

**Initial Assessment by the UK National Contact Point (NCP) for the OECD
Guidelines for Multinational Enterprises (the Guidelines)**

**Complaint from Justiça Ambiental against BHP Billiton PLC on Mozal
SARL (Mozambique)**

SUMMARY OF THE UK NCP DECISION

- The UK NCP has decided that some of the issues raised in Justiça Ambiental's complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers BHP Billiton PLC to have acted inconsistently with the Guidelines. The UK NCP is accepting for further consideration the alleged breach of Chapters II(2) (excluding the alleged breach of domestic law), III(1), III(2), V(1)(a), V(1)(b) and V(2) of the Guidelines.
- The UK NCP suspends the complaint process under the Guidelines to take into account the parties' decision to undergo conciliation/mediation outside of the UK NCP's process. The UK NCP requests both parties to provide an update every two months on the progress of the conciliation/mediation procedure undertaken outside of the UK NCP complaint process. After each update from the parties, the UK NCP will determine whether the UK NCP's complaint process needs to be reopened.

BACKGROUND

1. On 18 October 2010, Justiça Ambiental (JA) wrote on behalf of a coalition of institutions consisting of itself and Centro Terra Viva, Livaningo, Liga Moçambicana dos Direitos Humanos, Centro de Integridade Pública, and Kulima, to the UK NCP raising a number of concerns which it considered constitute a Specific Instance under the Guidelines in respect of the operations of Mozal SARL (Mozal), a subsidiary of the UK registered company BHP Billiton PLC (BHPB).

THE COMPLAINT AND RESPONSE

2. The concerns raised by JA relate to Mozal's operations in Mozambique and were specifically related by JA to Chapters II(2), II(5), III(1), III(2), V(1)(a), V(1)(b) and V(2) of the Guidelines which state that:

II(2). [Enterprises should] Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

II(5). [Enterprises should] Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.

III(1). Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. 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.

III(2). Enterprises should apply high quality standards for disclosure, accounting and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.

V(1). [Enterprises should] Establish and maintain a system of environmental management appropriate to the enterprise, including:
a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives.

V(2). [Enterprises should,] Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
a) provide the public and employees with adequate and timely information on the potential environment, 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. JA made the following allegations in respect of Mozal:
- a) That Mozal is planning to bypass for 6 months the fume and gas treatment centres of its aluminium smelter (near Maputo – Mozambique) in order to complete an upgrade of these treatment centres. This is needed to ensure that the smelter’s environmental emissions comply with required standards. JA alleged that, while the bypass is in place, the smelter’s exhaust fumes will be released into the air with likely negative effects on the environment and on the health and safety of the communities up to 40-100 km from the smelter;
 - b) That Mozal presented different contradictory reasons for the need for the work. Either they used inappropriate material or they neglected to make adequate provision in its 2001 Environmental

Impact Assessment on the smelter to address the natural lifetime of these treatment centres;

- c) That the Environmental Management Plan (EMP) produced by Mozal, and a study allegedly undertaken by researchers at the Eduardo Mondlane University in Maputo, on the environmental impact of the proposed bypass of the treatment centres, are inadequate. In particular, JA alleged that the EMP does not sufficiently evaluate alternatives to bypassing the treatment centres;
 - d) That Mozal refused to disclose to JA the special authorisation, based on the two documents referred to in paragraph 3(c), issued by Mozambique's Ministry for Coordination of Environmental Affairs (MICOA), granting Mozal permission to bypass the treatment centres. JA also alleged that Mozal refused to disclose its annual environmental performance reports to JA without prior agreement from JA to keep this information confidential (as JA did not comply with this request, it did not have access to the reports). JA further alleged that MICOA's special authorisation might have been issued in breach of Mozambique's law. JA suggested that, if Mozal had already carried out some short-term bypass operations, then these operations might not have had MICOA's special authorisation and thus might have breached Mozambique's law (namely, the Regulamento Sobre os Padrões de Qualidade Ambiental e de emissão de efluentes (Decreto 2 Junho 2004 n.18/2004));
 - e) That the three consultation meetings organised by Mozal took place after the company received the special authorisation from the MICOA. JA also alleged that the meetings were not sufficiently informative, left little room for questions from the attendees, and were held in English with extremely poor translation into the local languages;
 - f) That Mozal did not issue the same health warning to the affected communities as Hillside Aluminium¹'s smelter (South Africa) did in October 2004 when it bypassed the treatment centres for 72 hours;
 - g) That Mozal's actions described above breached Mozambique's 2004 Constitution, interpreted in the light of the United Nations (UN) Universal Declaration of Human Rights, and the African Charter on Human and People's Rights, and also breached the latter Charter.
4. BHPB wrote to the UK NCP on 17 November 2010, denying these allegations. In particular, BHPB stated:
- a) That Mozal urgently needs to repair its two fume treatment centres. BHPB estimated that this work will require a bypass of the treatment centres for 137 days starting late November 2010. BHPB later confirmed in its letter of 4 January 2011 that work on the two fume treatment centres started respectively on 17

¹ A subsidiary of BHPB.

November 2010 and 2 December 2010. BHPB also explained that, on the basis of two separate independent structural integrity studies, the problem with the treatment centres is structural and due to unanticipated corrosion over the operating life of the equipment. Therefore, the company argued that it needs to repair the treatment centres to eliminate the risk of catastrophic failure and minimise increasing safety risks to its employees, and further improve its environmental performance. BHPB also explained that the MICOA conducted a separate environmental audit on 24 November 2009 and confirmed the structural issues with the treatment centres;

- b) That Mozal did consider the effect of the bypass on community health and the environment, but concluded that there will be no significant acute or cumulative impact. The company further explained that this conclusion was supported by independent consultants and independent peer review, and that the impact of the bypass on people and the environment will be regularly monitored by SGS, an independent inspection, verification and certification organisation before and during the bypass. BHPB later confirmed in its letter of 4 January 2011 that the initial results of SGS' monitoring process after the start of the bypass show that air concentrations for all the controlled pollutants are well within the prescribed standards and there is no discernible impact on air concentrations resulting from the bypass so far;
- c) That Mozal did examine a range of alternative options to the bypass and explained the rationale behind these options in the EMP submitted to the MICOA. In particular, it considered: 1) a total shutdown of the facility; 2) a partial shutdown of the facility; 3) sequential repairs of the two treatment centres; and 4) simultaneous repair of the two treatment centres. Mozal concluded that option 4 was the best option based on the lowest overall community, environmental and financial impact;
- d) That, on 26 May 2010, the MICOA formally authorised Mozal's project. According to BHPB, this authorisation followed a four-month process which included the completion of a parallel study on the impact of the project on health, environment and community by the authorisation committee;
- e) That Mozal conducted a range of consultation meetings with interested and affected parties since April 2010, and that attendees were given an opportunity to discuss their concerns. BHPB explained that these meetings will continue as the project progresses. BHPB further clarified that documentation related to the bypass project (including the EMP) is available to the public at MICOA's library and copies have been collected by interested parties. BHPB stated that it will continue to engage with stakeholders on the progress of the project, including through meetings and by establishing a helpline to listen to concerns from the affected communities. BHPB later confirmed in its letter of 4 January 2011 that two further stakeholder events, open to all

relevant NGOs, took place on 1 and 22 December 2010 and another event is planned for 12 January 2011. According to BHPB, Mozal also met with local NGOs on 15 December 2010 to discuss their key concerns over the project and a process of conciliation going forward. It was agreed that Mozal and the local NGOs will meet again in January 2011 to clarify further key concerns. An information sharing arrangement was also agreed at the meeting;

- f) That the different approach taken by Mozal and Hillside Aluminium was due to the different kinds of repairs to be made on the treatment centres of the two aluminium smelters. In the case of Hillside Aluminium, the repairs only affected one treatment centre and were less complex than those required for both of Mozal's treatment centres.

THE UK NCP PROCESS SO FAR

5. The UK NCP received JA's complaint (and its supporting annexes) against BHPB on 18 October 2010. The UK NCP forwarded the complaint and the supporting annexes to BHPB on 19 October 2010. The company submitted a preliminary response to the allegations on 17 November 2010.
6. BHPB met with the UK NCP on 24 November 2010 to discuss the complaint process under the Guidelines. JA did not think it necessary to meet with the UK NCP but remained in e-mail contact with the UK NCP.

UK NCP DECISION

7. The UK NCP has decided that some of the issues raised in JA's complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers BHPB to have acted inconsistently with the Guidelines.
8. The UK NCP notes that JA specifically linked Mozal's alleged breach of Chapter II(2) of the Guidelines to: (a) Mozal's alleged breach of the human rights reflected in Mozambique's 2004 Constitution, interpreted in the light of the UN Universal Declaration of Human Rights and the African Charter on Human and People's Rights; and (b) the alleged breach of the latter Charter. Chapter II(2) recommends companies to respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments. Therefore, the UK NCP does not accept for consideration BHPB's alleged breach of Mozambique's 2004 Constitution because domestic law is outside of the scope of Chapter II(2).

9. The UK NCP also notes that JA specifically linked the alleged breach of Chapter II(5) of the Guidelines to Mozal's alleged breach of Mozambique's domestic law (namely MICOA's special authorisation procedure, and the Regulamento Sobre os Padrões de Qualidade Ambiental e de emissão de efluentes (Decreto 2 Junho 2004 n.18/2004)). JA did not submit any evidence to substantiate the allegations that: (a) MICOA's special authorisation to Mozal to bypass the smelter's treatment centres was in breach of Mozambique's domestic law; or (b) that the alleged short term bypass operations, that had allegedly already taken place, were unauthorised. JA also did not submit any evidence to substantiate the alleged attempt by Mozal to seek (or accept) an exemption not contemplated in Mozambique's law. Therefore, the UK NCP does not accept for consideration the alleged breach of Chapter II(5) of the Guidelines.
10. In light of the above, the UK NCP is accepting for further consideration the alleged breach of Chapters II(2) (excluding the alleged breach of domestic law), III(1), III(2), V(1)(a), V(1)(b) and V(2) of the Guidelines. The reasons for this decision are explained below.
11. As set out in paragraph 14 of the Commentary on the Guidelines on "Implementation in Specific Instances"², the UK NCP took the following points into account when considering whether JA's complaint merited further consideration:

a) Identity of JA and its interest in the matter:

The UK NCP is satisfied that JA is a legitimate and credible body to make this complaint. JA is based in Maputo, and therefore in proximity to the communities affected by Mozal's project. JA describes itself as a "*leading Mozambican NGO working on the impacts of Mozambique's rapid, uncontrolled and unsustainable development*"; and its mission as "*to engender a culture of civil action in Mozambique through both our actions to protect the environment, and our active engagement in developmental decisions pertaining to issues of environmental justice, both here in Mozambique and throughout the rest of the world*". JA is listed in the website of the Dutch-based international NGO "Friends of the Earth" as the lead contact in Mozambique³. In light of the above, the UK NCP considers that JA is directly interested in the issues raised in the complaint and is in a position to supply information about them.

² See page 58 of the Guidelines – available at: www.oecd.org/dataoecd/56/36/1922428.pdf - visited on 2 February 2011.

³ See <http://www.foei.org/en/who-we-are/member-directory/groups-by-region/mozambique> - visited on 2 February 2011.

b) Whether the issue is material and substantiated:

Within the scope of the Initial Assessment, JA has provided sufficient information for the UK NCP to conclude that some of the issues identified by JA are material and substantiated. JA has provided various documents in support of the complaint, including: a letter from JA to the MICOA dated 8 April 2010 (expressing concerns on the bypass and requesting further information on the project); MICOA's response to JA of 14 June 2010 (providing further information on the project); an analysis of the risks to human health of the polluting substances referred to by the MICOA; a letter from JA to Mozal dated 29 April 2010 (requesting the disclosure of the special authorisation granted to Mozal, the EMP, and other environmental information on the project); Mozal's response to JA of 5 August 2010 (deferring the release of the documents until the company has verified whether the documents can be legally released to third parties); JA's notes from the EMP and the study allegedly undertaken by researchers at the Eduardo Mondlane University in Maputo; JA's concerns on the validity of (and the conclusions reached by) these two documents; JA's report dated 1 October 2010 on the test results of air samples near Mozal's smelter; and a South African laboratory's analytical report confirming JA's test results. The UK NCP notes BHPB's statement that the following documents are already available to the public at MICOA's library: EMP; dispersion modelling assessment; proposal for monitoring the bypass by independent third party-SGS; summary of the monitoring plan for the bypass; communication plan; media fact sheet; and copy of the project presentation to stakeholders.

c) Relevance of applicable law and procedures:

According to JA, Mozal has breached Mozambique's law (namely, the Regulamento Sobre os Padrões de Qualidade Ambiental e de emissão de efluentes (Decreto 2 Junho 2004 n. 18/2004), and Mozambique's 2004 Constitution) in that it has allegedly failed to follow the special authorisation procedure to carry out the bypass, and did not obtain prior authorisation for any short-term bypass operations allegedly already carried out. In addition, JA submits that Mozal allegedly breached some of the human rights recognised in Mozambique's Constitution. BHPB submits that Mozal's practices are in compliance with Mozambique law.

The Guidelines represent supplementary principles and standards of behaviour of a non-legal character and are not a substitute for (nor should they be considered to override) local law and regulation. If a conciliated/mediated settlement is not possible, the UK NCP will not examine whether there has been any breach of Mozambique law.

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

The UK NCP understands from JA that two separate proceedings are currently ongoing in Mozambique: (a) application of 14 September 2010 for judicial review in Mozambique of MICOA's decision to grant a special authorisation to Mozal to build the bypass; and (b) petition of 28 September 2010 to Mozambique's Parliament requesting the immediate cancellation of MICOA's special authorisation to Mozal to build the bypass. In its letter of 4 January 2011, BHPB explained that: the proceedings under (a) concluded with the dismissal of JA's application to suspend and cancel the bypass authorisation; and the proceedings under (b) concluded that the special authorisation was legal and that no Parliamentary intervention was justifiable.

The UK NCP understands from the European Investment Bank (EIB) that the EIB is currently investigating a complaint on similar issues to those submitted to the UK NCP from JA under the Guidelines. The UK NCP also understands from the parties that the Compliance Advisor Ombudsman (CAO), which is the complaint mechanism of the International Financial Corporation (IFC) part of the World Bank Group, is also investigating the same complaint from JA and has in fact already offered conciliation/mediation to the parties.

If a conciliated/mediated settlement is not possible, the UK NCP will take into account as appropriate (and if available) the outcome of the relevant proceedings in Mozambique, at the EIB and the CAO as part of its examination of the complaint. In doing so, the UK NCP will consider whether its conclusions in relation to the complaint may conflict with the decisions of Mozambique's Parliament and courts, applying the general principle that while the Guidelines are supplementary principles and standards of behaviour which extend beyond domestic law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.

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 NCPs, is for the NCP to "*offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law*"⁴. To this effect, the UK NCP considers that by accepting this Specific Instance, it could help both parties in reaching a conciliated/mediated solution to the

⁴ See paragraph I(C) of the "Procedural Guidance" of the Guidelines.

complaint in relation to the issues of: an independent assessment of the impact on the environment of Mozal's proposed bypass; access to Mozal's annual reports on its environmental performance and the special authorisation granted by the MICOA to Mozal; information on all bypass procedures undertaken by Mozal to date; argued evaluation of alternatives to the bypass; adequate stakeholder engagement before and during the project.

NEXT STEPS

12. The UK NCP suspends the complaint process under the Guidelines to take into account the parties' decision to undergo conciliation/mediation outside of the UK NCP's process (namely as part of the CAO's complaint mechanism)⁵. The UK NCP requests both parties to provide an update, every two months, on the progress of the CAO's conciliation/mediation procedure. After each update from the parties, the UK NCP will determine whether the UK NCP's complaint process needs to be reopened.

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⁵ http://www.cao-ombudsman.org/cases/case_detail.aspx?id=159 (visited on 2 February 2011).