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Decision

Initial assessment: Global Legal Action Network complaint to the UK NCP about Anglo American

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1. Summary of the UK NCP decision

The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines), along with the Swiss and Australian NCPs received a complaint from Global Legal Action Network (GLAN) (the Complainant) about three multinational enterprises invested in the Cerrejón mine in Colombia. These three multinationals are: Anglo American (based in the UK), BHP Group Limited (based in Australia), and Glencore International AG (based in Switzerland) (the Investors).

The UK NCP is responsible for the initial assessment of the Complaint as it relates to Anglo American as they are a British listed multinational mining company with headquarters in London, United Kingdom. Anglo American has, indirectly, a one third shareholding in the companies which own and operate the Cerrejón mine.

In the Complaint GLAN allege that the Investors have not met the standards expected of them under the Guidelines including chapters on General Policies, Disclosure, Human Rights and Environment.

The UK NCP has decided that this Complaint merits further consideration. However, as this Complaint has various intricacies the UK NCP notes that:

- the issues which have been accepted relate to Anglo American's role as an investor and not with respect to the day-to-day operations of the Cerrejón mine
- since the submission of the Complaint, Anglo American announced that it had entered into an agreement for the sale of its one-third shareholding in Cerrejón to Glencore (Switzerland), which is expected to complete in H1 2022
- the Complaint has been brought against three multinational enterprises jointly invested in the companies which own and operate the Cerrejón mine: Anglo American, BHP Group Limited, and Glencore International AG
- the Guidelines have provisions on co-ordination between NCPs in complaints, noting NCPs should consult with a view to agreeing on which NCP will take the lead in assisting the parties

Ordinarily, pursuant to section 4 of the UK NCP Rules of Procedures, the UK NCP would offer mediation to both parties after the conclusion of the initial assessment. However, considering the points above, UK NCP suggests – subject to an agreement between the Complainant, Anglo American and the Swiss NCP – to transfer this Complaint to the Swiss NCP for joint mediation. The UK NCP would remain available to assist the Swiss NCP to facilitate involvement from Anglo American or other issues relevant to the UK.

2. Substance of the Complaint

The Complaint is made by GLAN a registered charity which was established in August 2015. Its members include legal practitioners, investigative journalists, and academics.

The Complaint was submitted with support of Christian Aid, ABColombia, Arbeitsgruppe Schweiz Kolumbien (ask!), AIDA, CINEP, CAJAR.

The Complaint has been brought against three multinational enterprises jointly invested in the companies which own and operate the Cerrejón mine: Anglo American, BHP Group Limited, and Glencore International AG.

The UK NCP is responsible for the initial assessment on Anglo American as they are a British listed multinational mining company with headquarters in London, England. Anglo American has, indirectly, a one third shareholding in the companies which own and operate the Cerrejón mine.

In the Complaint, GLAN alleges that the Investors have not observed the Guidelines including chapters on General Policies, Disclosure, Human Rights and Environment.

Anglo American accepted an invitation from the UK NCP to respond to the Complaint, and denies the allegations made by the Complainant.

Anglo American raised a number of objections to the Complaint. These include:

“ that they consider the Complaint ignores the fact that each of the Investors only has an indirect, one-third shareholding in Cerrejón, none of the current Shareholders is able to exercise independent management or control over Cerrejón’s activities; that they believe similar issues have been, or are being, considered in other domestic or international proceedings, creating a risk of inconsistent findings by the NCP; that they consider the Complainant’s allegations are broad-ranging, not specific and not adequately substantiated; that they consider the wide-ranging nature of the issues raised in the Complaint, and the diverse interests of local communities and other stakeholders, render the Complaint unsuitable for resolution via the NCP process.”

Anglo American also claims that the primary remedy sought by the Complainant – the initiation of a consultation process to achieve closure of the mine – is not something that can sensibly be the subject of a mediation process, nor is it within the remit of the Investors, each of which does not have the independent power or authority to direct or otherwise require Cerrejón to take any of the actions sought by the Complainant.

3. OECD Multinational Enterprises Guidelines provisions cited

The Complainant refers to the following provisions of the Guidelines:

3.1 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:

A. Enterprises should:

- 1) Contribute to economic, environmental and social progress with a view to achieving sustainable development.
- 2) Respect the internationally recognised human rights of those affected by their activities.
- 10) Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- 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.

3.2 IV. Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

- 1) 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.
- 2) Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- 5) Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
- 6) Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

3.3 VI. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

2) Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: a) provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environmental, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and

b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

3) Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

6) Continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as:

a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

b) development and provision of products or services that have no undue environmental impacts; are safe in their intended use; reduce greenhouse gas emissions; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;

c) promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues); and

d) exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity

3.4 III. Disclosure

1) Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

3) Enterprises are encouraged to communicate additional information that could include:

a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines;

b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;

c) its performance in relation to these statements and codes;

d) information on internal audit, risk management and legal compliance systems;

e) information on relationships with workers and other stakeholders.

4) Enterprises should apply high quality standards for accounting, and financial as well as non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported. An annual audit should be conducted by an independent, competent and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the enterprise in all material respects.

4. The Initial Assessment Process

The initial assessment process is a decision on whether the issues raised merit further examination. It does not determine whether the company has acted inconsistently with the Guidelines.

4.1 UK NCP Handling process

The UK NCP has provided a summary of actions which were taken during the initial assessment of the Complaint.

Date	Action
18 January 2021	The UK NCP received Complaint
19 January 2021	The UK NCP confirmed receipt
20 January 2021	The UK NCP confirmed appropriate contacts in Anglo American
28 January 2021	The UK NCP met with other NCPs to discuss co-ordination
29 January 2021	The UK NCP send Complaint to Anglo American for information
22 March 2021	The UK NCP met with other NCPs and the OECD RBC Chair to discuss lead NCP
26 April 2021	The UK NCP emailed Anglo American to ask further questions and to confirm co-ordination with the other NCPs
26 April 2021	The UK NCP emailed GLAN offering a meeting
06 May 2021	The UK NCP met with Anglo American to discuss the initial assessment process
11 May 2021	The UK NCP shared meeting notes with GLAN
19 May 2021	The UK NCP emailed Anglo American asking for a response to the Complaint alongside questions sent on 26 April
06 June 2021	The UK NCP shared the Complainant's additional information with Anglo American
16 July 2021	The UK NCP received response from Anglo American
20 July 2021	The UK NCP met with other NCPs to discuss co ordination

Date	Action
15 September 2021	The UK received additional information from the Complainant
21 September 2021	The UK received additional information from the Complainant
22 September 2021	The UK NCP met with other NCPs to discuss co ordination
04 October 2021	The UK shared information from Complainant with Anglo American

5. UK NCP decision

The UK NCP has decided that this Complaint merits further consideration. However, the UK NCP notes that the issues which have been accepted relate to Anglo American's role as an investor and not with respect to the day-to-day operations of the Cerrejón mine.

As set out in the OECD Guidelines Procedural Guidance, the UK NCP followed the following admissibility criteria when considering the Complaint:

5.1 Whether the UK NCP is the appropriate NCP to handle this Complaint

Anglo American is the holding company for the Anglo American group of companies, which includes Ammin Coal Holdings Limited. Ammin Coal Holdings Limited holds one-third of the shares in the joint venture behind the Cerrejón mine.

Anglo American is a British listed multinational mining company with headquarters in London, United Kingdom.

The other investors with a one third share in companies which own and operate the Cerrejón mine in Colombia are BHP Group Limited based in Australia and Glencore International AG based in Switzerland. The Swiss NCP and the AusNCP also received the Complaint.

Anglo American suggested that the Colombian NCP would be the most appropriate NCP to lead this Complaint, as these issues occurred in Colombia. Anglo American has underlined paragraph 23 of the Procedural Guidance of the Guidelines which states that: "Generally, issues will be dealt with by the NCP of the country in which

the issues have arisen". Secondly, Anglo American has stated that the Cerrejón incorporated joint venture is run by an independent management team which is based in Colombia.

The UK NCP found it to be appropriate for it to undertake an initial assessment of the Complaint given the company is based in the UK and the Complaint relates to alleged harms by a company which Anglo American has a one-third share in.

However, due to the complexities of the Complaint brought against the three investors, the UK NCP has proposed to transfer the case to the Swiss NCP. UK NCP believes this to be the most effective course of action after the initial assessment. If the Swiss NCP, the Complainant and Anglo American agree this would enable the Complaint to be dealt with by the Swiss NCP as a whole.

5.2 Identity of the Complainant and its interest in the matter

The Complaint is made by Global Legal Action Network (GLAN) a registered charity. Its members include legal practitioners, investigative journalists, and academics. GLAN's charitable objects are:

"to protect and promote human rights... throughout the world by... monitoring and reporting cases of human rights [abuses]... [and] contributing to the sound administration of international legal standards and human rights law through litigation, advocacy, training and information sharing...".

GLAN claim they are a legitimate interested party to submit a Complaint to the NCP. They provided information about how their Complaint had been submitted in consultation with, and supported by, the leadership of communities within La Guajira.

Anglo American claim the Complainant is not authorised to represent the community and there are more than 400 communities neighbouring the mine, whose highly diverse and complex interests and wishes must also be considered.

The 2019 OECD Guide for National Contacts Points on The Initial Assessment of Specific Instances, outlines how NCPs may consider the mandate of an organisation and its legitimate interests in a matter. It reads: "organisations with mandates or objectives related to certain Responsible Business Conduct themes may also have an interest in issues touching on those themes (i.e. instances of environmental harm, forced labour etc.). An NCP may consider the mandate of an organisation as well as its stated objectives in submitting a specific instance in considering the legitimacy of its interests in a matter".

The UK NCP accepts that the Complainant has an interest in bringing this Complaint in line with their charitable objectives. The UK NCP is satisfied that they have a valid interest in the issues raised.

5.3 Whether the issue is material and substantiated

Within the scope of the initial assessment, the Complainant has provided sufficient information for the UK NCP to conclude that the issues identified at the Cerrejón mine are material and substantiated.

The Complaint contains information to alleged human rights and environmental harms related to the Cerrejón mine, which the Complainant allege the Investors could influence, including:

- displacing Indigenous People, including the Wayúu and Afro-Colombian communities, without free, prior and informed consent
- evicting communities into inadequate housing
- impacting the local populations health
- polluting the water
- polluting the air
- damage to the local environment due to structural interventions in the hydrological system

The Complainant also provided information regarding the issues around non-observance of the Disclosure chapter of the Guidelines, including the alleged exclusion of information about the Cerrejón mine in Anglo American reports on the basis that it is independently managed.

The UK NCP accepts that the issues of the Complaint are material in relationship to the alleged breaches of specific provisions of Chapters II (General Policies), III (Disclosure), IV (Human Rights), and VI (Environment) of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the NCP to consider the issues raised merit further examination.

5.4 Whether there seems to be a link between the enterprise's activities and the issues raised

Anglo American states that it only has an indirect, one-third shareholding in Cerrejón and is not able to exercise independent management or control over Cerrejón's activities, nor does it have the independent power or authority to direct or otherwise require Cerrejón to take any of the actions sought by the Complainant.

The UK NCP notes that on 28 June 2021 Anglo American announced that it had entered into an agreement for the sale of its one-third interest in Cerrejón to Glencore and is expected to complete in H1 2022.

The UK NCP notes that this Complaint relates to Anglo American's role as an investor and not with respect to the day-to-day operations of the Cerrejón mine.

The Guidelines states that leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.

The UK NCP considers that, based on the information provided at the initial assessment stage, there seems to be a link between Anglo American's activities and the issues raised, that merits further examinations.

5.5 Relevance of applicable law and procedures, including court rulings

In addition to the Guidelines the Complaint includes references to several international instruments including: the Convention on the Rights of the Child, the OECD Due Diligence Guidance for Responsible Business Conduct, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Labor Organization Indigenous and Tribal Peoples Convention.

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

The Complaint and subsequent information provided include several references to ongoing and historical court rulings in Colombia.

Anglo American notes that very similar issues to the Complaint have been, or are being, considered in other domestic or international proceedings and they raised a concern that the UK NCP processes could interfere with existing legal processes.

The Guidelines state that when an NCP receives a submission that involves issues that have been or are being treated at another NCP or before other domestic or international fora, it should proceed by evaluating whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings.

The UK NCP therefore considers that an offer of good offices could make a positive contribution to the resolution of the issues raised by the Complainant, and would not create serious prejudice to the parties involved.

5.7 Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines

The UK NCP considers that accepting this Complaint would contribute to the purpose of the Guidelines because offering offices could help promote positive contributions by Anglo American to the economic, environmental, and social progress in Colombia.

The UK NCP also considers that accepting this Complaint would contribute to the effectiveness of the Guidelines, as offering good offices could facilitate an exchange between the parties about the issues and expectations of the Guidelines.

The UK NCP therefore considers that it would contribute to the purpose and effectiveness of the Guidelines for the UK NCP to consider the Complaint further as a key role of NCPs is to provide access to remedy.

6. Conclusion and next steps

The conclusions reached by the UK NCP in this initial assessment are based on the information it has been provided by the parties.

The UK NCP has decided that this Complaint merits further consideration. However, as this Complaint has various intricacies the UK NCP notes that:

- the issues which have been accepted relate to Anglo American's role as an investor and not with respect to the day-to-day operations of the Cerrejón mine
- since the submission of the Complaint, Anglo American announced that it had entered into an agreement for the sale of its one-third interest in Cerrejón to Glencore (Switzerland) and is expected to complete in H1 2022
- the Complaint has been brought against three multinational enterprises jointly invested in the Cerrejón mine in Colombia: Anglo American, BHP Group Limited, and Glencore International AG
- the Guidelines have provisions on co-ordination between NCPs in complaints, noting NCPs should consult with a view to agreeing on which NCP will take the lead in assisting the parties

Ordinarily, pursuant to section 4 of the UK NCP's Rules of Procedures, the UK NCP would offer mediation to both parties after the conclusion of the initial assessment. However, considering the points above, the UK NCP suggests – subject to an agreement between the Complainant, Anglo American and the Swiss NCP – to transfer this Complaint to the Swiss NCP for joint mediation. The UK NCP would remain available to assist the Swiss NCP to facilitate involvement from Anglo American or other issues relevant to the UK.

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