violence was financed by money channelled to the Mugabe government via a loan as part of a lucrative platinum deal by CAMEC.

11. Commentators at the time described the advance as a 'thinly disguised donation... nothing less than an unsecured cash loan to the Zimbabwe Government... "the president Robert Mugabe regime"'.[6] An opposition spokesman has stated:[7] 'all the heartache, pain, gerrymandering, violence, intimidation, repression that took place at the 2008 election is directly linked to that 100 million.'

12. In July 2011 RAID sent a memorandum to the Asset Freezing Unit (AFU) seeking clarification on: compliance of the 2008 platinum deal with sacntions and; the application of sanctions to trading in CAMEC shares of possible direct or indirect benefit to designated persons or entities, including Muller Conrad (a.k.a. Billy) Rautenbach, who was added to the EU list in January 2009.

[5] Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report; p. 115
[6] Barry Sergeant, 'Zimbabwe's robber barons,' *Moneyweb*, 28 June 2008.
[7] MDC-T Treasurer General Roy Bennett, in a SW Radio Africa interview, presented by Alex Bell, broadcast 14 August 2012. See *Transcript of Diaspora Diaries with Roy Bennett*, posted 17 August 2012, available at: <http://www.swradioafrica.com/2012/08/17/transcript-of-diaspora-diaries-with-roy-bennett/>.

13. RAID sought to clarify that designated individuals – including Billy Rautenbach (former owner of the principal assets acquired by CAMEC, who continued as manager of the mines for a significant period under CAMEC's ownership, and who was a major CAMEC shareholder) – did not profit from the sale of CAMEC to ENRC. Rautenbach held a significant shareholding in CAMEC via a number of entities that it is known or suspected that he controlled (Harvest View Limited, Meryweather Investments Limited, Temple Nominees Limited and Chambers Nominees Limited). When ENRC made its offer to acquire CAMEC, this entailed buying Rautenbach-controlled shares from which he would ultimately benefit. In order to buy such shares, ENRC was required to obtain a licence from HM Treasury.

14. The Treasury has refused to 'comment on specific cases involving named individuals and entities and…does not comment on individual licence applications'. It claims that claims that Article 8 of EU Regulation 314/2004 prohibits information obtained to facilitate compliance with the Regulation to be used for any purpose other than that for which it was provided.

15. Notwithstanding the validity or otherwise of withholding information on named entities, RAID contends that certain information being sought relates to the AFU's administration – for example, the dates upon which licenses were issued. Likewise, notwithstanding the validity or otherwise of relying upon Article 8 of Council Regulation 314/2008 to withhold information, RAID contends that information on the timing of licences or the dates of notification to other competent authorities or the Commission manifestly falls outside the scope of any such exemption. Moreover, key questions of compliance with sanctions law, in relation to both the 2008 platinum deal and ENRC's purchase of CAMEC, have not been publicly addressed.

16. Recent developments may yet force the authorities to reconsider the evidence. Eurasian Natural Resources Corporation (ENRC), the FTSE 100 company that acquired CAMEC and its assets in 2009, is now the subject of a criminal investigation by the Serious Fraud Office (SFO).[8] Moreover, press reports, based on a letter from a legal firm formerly engaged by ENRC's to conduct an internal investigation into misconduct, indicate that the acquisition of CAMEC 'involved possible breaches of financial sanctions'.[9]

Recommendations

i) Possible breaches of financial sanctions must be fully investigated and, where there is evidence of illegality, the perpetrators must be prosecuted.

ii) The AFU should make public all licence applications to deal or trade in the holdings of sanctioned individuals or entities and the grounds upon which any such licences were granted or refused; likewise, applications under EU provisions to release funds to sanctioned individuals or entities for 'extraordinary expenses'

[8] <http://www.sfo.gov.uk/our-work/our-cases/case-progress/enrc-plc.aspx>.
[9] Danny Fortson, 'Heart of Darkness,' *The Sunday Times*, 28 April 2013.

should be published in full or redacted form, having balanced personal confidentiality against the public interest.

iii) The process by which individuals or entities are designated as sanctions targets is entirely opaque. Not only should the rules or process by which decisions to add or remove people or entities be made public, but a channel should be established under which third parties, including NGOs, can submit information to be taken into consideration.

Private Security Providers

> *"The UK has played a leading role in supporting the development of effective regulation of PSC activity in complex environments to help ensure that their work is carried out in a manner consistent with international legal and human rights obligations."*[10]

17. RAID participated in the development of the International Code of Conduct for Private Security Service Providers (ICoC) and the establishment of the Association which includes provisions for oversight of the industry. RAID has participated in the process because it believes that, if accompanied by an effective governance and oversight mechanism, ICoC could be a step towards increasing transparency about the activities of the private security industry and holding private security providers accountable for human rights violations.

18. It is a matter of concern therefore that the Foreign and Commonwealth Office (FCO) and industry seem intent on self-regulation. The FCO seems to be paying lip-service to the ICoC multi-stakeholder initiative yet over the past year it has pressed ahead with plans for an industry-based certification procedure. In May 2013 the Minister for Africa, Mark Simmonds, announced that the UK Accreditation Service will shortly launch a pilot scheme to approve the certification bodies that will be able to independently audit and monitor private security companies to a separate UK national standard, supposedly 'derived' from the ICoC.[11] All of these steps have been taken behind closed doors with little or no public scrutiny and, to date, no civil society participation.

19. In 2011 the Security in Complex Environments Group (SCEG) was appointed as the UK Government's Industry Partner for the regulation of Private Security Companies. SCEG is a special interest group within ADS (the trade organisation for all companies operating in the UK Aerospace, Defence, Security and Space industries). RAID has expressed concern about the lack of transparency surrounding FCO's work with SCEG in the development of the UK national standard and an accompanying certification scheme. RAID has warned the Government that self-regulation by an industry body will lack credibility.

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[10] Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report pp 88-89

[11] FCO Minister's speech to Security in Complex Environments Group 8 May 2013 https://www.gov.uk/government/speeches/fco-ministers-speech-to-security-in-complex-environments-group

20. Civil society groups have also expressed concern that the process envisioned under the ICoC is over-reliant on corporate-level grievance mechanisms and that the role of the Association is limited to providing advice on the effectiveness of those mechanisms. But SCEG members have made clear their opposition to even this level of independent scrutiny.

21. States, as host countries, homes countries and clients of private security providers, retain the primary responsibility for regulating the industry. While the ICoC could be a positive development, it is not sufficient to make private security companies truly accountable for their actions. The Code, which envisions termination of membership as the ultimate sanction for non-compliance, is not equipped to deal with serious human rights violations, such as murder and torture. Only statutory national and international regulation can bring legal accountability and judicial remedies to victims for such actions. Indeed, as signatories of the Montreux Document[12] (which reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international and humanitarian and human rights law) , all member states in the ICoC Association would be required to establish criminal jurisdiction over private security providers and their personnel, to provide for non-criminal accountability, to include civil liability of private security companies, and to create sufficient administrative and other monitoring mechanisms to ensure accountability for any improper conduct.

Recommendations

1) The UK Government should establish criminal jurisdiction over private security providers and their personnel, provide for non-criminal accountability, to include civil liability of private security companies, and create sufficient administrative and other monitoring mechanisms to ensure accountability for any improper conduct.

2) The ICoC can only be credible if the Secretariat is able to maintain an independent capacity to authorize field audits in order to assess the impact of private security providers and to follow up on allegations of non-compliance with the Code, even if certification to a national standard has already been granted. Because governments, as clients of the industry, may experience a conflict of interest in acting both as regulators and users of the industry's services, an independent oversight mechanism is crucial to ensure that the process is credible.

3) If the ICoC is to be more than a toothless process, the Board should also be able to issue sanctions for non-compliance with the Code, including but not limited to suspension or termination of membership.

[12] Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm