

Specific Instance under the OECD Guidelines for Multi-National Enterprises

Complaint from International Accountability Project (IAP) and World Development Movement (WDM) against GCM Resources plc (GCM)

Application for review of the Final Statement

Recommendation of the Review Committee

1. On 15 May 2014, a Request was made on behalf of IAP and WDM for Review of the Final Statement by the UK National Contact Point issued in May 2014.
2. Promptly on receipt of the Request, the Steering Board were notified, and invited to declare their availability to participate in a Review. A Review Committee was established, comprising Edward Bickham, Jeremy Carver and Stephen Lowe, two External members and one Internal member of the Steering Board. The Request was elaborated by the Complainants on 2 June; and on 18 June, the UK NCP submitted its written Response to the request for review, and invited the Complainants and GCM, to submit any comments thereon. The Complainants commented on 24 June. GCM has not commented.
3. The Review Committee has duly considered the extensive material provided, including the Initial Assessment, and, pursuant to paragraph 6.1 of the Review Procedure, has determined how the Request may best be addressed. Following initial exchanges by e-mail and a meeting between members of the Committee, the Committee has agreed the following Recommendation to the Steering Board.

The Request

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4. The Complainants, two civil society organisations focusing on international development issues, seek review of the Final Statement on several points. The Final Statement upholds a complaint in respect of one issue, namely: inadequate systems for consultation for the purpose of paragraph 7 of Chapter II of the OECD Guidelines for Multinational Enterprises. But the Final Statement rejects other grounds for complaint, in particular: four aspects of the Human Rights Chapter of the Guidelines (Chapter IV), a failure to address or sufficiently investigate certain allegations, and unresolved concerns over the independence of the NCP in the light of exchanges between GCM and BIS, one of the government departments responsible for the UK NCP and where the NCP is based.

5. The Complaint deals with *prospective* human rights abuses in relation to the development of an open-cast mining project at Phulbari in Bangladesh. The project has been, and no doubt continues to be, controversial, and has aroused considerable opposition in Bangladesh, leading to violent protests, and an even more violent response by the authorities there. GCM and its predecessor company seem to have been closely involved with plans to develop the project since at least 2003. In 2006, at the request of the Bangladesh government, planning for the project ceased; but has since resumed. It is not evident to the Review Committee that any substantial progress towards implementing the project has yet occurred.

6. Thus, the Complaint focused on alleged acts and omissions of GCM in appraising and preparing for implementation of a project that has yet to move beyond the planning stage. The human rights abuses in issue are all *prospective*. Apart from the alleged conduct of the authorities in suppressing protests, no abuses have yet been said to have occurred. But it is clear from the 2011 Guidelines that the obligation of an enterprise to respect human rights includes the rights of those prospectively affected by its conduct, including planned conduct. The request asserts that the NCP has failed to apply these standards in its

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analysis of the Complaint, and that this is a *procedural* failure susceptible to review under the NCP's review process. The NCP disagrees.

Role of the Review Committee

7. The review process is solely intended to identify any procedural errors in the NCP's decision-making, and to ensure that, if identified, they are corrected to the extent possible. It is not the function of the Review Committee to examine or rule upon the substance of the NCP's decision. Thus, the Request, rightly, does not seek review of the NCP's decision that the Complaint is not supported by sufficient evidence or fails to identify infringement of the Guidelines. The Request is based, largely, on the premise that the NCP failed to apply the procedures and standards required under its own procedural rules. This raises an important threshold question:

For the purpose of a Complaint arising in respect of conduct prior to September 2011, is the NCP right to ignore the more detailed provisions of the 2011 Update of the Guidelines; or is it bound to consider the Complaint against the more elaborate requirements under the current Guidelines?

Should the NCP have applied the 2011 Guidelines to conduct occurring prior to September 2011?

8. The Update to the Guidelines was adopted at the OECD Ministerial Meeting in Paris on 25 May 2011. At its first meeting following this, on 29 June 2011, the Steering Board was asked for its views on when the new Guidelines should be applied. In his report on the Update, the Chair of the OECD Investment Committee noted an "informal understanding that, when a legal instrument is adopted or revised, a reasonable length of time – approximately six months – is needed in order to implement its provisions. In addition, it is important to note that the revisions to the Guidelines do not have retroactive application."

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Nevertheless, the UK Steering Board agreed that the new Guidelines should be applied with effect from 1 September 2011

(<http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/assets/biscore/business-sectors/docs/n/note-17th-uk-ncp-steering-board.pdf>).

9. Consistent with that decision, the NCP made its Initial Assessment of a Complaint from a Civil Society Organisation of a UK Bank (A) in respect of a business relationship with a company in Russia, rejecting the complaint (<https://www.gov.uk/government/publications/uk-ncp-initial-assessment-a-complaint-by-a-russian-non-government-organisation-against-a-uk-bank-a>). After noting that enterprises are not accountable under the new Guidelines for actions they took before the new provisions applied, the NCP observed that it might look for evidence of an enterprise's knowledge of an ongoing impact at 1 September 2011, or to new actions or events from 1 September 2011 that related to previous events.

10. The question therefore remains far from straightforward. An enterprise will not be held to have breached the Guidelines by conduct taking place before 1 September 2011 that infringed only those elements of the Guidelines introduced by the May 2011 Update. But a Complaint may still be found in respect of a failure to act after 1 September 2011 in relation to prior conduct in the light of matters known to it when the new Guidelines took effect. Thus, in the context of alleged human rights abuses, a company may not be criticised for its conduct before 1 September 2011. But, if that conduct raised human rights concerns covered in the new Guidelines, an enterprise may have a duty to address those concerns after 1 September 2011 in the light of its knowledge of the concerns in question.

11. It seems that this is particularly the case when the alleged abuses in issue are prospective, rather than actual and past. An enterprise contemplating a new project should apply to its planning the latest

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relevant and applicable standards. Obviously, if a relevant provision of applicable law changes during the planning period, a company will need to adjust its plans to accommodate that law. The same principle can be said to apply to the Guidelines.

12. If the answer to this threshold question is correct, we must review the procedure followed by the NCP in arriving at its Final Statement to determine whether the NCP's failure to take account of actions prior to 1 September 2011 was incorrect, or irrelevant.

13. In its Response to the Request for Review, the NCP places reliance on the non-retrospectivity of the Guidelines:

“The 2011 Guidelines clearly state companies’ obligations to address actual and potential human rights impacts. Prior to 2011, the Guidelines place a more general obligation on companies to respect human rights, but the UK NCP notes there is no clear statement that this applies to potential (future) impacts (or indeed to obligations to identify and address adverse impacts). The UK NCP applies the 2011 Guidelines to actions of companies from September 2011 and to impacts known to the company at that date.”

14. From this, we read the Final Statement as concluding that the NCP did not need to address any acts or omissions of GCM prior to 1 September 2011 that would not have infringed the Guidelines in force before 2011. We believe this approach to be insufficient, and that GCM's conduct after 1 September 2011 may be relevant for consideration under the Complaint to the extent that it could address potential adverse impacts after that date, subject to considerations of reasonableness and proportionality.

15. Thus, we consider that the Complainants may be right to observe that the NCP “misdirected itself” (Request §20). This is a procedural error, albeit one with which we have some sympathy. Neither the Request

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nor the Complainants' Reply picks up on the core of this issue, which is essentially a problem of inter-temporal application. Re-stated, as we have, in terms of a duty to apply the prevailing standards of human rights (or any other relevant) observance, it is not hard to see that what a company did or did not do last year may be radically different to what it must do now in the light of changes of law or regulation. There is no reason of principle why the same should not apply to the Guidelines albeit the test may not be as absolute.

16. To clarify the point, as it applies to projects in course of preparation, three distinct aspects need to be considered:

- Those acts or processes already concluded, which should not need to be revisited in the light of subsequent changes in the Guidelines;
- Those acts or processes, such as the planning for a new phase of a project, that have yet to be commenced, which should be appraised in the light of the Guidelines prevailing when being performed; and
- Those acts or processes that fall to be continued after new Guidelines have been adopted. This last category is the 'grey area' where a test of reasonableness may be required to assess the extent to which even past actions have to be appraised in the light of current Guidelines even where they did not apply when the acts or processes were commenced. It may not, for example, be reasonable for the NCP in such circumstances to reach an adverse ruling if, because of a change in the Guidelines, an investor would need to undo or redo substantive work and in the process bring into question the viability of a project.

Application to the Review

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17. In paragraphs 18 – 27 of the Request, the Complainants elaborated how, in their view, the NCP had failed to investigate or address matters “squarely” within the scope of the Guidelines, and thus within the mandate of the NCP. This failure fell under four heads:
- a. an asserted failure to ask about the risk of adverse impacts if the project went ahead;
 - b. a finding that could not be made without addressing prospective breaches;
 - c. an inconsistency between a finding of no breach with a late amendment addressing possible future risks; and
 - d. a dismissal based on the lack of a ‘business relationship’ between GCM and the Bangladesh Government.
18. The NCP’s Response to all these charges cites the non-applicability of the 2011 Guidelines to GCM’s actions prior to 1 September 2011. If, and to the extent that, after 1 September 2011, there was no conduct of GCM in pursuing or implementing the Phulbari Mine project, the NCP may be correct that the current Guidelines are irrelevant. The Complainants certainly seem to have relied on them as the basis for their Complaint. The fact, if true, that GCM failed prior to September 2011 to act within the standards set by the 2011 Update, is not a valid ground for complaint to the NCP.
19. It is not clear, however, that this is the limit of the Complaint. If, and to the extent that, the Complaint pointed to an aspect of GCM’s conduct that was either part of a new phase of the project or might reasonably be taken into account in an ongoing dimension of work after 1 September 2011, it may have been appropriate for the NCP to have regard to the current Guidelines. If GCM continued to be actively involved in the project, the 2011 Guidelines, including the Human Rights Chapter, would apply. This could extend to cover acts prior to September 2011 where, for example, new factors have arisen which affect the risk of adverse impacts. This would not, however, extend to

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require concluded acts to be re-performed unless they were part of the on-going evaluation of implementation of the project.

20. It is not the function of this Review to second-guess the NCP's own appraisal of the Complaint, or to say that there were factors which required a different result. It may well be that the Final Statement reaches the correct conclusions. Our concern is solely with the procedure adopted. We cannot say with certainty that the wrong procedure was followed. Our concern is with the NCP's stated position that the 2011 Guidelines did not apply to the Complaint. There are circumstances where the current Guidelines might apply; and our recommendation is that the NCP should re-examine the Complaint solely in the light of this concern, and issue a new Final Statement reflecting this re-examination..

21. We also wish to make clear that this recommendation should not lead to a re-opening of the Complaint. It is for the NCP to decide, in the light of its re-examination, whether it needs further information or submissions from the parties. If not, the NCP should prepare and finalise its Final Statement in the normal way, based upon the material already available.

Other grounds for review

22. As noted above, the Complainants have cited two other grounds for its Request. The first of these concerned the adequacy of the NCP's evaluation of information available to it. This focused on the NCP's investigation of an allegation about local responses to the proposed project, and opinions from two individuals with some expert knowledge of the project.

23. The NCP responds to this ground, generally, by asserting the limitations of its own fact-finding role; and, specifically, by setting out its position in relation to the information available.

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24. This review does not find this ground for review well founded. In an earlier review, the Steering Board has observed:

Nothing in the Procedures requires the NCP to undertake independent research in considering a complaint, although we are aware that the NCP has, and will, inform itself about the facts and circumstances raised by the complaint. Where relevant, the NCP will cite such material in its draft statements, which are in all cases made available in advance to the parties so that they can comment on them.

25. The implication of this is clear: it for the NCP to decide the extent of its investigation in any complaint. This will vary from complaint to complaint, and also with the stage a complaint achieves (for example whether on initial assessment or full investigation). Unless it is obvious that the NCP has failed to take account of information provided or reliably identified as available, it must be the NCP's judgment as to the significance it draws from the information available.

26. The sixth and final ground for review concerns an assertion that the NCP has failed to demonstrate its independence in the treatment of this Complaint. This is based on two incidents: first, an email obtained by the complainants under FOI procedures indicating exchanges between GCM and BIS, the Department from which the NCP operates; and, second, the NCP's alteration of its Final Statement in reaction to submissions from GCM prior to issuing the Final Statement in May.

27. The review is not persuaded that there has been a lack of independence by the NCP in its conduct of this case. BIS, as many other government departments, has multiple roles and functions, and will interact with numerous parties over different matters. The NCP has said that the email exchange in question had nothing to do with it, and its subject matter was irrelevant to its handing of the Complaint. We

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have seen nothing to question this statement. As for the Final Statement, it is standard practice for the NCP to send a draft of its findings (initial or final) to the parties for their comments prior to finalising them for publication, as its procedures require. It would be pointless to do so unless this resulted, in appropriate circumstances, in revision of elements of the findings. The NCP's explanation of what it did in relation to the submission of GCM is entirely plausible.

Recommendation

28. The Review Committee recommends that the Steering Board should accept the Request for Review of the Final Statement in the limited terms of this recommendation, and the NCP should re-examine the Complaint in the light of our observations at paragraphs 20-21 above.
29. We also recommend that this recommendation should be communicated to the parties, together with the Steering Board's regrets for the delay in completing this review. The Request became available for consideration just prior to the holiday season, and it proved very difficult for the three members to find common time when they could meet for deliberation. The Committee regrets any inconvenience to the parties from a failure to adhere to the Steering Board's normal and correct insistence on timely discharge of its functions.

22 September 2014