



Update for the UK National Contact Point for the OECD Guidelines

RAID/ACIDH v ENRC

April 5, 2017

1. Introduction

In May 2013 Rights and Accountability in Development (RAID) with its Congolese partner, *Action contre l'impunité pour les droits humains* (ACIDH), filed a complaint under the OECD Guidelines for Multinational Enterprises about alleged human rights violations of communities living on mine sites in the Democratic Republic of Congo controlled by the subsidiaries and business partners of the London-listed Eurasian Natural Resources Corporation (ENRC). The company has since been re-named Eurasian Resources Group (ERG) and taken into private ownership.¹ The OECD procedure was concluded in February 2016 with the UK National Contact Point (NCP), a government body, reaching adverse findings against the company.

The NCP also made four recommendations to be implemented by ENRC/ERG. These covered the issues of communications with the community, meeting expectations about mine security, ensuring safe water, and improving community development. The UK Government said it would review ENRC's progress after 12 months. This RAID report has been prepared to provide input to that review.

This report:

- (1) Summarises the findings and recommendations made by the NCP.
- (2) Provides an update, based upon site visits by a partner NGO, on the company's implementation of the NCP's recommendations.
- (3) Highlights recent civil and criminal corruption charges in the United States against a US hedge fund which refer to the mining assets at the heart of RAID's original complaint which were ultimately acquired by ENRC.
- (4) Provides recommendations for urgent follow-up action by the NCP.

In summary, a year after the conclusion of the OECD complaint against ENRC, few of the NCP's recommendations have been implemented and, in many respects, the security and living standards of the people living in the affected villages has deteriorated. This lack of progress requires urgent attention by the NCP and immediate follow-up with the company. Moreover, the

¹ At the time the complaint was filed in May 2013, ENRC plc was listed on the London Stock Exchange. ENRC delisted from the London Stock Exchange on 25 November 2013 and from the Kazakhstan Stock Exchange on 27 December 2013, becoming an entirely private company under the name Eurasian Resources Group (ERG), based in Luxembourg.

reference by the US authorities to corrupt transactions in the DRC concerning assets acquired by ENRC, and the continuing investigation of the latter by the Serious Fraud Office (SFO) in the UK, must raise questions about the reputation of ENRC and the *bona fide* nature of any commitments arising from the NCP process.

2. The RAID v ENRC complaint: NCP findings and recommendations, February 2016

The objectives of RAID's complaint were to ensure that ENRC's Congolese subsidiaries and business partners provided a secure supply of clean water for local villagers; developed an artisanal mining strategy to prevent conflict; undertook environmental and social monitoring to address negative impacts of the mining operations; and set up an effective complaints mechanism. These objectives are in line with the provisions of the *OECD Guidelines for Multinational Enterprises*, the *UN Guiding Principles on Business and Human Rights* and the *Voluntary Principles on Security and Human Rights* – all key components of the UK's National Action Plan on Business and Human Rights.

The complaint was examined by the UK NCP (then based in the Department for Business, Innovation and Skills).² The company disputed most of RAID's claims but refused to disclose relevant information such as its social and environmental assessments or its Memorandum of Understanding with the Congolese mine police, deployed at the sites. When attempts at mediation broke down, ENRC sought to have the NCP's conclusions overturned on procedural grounds, but its appeal was rejected. After an examination of the issues by the NCP, the case was concluded in February 2016 and a final statement issued.³

NCP findings

According to the NCP's findings, ENRC – though not directly responsible – had been aware of the contamination of water sources at two mine sites in southern DRC controlled by its subsidiaries, COMIDE (La Congolaise des Mines et de Développement) and Africo Resources Limited (a Canadian company). Several thousand people living in the remote villages of **Lenge** and **Kisankala**, which lie on neighbouring mine sites, were effectively denied access to clean water. According to the complainants, ENRC was aware from its due diligence report that 'the population in the vicinity of the COMIDE and Africo licences is largely poverty stricken'.⁴ [The paragraph numbers in the text refer to the Final Statement.]

The NCP concluded that:

- 'ENRC has not engaged effectively with two stakeholder communities on the concessions, and has not taken adequate steps to address impacts on the communities'.
- 'ENRC has not met the obligation to address human rights impacts with which it is involved'.
- 'One of the impacts that is not adequately addressed is a threat to the security of community access to safe drinking water. The right to safe water is a human right'.

The UK NCP also made four recommendations to ENRC/ERG as detailed below.

² In September 2016, the UK National Contact Point for the OECD Guidelines for Multinational Enterprises moved to the Department for International Trade.

³ UK NCP Final Statement: Complaint by RAID against ENRC, < <https://www.gov.uk/government/publications/uk-ncp-final-statement-raid-complaint-against-enrc-democratic-republic-of-congo>>.

⁴ *Competent Person's Report prepared for ENRC on the Mineral Assets of Camrose*, dated November 2012.

3. ERG's implementation of the NCP's recommendations

In order to provide information to the NCP on ERG's implementation of the recommendations made in the final statement, RAID's Congolese partner visited Kisankala and conducted interviews during February and March 2017 with people from both communities. The visit was undertaken by AFREWATCH, founded in 2015 by Emmanuel Umpula Nkumba, the former Executive Director of ACIDH (the original co-complainant). Given the status of the complaint against ENRC and Emmanuel's in-depth knowledge of the situation at Lenge and Kisankala, ACIDH had a formal agreement with M. Umpula Nkumba that he would continue to represent ACIDH in any mediation or hearings until the conclusion of the case.

The findings from the recent NGO visits, as these relate to each NCP recommendation (italicised in the text), are set out below.

i) NCP recommendation on communications with the Company

- *to ensure that effective communications channels are in place between ENRC, the concession holding companies, and the stakeholder communities of Kisankala and Lenge. The NCP considers that there should be a publicly available communications strategy, including accessible and effective grievance procedures.*

NGO findings

Communication has not improved in Lenge where the community has virtually no contact with company representatives. Villagers allege that the company has at times threatened them with forced displacement and has made no offer to assist them to relocate either outside the concession or to a more suitable area within the concession. At Kisankala there are brief routine visits by a Community Relations agent once a month. Other than questions relating to repairs of the water supply at Kisankala, **there is no effective means for the communities to raise complaints or concerns with the company.**

ii) NCP recommendation on standards of conduct for staff and security providers

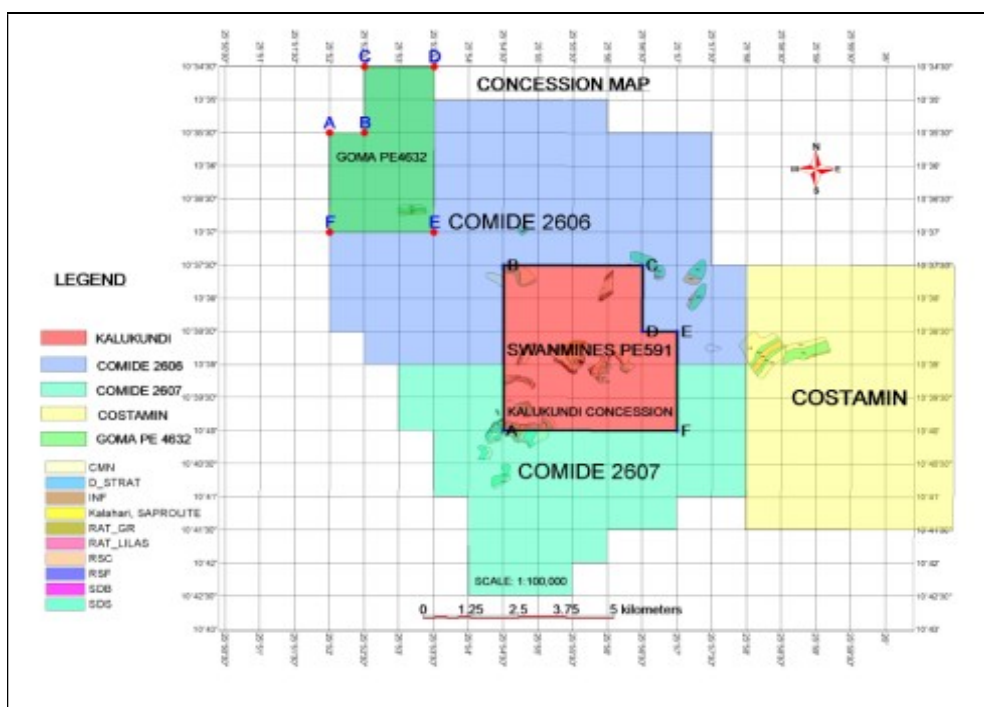
- *to inform the communities about standards of conduct expected of staff and security contractors on the site, and ensure that the communities receive timely advice about anticipated changes to the schedule for mining.*

The NCP did not reach a finding as regards the frequent clashes with artisanal miners, but noted that the company had failed to demonstrate that it 'had taken action to address the ongoing risks to communities from its security operations or to encourage its business partners to apply [OECD] Guidelines standards in addressing them'.

NGO findings

A private company, Bras Security, currently patrols both sites. Contrary to accepted policy among international mining companies, soldiers of the elite Republican Guards (who are under the direct control of President Kabila) are also present at the sites. The Republican Guard have a well-documented track record of human rights abuses by the United Nations and other human rights groups, and have frequently been accused of extortion and human rights violations around artisanal mining sites, including those in which members of the presidential family have interests.

The Goma concession to the north of COMIDE’s concession (see diagram below) has been identified in court records as being 10 per cent owned by the Kabila family.⁵



Synergy ARL Kalukundi Project RAP - June 2007

Over the past year there has been a huge influx of artisanal miners into both villages, especially into Lenge. Lenge’s population has swollen from some 300 people to about 6,000, bringing with it a significant number of problems and increased tension. There are frequent arrests by the private security guards or mine police of artisanal miners trying to collect minerals inside the concession. Artisanal miners who are arrested are often abused: they are allegedly tied up or handcuffed and then beaten by police or private security guards. They are often held for 24 hours, sometimes on the mine site or at the courthouse cells in Kolwezi. In most cases, they are released only after their families have paid a ‘fine’. Radio Okapi and other Congolese media reported in early 2015 that the miners were encouraged by the authorities, after a series of lethal accidents, to move from Kasulo, a chaotic mine site that operated in a poor residential suburb of the city of Kolwezi.⁶ Many of the artisanal miners who were removed from Kasulo are now based in Lenge and dig for minerals in nearby concessions, such as at Goma Mining.

The Chiefs of Lenge and Kisankala seem to be regarded by the company as responsible for the actions of the artisanal miners, even though they have no control over their activities and were not instrumental in encouraging them to relocate to the area. In December 2016, the chief of Lenge was called to a meeting with the company in December 2016 and was questioned about encroachment by illegal artisanal miners into COMIDE. **Village residents interviewed by AFREWATCH said they were not aware of any company policy or guidance about the standard of conduct expected of staff and security contractors.**

⁵ Michael Kavanagh, Thomas Wilson and Franz Wild, ‘With His Family Fortune at Stake, Congo President Kabila Digs In’, *Bloomberg*, 15 December 2016, <<https://www.bloomberg.com/news/features/2016-12-15/with-his-family-fortune-at-stake-congo-president-kabila-digs-in>>.

⁶ *Agence Congolaise de Presse*, ‘Vers la délocalisation des creuseurs de Kasulo à Kolwezi’, 3 January 2015, <<http://acpcongo.com/acp/vers-la-delocalisation-des-creuseurs-de-kasulo-a-kolwezi/>>.

iii) NCP recommendation on provision of clean water

- *to use its influence to ensure that site security management includes measures that assure continuing unrestricted community access to the water supply provided in 2007-08.*

During the NCP process, ENRC/ERG claimed that, despite its 64% holding in Africo's Joint Venture, it had little leverage over the Kalukundi concession. The UK NCP asked ENRC to use its influence with Africo/Swanmines to ensure 'unrestricted and continuing community access to water'. Following ERG's acquisition of Africo the company should take full responsibility for ensuring unrestricted community access to clean water.

NGO findings

The only positive outcome of the complaint is that water is now available each day at Kisankala between the hours of 6.00-11.00 and 15.00-19.00 without charge. If there are any problems with the supply the company promptly carries out repairs.

In July 2016 COMIDE committed to digging a new borehole at Lenge so people would no longer have to drink contaminated river water. This commitment has not been kept. Local people continue to consume polluted water with all the attendant health risks.

The company continues to provide access to clean water at Kisankala, although this is dependent on the company's goodwill to enact repairs. There is no formal agreement with the community about the provision of clean water. There is no provision of clean water at Lenge.

iv) NCP recommendation on improving living conditions

- *in consultation with the communities, to consider whether plans to provide or enhance community facilities as part of mining plans can be progressed at an early stage.*

NGO findings

Before the complaint, ENRC's subsidiaries largely ignored villager residents and their pressing needs. As a result of the complaint, COMIDE and Africo appointed community relations officers and began to take some steps to improve conditions in the villages. In 2015, during a visit to Kisankala, RAID observed some improvements: additional latrines had been dug (albeit crudely) and the mounds of rubbish spread around the village had been cleared away. A new health clinic was opened in July 2016, staffed by a doctor and a nurse, and basic health care was available at no charge for all the Kisankala residents.

After only six months, in December 2016, the clinic was closed (see photo below) and health care suspended. Soon afterwards, there was an outbreak of fever (possibly typhoid or cholera) in Kisankala and 12 children died. During the same month, the company stopped paying teachers' salaries at Kisankala. According to the community relations agent, the community projects had been closed because Swanmines and COMIDE had not reached an agreement about their funding.

Plans to promote agriculture have also come to nothing. In November 2016, there was a workshop with participants from both Kisankala and Lenge about setting up agricultural projects, but these have not yet materialised.



(Kisankala Health Centre closed. AFREWATCH, 22 March 2017)

At Lenge the company has not undertaken any community development projects and health care has not been provided. Furthermore, the paths (underneath transmission lines) that many local residents from Lenge used as short cuts across the concession to reach the main trading centres of Lualaba and Kolwezi city have been blocked. Lenge residents used these paths to get food from local markets, take their produce to sell along the national highway, reach health clinics and take their children to school. The blocking of the paths mean local residents need to walk up to 10 – 15 extra kilometres. Nothing has been put in place to facilitate transport or to help them leave, enter or cross the concession safely.

In the rainy season, the access road from the national highway leading to Kisankala is especially poor and often impassable due to damage caused by heavy trucks going to and from Swanmines.

Road to Kisankala Village (AFREWATCH, 22 March 2017)



4. The DRC corruption scheme, the ongoing SFO investigation into ENRC and implications for the affected communities

The original complaint did not invoke the relevant provisions of the *OECD Guidelines* on combatting bribery, since such issues were likely to have been considered inadmissible because of ongoing criminal investigations. Nevertheless, the hardships and abuses experienced by the affected communities are inextricably linked to the corrupt transactions described in a recent Foreign Corrupt Practices Act (FCPA) settlement in the United States.⁷

In September 2016, the US Department of Justice (DOJ) charged Och-Ziff, one of the largest hedge funds in the world, with conspiracy to violate the anti-bribery provisions of the FCPA.⁸ The Securities and Exchange Commission (SEC) also announced that Och-Ziff had agreed to settle civil charges of violating the FCPA.⁹ Overall, Och-Ziff agreed to pay combined civil and criminal penalties of \$412 million, the largest ever settlement concerning a Wall Street firm. According to the SEC a 'significant portion' of the loans paid to Och-Ziff's 'Israeli businessman...partner in DRC' – matching Dan Gertler, a close associate of DRC's President Joseph Kabila – were used 'to pay bribes to high-ranking DRC officials to secure mining assets'.¹⁰ Gertler and the holding company he controls strongly deny the allegations and he has neither been named nor charged by the US authorities.¹¹ DRC mining assets acquired by Gertler, including the mine sites held by COMIDE and Africo Resources, were ultimately sold on to ENRC. The US authorities set out the transactions underlying the 'DRC Corruption Scheme':

In or about and between March 2008 and February 2011, Och-Ziff entered into several DRC-related transactions with DRC Partner [Gertler]:... (2) a \$124 million convertible loan through a subsidiary company and AGC to Company B [Camrose Resources Limited], a DRC Partner-controlled shell entity, funded in or about and between April and October 2008 (the "Convertible Loan Agreement"); and (3) a \$130 million margin loan to Company C [Lora Enterprises Limited], a DRC Partner-controlled shell entity, in November 2010 and February 2011 (the "Margin Loan Agreement"). Leading up to and through these transactions, Och-Ziff Employee 3 and Och-Ziff Employee 5 were made aware of and participated in the corrupt payments, using funds provided by Och-Ziff to Company B [Camrose] and Company C [Lora], that DRC Partner made to various DRC officials to secure mining interests in the DRC. [DOJ, *Deferred Prosecution Agreement*, Statement of Facts, 28]

Och-Ziff and DRC Partner [Gertler] worked to acquire and consolidate assets in the DRC into an entity [Camrose] controlled by DRC Partner that could then be sold to a large publicly-traded mining company [ENRC] for a significant profit. [SEC Order, 42]

⁷ For further information see RAID's January 2017 report, 'Bribery in its purest form': *Och-Ziff, asset laundering and the London connection*, <<http://www.raid-uk.org/documents/ozbriberyinitspurestformfullreport-pdf>>.

⁸ United States of America against Och-Ziff Capital Management Group LLC, *Deferred Prosecution Agreement* [hereafter, 'DPA'], Cr. No. 16-516 (NGG), United States District Court Eastern District of New York, 29 September 2016, <<https://www.justice.gov/opa/file/899306/download>>.

⁹ U.S. Securities and Exchange Commission, 'Och-Ziff Hedge Fund Settles FCPA Charges Och-Ziff Executives Also Settle Charges', *Press Release*, 2016-203, 29 September 2016, <<https://www.sec.gov/news/pressrelease/2016-203.html>>.

¹⁰ U.S. Securities and Exchange Commission, *Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order* [hereafter, 'SEC Order'], against Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, Joel M. Frank, Securities and Exchange Act of 1934 *Release No. 78989*/September 29, 2016, Investment Advisers Act of 1940 *Release No. 4540*/September 29, 2016, Administrative Proceeding *File No. 3-17595*, <<https://www.sec.gov/litigation/admin/2016/34-78989.pdf>>.

¹¹ 'The Fleurette Group and Dan Gertler strongly deny the allegations announced today, which are motivated by a hedge fund trying to put behind it problems sparked by people that have nothing to do with Fleurette.' Spokesman for the Fleurette Group quoted in: Franz Wild and Keri Geiger, 'Diamond Magnate at the Heart of Och-Ziff's Africa Ambitions', *Bloomberg*, 30 September 2016, <<http://www.bloomberg.com/news/articles/2016-09-30/the-diamond-magnate-at-the-heart-of-och-ziff-s-africa-ambitions>>.

The US authorities describe how Och-Ziff's DRC Partner [Gertler] went about obtaining assets belonging to a Canadian mining company, identified as Africo Resources Limited.¹² A senior DRC Official had orchestrated the taking of Africo's interest in a DRC mine. The DOJ details how Och-Ziff's DRC Partner paid '\$500,000 to DRC officials, including judges, who were involved in the Africo court case to corruptly influence the outcome of those proceedings to the benefit of Och-Ziff and DRC Partner'.¹³ Camrose, using \$100 million from Och-Ziff, then moved in to purchase a majority stake in Africo in exchange for resolving its legal issues.¹⁴

It is apparent that the affected communities in RAID's complaint to the NCP are located on concessions belonging to ENRC subsidiaries acquired through these exploitative and, in the cases detailed by the US authorities, corrupt transactions. The village of Lenge is located deep inside the concession for which COMIDE holds the mining licence. COMIDE was owned by Camrose and other entities associated with Gertler and his holding company. Kisankala is on the Kalukundi concession, majority owned, via Swanmines, by Africo Resources. (See organisational chart for details). **Immediately after Camrose's takeover of Africo, programmes supporting the Kisankala community, including plans to resettle the village, were withdrawn or halted.** ENRC took control and responsibility for the COMIDE and Swanmines licences when it acquired Gertler's Camrose in two tranches during 2010 and 2012.

To attract a buyer for Camrose, the DOJ describes how 'Och-Ziff Employee 5 worked with DRC Partner [Gertler] to obtain additional...assets known as Kolwezi Tailings and SMKK....Kolwezi Tailings had been stripped by the DRC government from a mining company immediately before being obtained by a group of companies controlled by DRC Partner and the DRC government.'¹⁵ The DOJ confirms:¹⁶

On or about August 20, 2010, Mining Company 1 acquired 50.5 percent of Company B. Mining Company 1 agreed to pay up to \$575 million over two years, including \$50 million in cash. Och-Ziff Employee 3 and Och-Ziff Employee 5 were informed by a co-conspirator that the \$50 million was for DRC Partner to "use on the ground" to corruptly acquire Kolwezi Tailings. As part of the deal, Mining Company 1 guaranteed repayment of the Convertible Loan Agreement through a novation of the loan.

'Mining Company 1' and the 'third-party mining company' (see below) are both identifiable as ENRC, although the latter has neither been named nor charged by the US authorities.

According to the DOJ, a \$110 million margin loan was made, through an entity controlled by Och-Ziff, to Lora Enterprises Limited.¹⁷ The loan was extended by a further \$20 million in February 2011.¹⁸ The DOJ Statement of Facts confirms: '[i]n or about and between November 2010 and February 2011, DRC Partner caused approximately \$20 million in corrupt payments to be made to various DRC officials'.¹⁹ According to the SEC:²⁰ 'These bribes were part of his efforts to acquire additional assets and consolidate his DRC holdings in order to sell those holdings to a third-party mining company [ENRC]....In December 2012, the outstanding loans relating to DRC Partner were repaid to Och-Ziff in full, with interest, as part of a transaction in which DRC Partner sold his DRC mining entities to a third-party mining company [ENRC].'

¹² DPA, Statement of Facts, 29 ff.

¹³ DPA, Statement of Facts, 38.

¹⁴ DPA, Statement of Facts 33.

¹⁵ DPA, Statement of Facts 51.

¹⁶ DPA, Statement of Facts, 53.

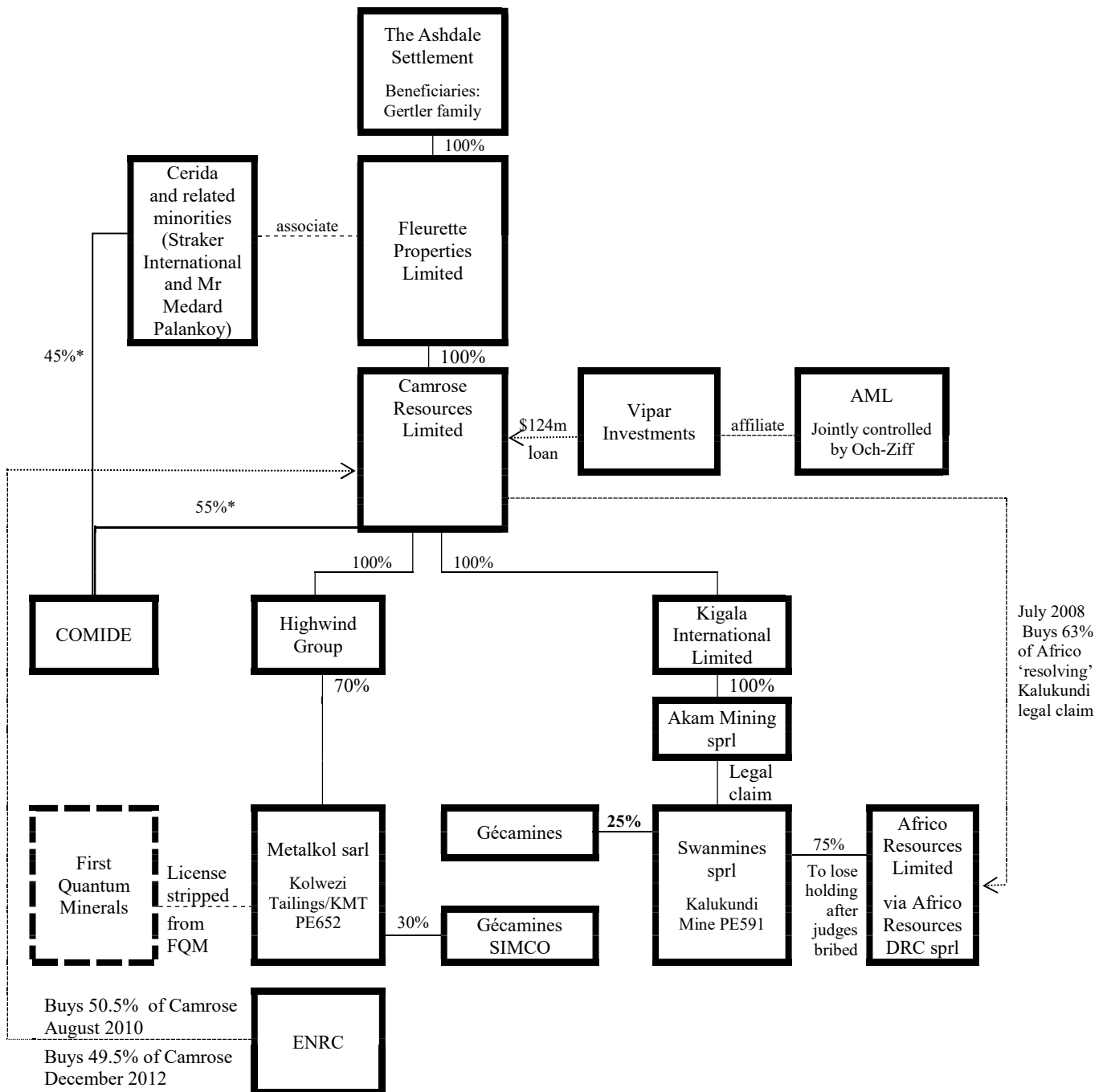
¹⁷ DPA, Statement of Facts, 58.

¹⁸ DPA, Statement of Facts, 59.

¹⁹ DPA, Statement of Facts, 60.

²⁰ SEC Order, 66 – 67.

The influential Africa Progress Panel, established to promote equitable and sustainable development for Africa and chaired by former UN Secretary-General, Kofi Annan, has stated: 'Taking into consideration other assets wrapped up in the Camrose purchase, ENRC effectively paid \$685.75 million for Kolwezi and associated concessions, which were originally purchased ...for \$63.5 million – a return of just under 1,000 per cent for the offshore companies concerned'.²¹



*Camrose's 55% holding in COMIDE increased to 100% after ENRC bought the remaining 49.5% in Camrose as ENRC also bought Cerida and its related minorities.

²¹ Africa Progress Report 2013, Box 9, The Kolwezi project, p.58.

In July 2016 Africo was acquired by ERG (as noted, the successor company to ENRC) and delisted from the Toronto Stock Exchange. RAID has written to the Canadian authorities to ask why they allowed the take-over and delisting of Africo, given the advanced stage of the investigations into Och-Ziff by the US authorities and the on-going inquiry by the SFO into ENRC.

In July 2016, it was widely reported that the SFO had secured special so-called 'blockbuster' funding to continue its investigation into ENRC.²² In December 2016, *Bloomberg* reported that Dan Gertler is included as part of the SFO's investigation into ENRC.²³

5. Conclusion and recommendations

A year after the conclusion of the OECD complaint, few of the NCP's recommendations have been implemented and, in many respects, the situation in the villages has worsened. This is largely because of the decision of the authorities to encourage thousands of artisanal miners to relocate into the area from Kasulo. The alleged lack of agreement between COMIDE and Swanmines for covering the costs of community programmes in Kisankala seems unconvincing given that, since July 2016, both are fully owned ERG subsidiaries.

Recommendations

As a matter of urgency, the NCP should:

1. Urgently request ERG to explain why it has stopped the provision of health care and the payment of teachers' salaries without warning at Kisankala; and request to be informed when these services will be resumed.
2. Ask ERG how its local employee social investment programme, referred to by ERG's CEO at the Africa Mining Indaba in 2016, is being implemented in Kisankala and Lenge; what financial and other resources have been earmarked in 2016, 2017 and 2018 to improve living standards, including healthcare and education, in Kisankala and Lenge?
3. Remind ERG of its commitment to improve access to clean water for the village of Lenge, seek an explanation of why this has not been done, and ask the company to keep the NCP informed of progress.
4. Request ERG to set out what it has done to prevent or dissuade the Congolese authorities from encouraging the relocation of thousands of artisanal miners into its concession areas when there is no infrastructure in place to deal with such a rapid increase in population.
5. Seek details from ERG on: i) why Republican Guards are active in and around its COMIDE concession, especially as regards their well-documented record of human rights abuses and; ii) whether the company has carried out a human rights impact assessment to help prevent extortion and other human rights abuses around the village of Lenge.
6. Request ERG to explain its strategy for dealing with encroachments by artisanal miners and provide information on the protocols it has in place relating to arrest and custody, including details of the authority under which the artisanal miners are detained and fined.

²² See, for example, Caroline Binham and Tom Burgis, 'UK awards extra funds for SFO probe into ENRC's mining deals - Serious Fraud Office stepping up investigation into alleged corruption involving Africa deals', *Financial Times*, 3 July 2016, <<https://www.ft.com/content/edb2760e-3fb3-11e6-9f2c-36b487ebd80a>>.

²³ Thomas Wilson, 'SFO Probes Israeli Billionaire, Ex-ENRC Directors on Congo Deals', *Bloomberg*, 5 December 2016, <<https://www.bloomberg.com/news/articles/2016-12-05/sfo-probes-israeli-billionaire-ex-enrc-directors-on-congo-deals>>.

7. Ask ERG to present its Communication Strategy to the NCP and within three months draw up an accessible and effective grievance procedure for both communities.
8. Remind ERG that the UK Government considers the company responsible for the full implementation of the NCP's recommendations at Kisankala and Lenge.
9. Remind ERG, in light of the reference by the US authorities to corrupt transactions involving entities acquired by ENRC, that 'the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty' (*OECD Guidelines, Commentary on Combating Bribery, Bribe Solicitation and Extortion*).