



## **Initial Assessment by Luxembourg National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (hereafter: the Guidelines)**

Complaint Friends of the Earth Europe and Sustainable Development Institute / Friends of the Earth Liberia (FoE) against ArcelorMittal in Liberia.

### **1. Summary of the Luxembourg NCP decision**

- The Luxembourg NCP has decided that the issues raised in the complaint deserve further consideration and is prepared to offer its good offices to help parties resolve the issue.. This does not mean that the Luxembourg NCP considers ArcelorMittal to have acted inconsistently with the Guidelines. The Luxembourg NCP is accepting for additional consideration the alleged breach of Chapter II, articles 1, 7, 11 and Chapter VI articles 1 and 5 of the Guidelines.
- The Luxembourg NCP will formally contact both parties to ask whether they are willing to engage in conciliation/mediation, through the use of a professional mediator engaged by the Luxembourg NCP, with the aim of reaching a settlement. If they are both so willing, the Luxembourg NCP will intermediate with both parties to arrange the meetings.
- The Netherlands NCP offered assistance in dealing with this Specific Instance and the Luxembourg NCP is willing to accept the Dutch assistance to handle this notification, as well as for procedural aspects as for the mediation process.

### **2. Background**

On 24<sup>th</sup> May, Mr Frans Evers, Chairman of the Netherlands NCP forwarded a notification concerning ArcelorMittal Liberia, submitted by Friends of the Earth Europe and Sustainable Development Institute / Friends of the Earth Liberia, raising a number of concerns which FoE considered to constitute a Specific Instance under the Guidelines in respect of the operations of the Luxembourg registered company ArcelorMittal S.A. in Liberia.

### **3. The complaint**

The concerns raised by FoE relate to ArcelorMittal's operations in Liberia and were specifically related to Chapter II, articles 1, 7, 11 and Chapter VI, articles 1 and 5 of the Guidelines, which state that:



## **"II. General Policies**

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*

*1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.*

*[...]*

*7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.*

*[...]*

*11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur."*

*[...]*

## **"VII. Combating Bribery, Bribe Solicitation and Extortion**

*Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:*

*1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channeling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates.*

*[...]*

*5. Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honor these commitments. Enterprises should also*





*foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery, bribe solicitation and extortion.”*

**FoE made the following allegations in relation with ArcelorMittal Liberia:**

ArcelorMittal took over an old mining project and negotiated a 25-year concession with the National Transitional Government of Liberia (NTGL) to develop the iron ore deposits situated in the north-west of the country. The document retracing the issues of the deal is called the Mineral Development Agreement (MDA). Among others, ArcelorMittal agreed to an annual payment of US\$3 million for communities that would be affected by Mittal Steel operations. The contract was re-negotiated in 2006 after the presidential elections and ratified by the Liberian Legislature in 2007.

According to the terms of use of the new MDA, ArcelorMittal is obliged to provide approximately US\$73 million over the 25 year span of the concession to support socio-economic development in Liberia via the County Social Development Found (CSDF). This fund was created in fulfillment of art.12 of the amended MDA as a part of ArcelorMittal Liberia’s Corporate Social Responsibility plan. Actually, US\$1 million of the US\$ 73 million fund was sent since the contract was being renegotiated and US\$3 million should be send on an annual basis for the other 24 years. These funds should be affected to three counties, which are most affected by company’s operations, namely Nimba (US\$1.5 million), Bong (US\$0.5 million) and Grand Bassa (US\$1 million).

Furthermore, 20% of each county’s allocation must be spent annually in communities classified as “directly affected by ArcelorMittal Liberia operations”. These allocations constitute the CSDF. To manage the fund at the national level, the process is lead by both, ArcelorMittal Liberia and the government of Liberia through a “Dedicated Funds Committee” (DFC). This Committee is chaired by the Minister of Lands, mines and Energy of Liberia and includes other members of the Liberian Government. ArcelorMittal Liberia holds a 50% approval authority in the DFC, the Government of Liberia retains the other 50%. The responsibilities of the DFC include: appraising and approving projects proposed by each county, conducting, monitoring and evaluation of those projects, auditing and reporting on the use of the fund.

FoE reports that there is public dissatisfaction with the manner in which the Mineral Development Agreement (MDA) and the County Social Development Found (CSDF) are implemented and managed by ArcelorMittal Liberia. FoE states that reports of misappropriation and misuse of the fund are widespread and it seems that none of those implicated in the alleged misuse of money from the fund have been at least investigated or punished. Apparently the fund which should contribute to the Government’s efforts to meet the objectives of the Poverty Reduction Strategy is being mismanaged by the DFC, in which ArcelorMittal Liberia holds a veto.



FoE reports that the citizens in the three concerned counties have been largely marginalized and excluded in the process and that ArcelorMittal Liberia has sufficient leverage in the decision of the use of the fund to change this situation.

FoE refers to the low scores of Liberia in most international governance and anti-corruption indicators and recalls that the mismanagement of the country's natural resources was one of the original causes for the civil war. This should animate ArcelorMittal Liberia to adopt management control systems that discourage corrupt practices and ensure that its operations in Liberia are in harmony with OECD Guidelines.

FoE states that in August 2008 ArcelorMittal Liberia donated 100 pick-up trucks to the Government of Liberia – allegedly to support agricultural activities across the country – and this is viewed as the company's direct involvement in local politics. FoE declares that these pick-up trucks mostly ended up in the hands of legislators. The vehicles were assigned to legislators instead of the Ministry of Agriculture and most of the legislators are using these vehicles in Monrovia and not for agricultural activities in their constituencies.

FoE argues that ArcelorMittal Liberia is in contradiction with their engagement not to use subcontracts, purchase orders or consulting agreements as means of channeling payments to public officials as well as an improper involvement in political activities in order to retain business.

FoE affirms that ArcelorMittal Liberia breached the Guidelines through:

- The County Social Development Fund, that is established and governed by the Government of Liberia and ArcelorMittal Liberia, is failing to address the needs of communities impacted by the operations of ArcelorMittal Liberia.
- ArcelorMittal Liberia is not properly informing some of the neighboring communities about its operations and the possible impact on these communities.
- Many projects did not benefit the local population but were financing dubious projects that seemed to be more in the interest of decision makers and contractors than the surrounding communities.
- Less than 20% of the revenues were allocated to projects that would benefit directly affected communities.
- Liberian newspapers cited a leaked DFC report that concluded that there was widespread malpractices and outright misuse of funds.





- Some of the members of the CDMC's which are managing the country allotment of the funds, have been named by Liberian auditing authorities for corrupt practices involving the management of other public funds.

**ArcelorMittal Liberia wrote to FoE on February 18 2009<sup>1</sup> and March 31 2010<sup>2</sup>:**

ArcelorMittal Liberia rejected the allegations. The company stated that the vehicles are at the disposal of the Liberian Government and their use is monitored and enforced by the General Services Agency.

ArcelorMittal Liberia puts the responsibility for the proper use of the pick-ups on the Liberian Government. The company declares that the donation of the vehicles was in direct response to an appeal from the President of Liberia for vehicles to support agricultural activities in rural areas.<sup>3</sup>

These declarations have been addressed to FoE by ArcelorMittal and have not been exchanged in the context of the mediation process in accordance with the implementation procedures of the Guidelines.

The Luxembourg NCP has not met with the parties yet and these affirmations are not representative of the progress of the -still to be agreed upon- mediation process nor do they represent the way the Luxembourg NCP understands this case.

**4. The Luxembourg NCP process so far**

The Luxembourg NCP received the FoE notification against ArcelorMittal Liberia on 24<sup>th</sup> May 2011.

Liberia, in which the alleged breaches took place, does not adhere to the Guidelines and therefore does not have an NCP. As ArcelorMittal is a Luxembourg registered company with headquarters in Luxembourg City, the Luxembourg NCP took the lead in handling this notification.

The Luxembourg NCP has no previous experience with the handling of Specific Instances. In light of collegial cooperation between NCPs and taking into account its available resources, the Netherlands NCP offered to share its experience and provide the Luxembourg NCP and/or its external mediator assistance in dealing with the notification. The Luxembourg NCP informed the complainant that the Luxembourg NCP would take the lead in handling this notification, with support from the Netherlands NCP, on July 18<sup>th</sup> 2011.

According to the Luxembourg Code of Criminal Procedure, article 23 (2), the Luxembourg NCP passed on the information about the notification and the

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<sup>1</sup> [http://www.foeeurope.org/corporates/pdf/Letter\\_from\\_AML\\_to\\_FOEI\\_2009\\_1.pdf](http://www.foeeurope.org/corporates/pdf/Letter_from_AML_to_FOEI_2009_1.pdf)

<sup>2</sup> [http://www.foeeurope.org/corporates/pdf/Letter\\_from\\_AML\\_to\\_GAAM\\_2010\\_4.pdf](http://www.foeeurope.org/corporates/pdf/Letter_from_AML_to_GAAM_2010_4.pdf)

<sup>3</sup> [http://www.emansion.gov.lr/press.php?news\\_id=930](http://www.emansion.gov.lr/press.php?news_id=930)



background to the Luxembourg Public Prosecutor. Civil servants are obliged to do so under Luxembourg law.

The Luxembourg NCP has decided that the issues raised in the FoE's complaint merit further consideration and has decided to accept the Specific Instance for further examination. This does not mean that Luxembourg NCP considers ArcelorMittal to have acted inconsistently with the Guidelines.

The Luxembourg NCP is accepting for further consideration the alleged breach of Chapters Chapter II(1), II(7), II(11), VII(1) and VI(5) of the Guidelines. The reasons for this decision are explained below.

As set out in paragraph 14 of the Commentary on the Guidelines on "Implementation in Specific Instances"<sup>4</sup>, the Luxembourg NCP took the following points into account when considering whether the notification submitted by FoE merits further consideration:

a) Identity of FoE and its interest in the matter

The complaint was forwarded to the Luxembourg NCP by the Netherlands NCP on request of Friends of the Earth Europe (FoE). Friends of the Earth Europe is a non-governmental organization based in Belgium. According to its website<sup>5</sup>, FoE "*campaigns for sustainable and just societies and for the protection of the environment, [...] increases public participation and democratic decision making. Greater democracy is both an end in itself and is vital to the protection of the environment and the sound management of natural resources, [...] achieves environmental, social, economic and political justice and equal access to resources and opportunities for men and women on the local, national, regional and international levels.*" The Luxembourg NCP is considering that FoE is a legitimate and credible body to submit this complaint. FoE stated in the complaint against ArcelorMittal Liberia that they "*work on a range of issues including natural resource governance and management, the environment, state and corporate social responsibility with regards to resource exploitation, economic and social justice for rural populations and democratic participation*". In this regard, the Luxembourg NCP considers that FoE is directly interested in the issues raised in the complaint and is in a position to supply information about them.

b) Whether the issue is material and substantiated

FoE has provided sufficient information to the Luxembourg NCP to conclude that the issues raised by FoE are material and substantiated. FoE has produced various documents in support of the complaint, including the reports: from FoE/SDI "Working for Development? ArcelorMittal's mining operations in Liberia"<sup>6</sup>, from

<sup>4</sup> <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (page 58)

<sup>5</sup> <http://www.foeeurope.org/about/english.htm> - visited on 23 August 2011)

<sup>6</sup> [http://www.foeeurope.org/publications/2010/Working\\_for\\_development\\_june2010.pdf](http://www.foeeurope.org/publications/2010/Working_for_development_june2010.pdf)





Global Witness 2006 “Heavy Mittal?”<sup>7</sup> and from the Heinrich Böll Stiftung “Beyond EITI: The Need for Transparency in the Awarding of Concessions”<sup>8</sup>

c) Relevance of applicable law and procedures:

According to the Liberian Constitution, bribery, the misuse of government resources and other corrupt practices are prohibited by law. In particular, the Liberian Constitution<sup>9</sup> ratified October 19, 1983 specifies:

*“CHAPTER II - GENERAL PRINCIPLES OF NATIONAL POLICY*

*Article 5*

*The Republic shall:*

*[...]*

*c) take steps, by appropriate legislation and executive orders, to eliminate sectionalism and tribalism, and such abuses of power as the misuse of government resources, nepotism and all other corrupt practices.*

*Article 7*

*The Republic shall, consistent with the principles of individual freedom and social justice enshrined in this Constitution, manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia.*

*CHAPTER VI - THE EXECUTIVE*

*Article 62*

*The President and the Vice-President may be removed from office by impeachment for treason, bribery and other felonies, violation of the Constitution or gross misconduct.*

*MISCELLANEOUS*

*Article 90*

- a) No person, whether elected or appointed to any public office, shall engage in any other activity which shall be against public policy, or constitute conflict of interest.*
- b) No person holding public office shall demand and receive any other perquisites, emoluments or benefits, directly or indirectly, on account of any duty required by Government.*
- c) The Legislature shall, in pursuance of the above provision, prescribe a Code of Conduct for all public officials and employees, stipulating the acts which*

<sup>7</sup> <http://www.globalwitness.org/library/heavy-mittal>

<sup>8</sup> <http://www.boell.de/intlpolitics/energy/resource-governance-2748.html>

<sup>9</sup> [http://www.liberianlegal.com/constitution1986.htm#\\_GENERAL\\_PRINCIPLES\\_OF](http://www.liberianlegal.com/constitution1986.htm#_GENERAL_PRINCIPLES_OF)



*constitute conflict of interest or are against public policy, and the penalties for violation thereof.”*

These few paragraphs do not represent the possibly relevant legislation applicable in this case in Liberia. The Luxembourg NCP does not claim to be aware of the local laws and procedures applicable in Liberia in order to handle such issues.

The Guidelines represent voluntary principles and standards of behavior of a non-legal character and are not a substitute for local law and regulation.

- d) How similar issues have been, or are being, treated in other domestic or international proceedings

In accordance to Luxembourg law, Code of Criminal Procedure, article 23(2), civil servants are obliged to file a statement of facts to the Public Prosecutor, which could eventually lead to a parallel procedure to the NCP-process.

- e) Whether the consideration of the Specific Issue would contribute to the purposes and effectiveness of the Guidelines

One of the stated aims of the Guidelines, specifically the role of the NCP's, is for them to “*offer a forum for discussion and assist the business community, employee organizations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law*”<sup>10</sup>. For this purpose and taking into account the concerns of FoE as outlined above, the Luxembourg NCP considers that by accepting this Specific Instance, it could help both parties in reaching a mediated solution to the complaint.

## 5. Next Steps

The Luxembourg NCP will contact both parties to assess whether they are willing to engage in mediation, through the use of professional mediator engaged by the Luxembourg NCP, with the aim of reaching a settlement. If both parties are so willing, the Luxembourg NCP will then intermediate with the parties to arrange the mediation meetings.

In this respect, the Luxembourg NCP would like to arrange one or more exploratory meetings with both parties separately to determine whether conciliation, mediation or a formal findings process might be appropriate. Before a decision to conduct a formal findings process or to conciliate or mediate a notification is made, the NCP is, according to the Guidelines, expected to help the parties identify and clarify issues, identify necessary participants, determine whether some type of neutral assistance would be useful, and if so, select a mutually acceptable intermediary.

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<sup>10</sup> <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (page 34)





If mediation is successful, the Luxembourg NCP will reflect the successful outcome of this process in its Final Statement, drawn up jointly by all parties, without making a determination as to whether the company has acted inconsistently with the Guidelines.

If such a settlement is not possible, or if one or both parties do not wish to participate in conciliation/mediation, the Luxembourg NCP will draw up a Final Statement unilaterally, reflecting the course and outcome of the NCP-procedure and the reasons why no agreement could be reached and will make recommendations on the implementation of the Guidelines

**October 2011**

**Luxembourg National Contact Point for the OECD Guidelines for Multinational Enterprises**

**Tom Theves, Christophe Thirriard**

A handwritten signature in blue ink, appearing to be 'T. Theves'.

A handwritten signature in black ink, appearing to be 'C. Thirriard'.