

**Initial Assessment By The UK
National Contact Point For
The OECD Guidelines For
Multinational Enterprises**

**COMPLAINT FROM THE
INTERNATIONAL
ACCOUNTABILITY PROJECT AND
THE WORLD DEVELOPMENT
MOVEMENT AGAINST GCM
RESOURCES PLC IN
BANGLADESH**

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Summary of the UK National Contact Point decision

- **The UK NCP for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided that some of the issues raised in the complaint merit further examination and has accepted the complaint for further consideration. This does not mean that the NCP considers the company has acted inconsistently with the Guidelines.**
- **The UK NCP is accepting for further consideration the issues relating to the company's obligations under Chapter II, Paragraphs 2 and 7 and Chapter IV, Paragraphs 1 and 5. The NCP considers that the issues relating to the company's obligations under Chapter III, Paragraph 2 and Chapter IV, Paragraphs 2 and 3 are not substantiated.**

The complaint and response

The complaint

1. On 21st December 2012, the International Accountability Project (IAP) and the World Development Movement (WDM) wrote to the UK NCP raising concerns under the Guidelines about actions of GCM Resources plc in Bangladesh.
2. The complainants say that they represent communities opposed to a proposed coal mine in the Dinajpur region of Bangladesh. Mining exploration rights were acquired in 1998 by *Asia Energy Corporation (Bangladesh) Pty Ltd (AEC)*, which is a wholly owned subsidiary of UK company GCM Resources (GCM). The complainants allege that the open cast mine planned by GCM will necessarily adversely affect human rights by displacing large numbers of people, including indigenous communities, destroying the basis of their subsistence and livelihoods, and having widespread, severe and lasting impacts on the local environment, food security and water supply for the population in a large area surrounding the mine.
3. In 2006, a paramilitary force of the Bangladeshi government opened fire on protestors opposing the mine, killing three people and injuring others. The actions of this force (the Rapid Action Battalion), which has repeatedly been deployed to demonstrations against the project since 2006, have given rise to concerns about the risk of further human rights violations. In the context of these past events and concerns, the complainants say that the company should consider the risks if the mine proceeds of continuing local opposition leading to further protests and violence.
4. Development of the mine is subject to approval by the Government of Bangladesh. The complainants say that by lobbying for this approval and continuing to "aggressively pursue" the project, GCM has acted

inconsistently with the Guidelines. They say that GCM can act consistently with the Guidelines only by abandoning the project, because open cast mining cannot be developed in the extremely densely populated region in a manner consistent with the Guidelines. The complainants consider that the project will not proceed if GCM withdraws, and invite the NCP to help mediate its withdrawal.

The company's response

5. GCM responded on 4th February 2013 and denied all the allegations. Work on the project to date has been under the terms of the Government licence granted, and has included developing and maintaining project plans (including plans relating to social and environmental mitigation measures), consultation and communication with affected communities, and legitimate lobbying of government representatives. GCM is now awaiting permission from the Government of Bangladesh to proceed to develop the mine.
6. The company says that its development plans were based on due diligence appropriate to satisfy relevant international standards at the time of their development, including social and environmental standards. It is currently updating its plans to reflect more recent developments in standards (including the updated 2011 OECD Guidelines). Its plans establish the need to use an open cast mining method, and include detailed measures to avoid or mitigate its adverse impacts. The company notes that by helping to address Bangladesh's need for increased and more reliable energy supplies, as well as providing employment, the mine would have positive impacts on the living conditions (and associated human rights) of local communities and Bangladeshis generally.
7. GCM agrees that a small group of local activists strongly oppose the project, but considers that much of the opposition reported by the complainants is politically motivated. There is evidence that support for regional development and job creation based on development of the mine and associated power generation is growing across the Project area. The company acknowledges that protests in the area have led to violence in 2006, but says that GCM is not responsible for the violence and deplores violence by any party. Since 2006, the company has limited its activities with local communities to help minimise the risks of violence.
8. GCM also points out that since it completed the feasibility study for the Project in late 2005, appreciation of the importance of Bangladesh's coal resources to the country's development has grown.
9. GCM notes that it has previously offered to discuss the issues with the complainant organisations, but they have not taken up the offer. The company does not consider that the complainants have a mandate

from or close connection with the communities they claim to represent. Also the views they claim to represent do not reflect the views of the community as a whole. GCM also notes that withdrawing from the project as the complainants propose could conflict with its duties to shareholders under UK law, and deprive Bangladesh of the benefits of the mine. Also, this proven coal resource is the largest known viable new energy source in this energy starved country and, whether GCM abandons the project or not, it is highly likely extraction of this much needed energy resource will occur.

The UK NCP process so far

10. The NCP received the complaint and supporting documents on 21st December 2012. The NCP forwarded the complaint to GCM on 4th January 2013 and received the company's response on 4th February 2013.
11. The NCP offered each party a meeting to explain the complaints process. A teleconference with the complainants took place on 15th January 2013, and a meeting with the company took place on 16th January 2013.
12. The complainants made a short further submission on 26th February 2013, including a response to a question from the NCP. The company made a short further response on 14th March 2013. Parties commented on an initial draft of the Initial Assessment in April (the complainants commented in writing on 12th April and the company initially advised the NCP of its comments by telephone on 4 April and confirmed these in writing on 12th April. The NCP revised the draft in response to parties' comments and both parties made written comments on a revised draft on 24th May. Some further minor changes to reflect comments are incorporated in this finalised statement.
13. In accordance with our written procedures all information submitted in the complaint and responses was shared with both parties.

Guidelines provisions cited

14. The complaint refers to the following provisions of the Guidelines:

Chapter II General Policies

Paragraph 2 *[Enterprises should...] Respect the internationally recognised human rights of those affected by their activities.*

Paragraph 7 *[Enterprises should...] 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.

Chapter III Disclosure

Paragraph 2 *Disclosure policies of enterprises should include, but not be limited to, material information on:*

f) foreseeable risk factors;

Chapter IV Human Rights

Paragraph 1 *[Enterprises should...] Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*

Paragraph 2. *[Enterprises should...] Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

Paragraph 3. *[Enterprises should...] Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*

Paragraph 5. *[Enterprises should...] Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of risks of adverse human rights impacts.*

15. Chapter IV provisions were added to the Guidelines in 2011. They are applied by the UK NCP to actions of enterprises from 1st September 2011 and to ongoing risks and impacts known to the enterprise at 1st September 2011.

UK NCP decision

16. The UK NCP has decided to accept the complaint for further consideration, taking into account the following points:

Identity of the complainants and their interest in the matter

17. The NCP is satisfied that the complainants are in a position to provide information about the issues in the complaint. California-based IAP and London-based WDM are civil society organisations campaigning on global development issues, and have taken an interest in this Project since 2008. They have provided documents endorsed by community

representatives, evidence of contacts or links with local and expatriate Bangladeshi groups, and reports from a field visit to the Project area.

18. The NCP notes that GCM does not consider that the complainants have a mandate from the communities affected by the mine. In response to a question from the NCP, the complainants have confirmed that representatives of Bangladeshi groups opposed to the mine would participate in any mediation in the complaint. The NCP recognises that further examination of the complaint will also need to take into account the wider range of people potentially affected by the mine.

Is the complaint material and substantiated

19. The NCP considers that there are substantiated issues meriting further examination. Specifically, the NCP finds that the issues related to GCM's responsibilities under Chapter II, Paragraphs 2 and 7 and Chapter IV, Paragraphs 1 and 5 merit further examination:

Evidence

20. Evidence submitted by the complainants includes: statements endorsed by community representatives, press reports of the 2006 protest and other protests, and analysis by the complainants of the potential adverse impacts of the mine, and studies commissioned by GCM and former investors in the Project (the validity and independence of the complainants' analysis are disputed by the company).
21. Evidence in relation to affected communities appears to the NCP to establish that some who will be affected strongly oppose the mine's development, and that protests by opponents of the mine carry a continuing risk of violence for the protestors and others (and led to deaths and injuries to protestors as a result of government paramilitary action in 2006).
22. The NCP considers that the evidence currently before it in relation to the potential impacts of the mine itself establishes that there are potentially significant adverse impacts, but does not establish that these impacts cannot be avoided or mitigated.

Issues meriting further examination

23. Chapter II, Paragraph 2 is a broadly drafted provision requiring enterprises to respect the human rights of those affected by their activities. Commentary in the 2000 Guidelines indicates that it is intended to apply to human rights identified in the Universal Declaration of Human Rights and to other obligations of the government concerned (the 2011 Guidelines make a wider reference to the International Bill of Human Rights). The universal declaration rights relevant to the impacts

identified in the complaint appear to the NCP to include rights to life, liberty and security of person, freedom of movement and residence and rights to property and standard of living. The complainants also refer to the 2007 UN Declaration on the Rights of Indigenous Peoples.

24. The NCP considers that there is a substantiated issue meriting further examination in respect of whether the company's plans for developing the mine respected the rights of affected communities by including robust processes to engage and consult them and to establish and manage effects on them.
25. Chapter II, Paragraph 7 refers to self-regulatory standards adopted by an enterprise. GCM has committed to comply with international standards including the Equator Principles, IFC Performance Standards and the UN Global Compact, as well as the OECD Guidelines themselves. The NCP considers that there is a substantiated issue meriting further examination in respect of whether the company's plans met these standards, and included measures to foster trust with local communities.
26. Chapter IV, Paragraph 1 applies from September 2011 (see paragraph 15 above) and elaborates on the general requirement to respect human rights in Chapter II, adding a specific responsibility to address human rights. Chapter IV, Paragraph 5 applies from September 2011 (see paragraph 15 above) and requires enterprises to undertake human rights due diligence. The NCP considers that there is a substantiated issue in respect of whether in the period between September 2011 and December 2012 (when the complaint was made) the company's updating of its plans included appropriate human rights due diligence and measures adequate to address any impacts identified.

Issues not substantiated

Chapter IV

27. As previously noted, Chapter IV provisions are applied by the UK NCP to actions of enterprises from September 2011 and impacts known to enterprises at that date. They contemplate a number of different relationships that an enterprise may have to human rights impacts: it may be generally involved with them (Paragraph 1), cause or contribute to them (Paragraph 2), or be linked to them by a business relationship (Paragraph 3).
28. It does not appear to the NCP that the complaint identifies a relevant impact that GCM caused on or after 1st September 2011 or knew at that date would be caused. The complainants say that GCM knew (or should have known) that adverse impacts are inevitable if the mine proceeds. As noted at Paragraph 22 above, the NCP considers that the

evidence establishes there are potential adverse impacts of the mine, but the company considers that its plans avoid or fully mitigate these. The NCP does not consider that there is a substantiated issue that by not withdrawing from the project, GCM has not avoided causing adverse impacts.

29. Chapter IV, Paragraph 3 requires enterprises to address impacts linked to them by a business relationship. The NCP does not consider that the complaint identifies a business relationship to which the provisions apply. The Guidelines commentary defines a “business relationship” as including “State entities”, but on the evidence in the complaint and response this does not appear to the NCP to extend to GCM’s relationship with the Government of Bangladesh.
30. The NCP therefore considers that the only relationship substantiated in the complaint between the company and human rights impacts is the general involvement contemplated in Paragraph 1. The NCP notes, however, that examination of the substantiated issues may disclose further information about the company’s relationship to impacts. If this is the case, the NCP will note this in its Final Statement.

Chapter III

31. Chapter III, Paragraph 2 requires enterprises to disclose foreseeable risks. The NCP does not consider that the evidence submitted in the complaint substantiates an allegation that GCM has breached this provision of the Guidelines. As with Chapter IV, Paragraph 2, it appears to the NCP that the complainants rely on their assessment that the adverse impacts they identify are inevitable.

Relevance of applicable law and procedures, including court rulings:

32. The Guidelines state (Chapter 1, paragraph 2) that “*obeying domestic laws is the first obligation of enterprises*” and that “*While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and operations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.*”
33. As noted above, GCM is waiting for permission from the Bangladeshi Government to develop the mine.
34. The mining project is the main business of GCM and the development rights are the company’s major asset. The NCP notes GCM’s

observation that under Section 172 of the Companies Act, its Directors are required to promote the success of the company. As GCM acknowledges, in discharging this duty, Directors are required to have regard to factors including: *the long term consequences of any decision; the interests of the company's employees; the need to foster business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members.*

How similar issues have been, or are being, treated in other domestic or international proceedings:

35. The complainants appealed to various United Nations Special Rapporteurs in 2011 in connection with issues raised in the complaint. The UN's Special Procedures Committee advises the UK NCP that the Rapporteurs are awaiting a substantive response from the Government of Bangladesh on the issues. The Rapporteurs made no contact with GCM before writing to the Bangladesh Government, but the company met their officers in December 2012, has subsequently provided written information to them and has since offered on several occasions to meet the Rapporteurs. More information on these proceedings is at:

<http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>

and the NCP will note any further statements by the Rapporteurs.

Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:

36. The NCP believes that in general the Guidelines promote an approach of enterprises engaging where they can do so responsibly, rather than minimising their risks by avoiding particular countries or projects. The aims of the Guidelines (as set out in their Preface) are to *“ensure that the operations of [multinational] enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.”*

Conclusion

37. The NCP concludes that the issues substantiated should be accepted for further examination. This does not mean that GCM Resources has acted inconsistently with the Guidelines and the NCP does not draw any conclusion about whether the company should pursue the project.

38. The NCP concludes that the following issues merit further examination:
- a) whether the company's plans for developing the mine respect the rights of affected communities by including adequate measures to engage with and consult these communities and robust processes to establish and address the effects of the mine
 - b) whether the company's plans met the self-regulatory standards it had committed to, and included measures to foster trust with local communities.
 - c) whether the company's review of its plans in the period between September 2011 and December 2012 (when the complaint was made) included human rights due diligence appropriate to meet the company's enhanced responsibilities under the Guidelines and measures to address any impacts identified and not previously addressed.
39. The NCP does not consider that examination of the company's due diligence should extend to an independent assessment by the NCP of mine's future impacts, and believes that this would be likely to be outside the remit and expertise of the UK NCP.

Next steps

40. The UK NCP will formally ask the complainants and GCM whether they are willing to engage in mediation to agree a settlement. The NCP is aware that the complainants' objective for mediation is the company's withdrawal from the Project, but notes that the NCP offer does not make any judgment about what the outcome of mediation should be.
41. Subject to their responses, the UK NCP will liaise with both parties to arrange mediation/conciliation meetings. If a mediated/conciliated solution is not possible, or parties do not wish to engage in mediation/conciliation, the UK NCP will make a further examination of the points in paragraph 38 before issuing a Final Statement on this complaint.
42. In line with OECD Guidance, mediation or further examination will be confidential while in progress. Once complete, the outcome will be reflected in a Final Statement by the NCP.

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UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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