

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

**Complaint from the European Centre for Constitutional and Human Rights
against ICT Cotton Limited (in Uzbekistan)**

SUMMARY OF THE UK NCP DECISION

- The UK NCP declines ICT Cotton’s request that the complaint should be rejected at the Initial Assessment stage of the complaint process. ICT Cotton had argued that the complaint should be rejected because of the lack of an “investment nexus” between ICT Cotton and Uzbekistan, or between ICT Cotton and companies owned by the Government of Uzbekistan.
- The UK NCP has decided that the issues raised in the complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers ICT Cotton to have acted inconsistently with the Guidelines. The UK NCP is accepting for further consideration the alleged breach of Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) of the Guidelines.
- The UK 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 UK NCP, with the aim of reaching a settlement. If they are both so willing, the UK NCP will then liaise with both parties to arrange the conciliation/mediation meetings.

BACKGROUND

1. On 7 December 2010, Leigh Day & Co Solicitors, acting on behalf of the European Centre for Constitutional and Human Rights (ECCHR), wrote to the UK NCP raising a number of concerns which the ECCHR considered constitute a Specific Instance under the Guidelines in respect of the operations of the UK registered company ICT Cotton Limited (ICTC) in Uzbekistan.

THE COMPLAINT AND RESPONSE

2. The concerns raised by the ECCHR relate to ICTC’s operations in Uzbekistan and were specifically related by the ECCHR to Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) 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, social and environmental progress with a view to achieving sustainable development.*
- 2. Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.*

[...]

10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.”

“IV. Employment and Industrial Relations

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

[...]

1.(b) Contribute to the effective abolition of child labour.

1.(c) Contribute to the elimination of all forms of forced or compulsory labour.”

3. The ECCHR made the following allegations in respect of ICTC:

- a) That ICTC may buy cotton from Uzprommashimpeks, one of three companies controlled by the Government of Uzbekistan which sell to international buyers the cotton produced in Uzbekistan. The ECCHR further submitted that: ICTC lists Tashkent (Uzbekistan) on its website as one out of seven ICTC locations; that ICTC, under its former name of ICT International Cotton Trading, is in fact listed as one of Uzprommashimpeks’ partners; and that ICTC participated at the Tashkent Cotton Fair in October 2009;
- b) That the cotton bought by ICTC in Uzbekistan is produced through the systematic use of child and forced labour supported by the Government of Uzbekistan, which in turn negatively affects the sustainable development of the region;
- c) That ICTC, in view of its relationship with the Government of Uzbekistan outlined in paragraph 3(a) above, is in a position to influence, either alone or as part of international groups (such as the Bremen Cotton Exchange or the International Cotton Advisory Committee (ICAC)), the Uzbek authorities regarding their use of forced and child labour. The ECCHR further alleged that ICTC chose not to join an international group of cotton (and cotton products) retailers boycotting the use of cotton produced in Uzbekistan;
- d) That ICTC, in view of its relationship with the Government of Uzbekistan outlined in paragraph 3(a) above, breached the Guidelines through:
 - i. Its supply chain. The ECCHR alleged that, if it is confirmed that ICTC entertains significant trade relationships with Uzbek State corporations and as a result it has opportunities to influence the situation but has failed to do so, by continuing to buy cotton from the Government of Uzbekistan, ICTC might have contributed to (and helped to maintain and incentivise) the use of forced and child labour in cotton production. Therefore, ICTC would have arguably been responsible for violations of the Guidelines committed by the Government of Uzbekistan.
 - ii. Complicity with human rights abuses committed by the Government of Uzbekistan. The ECCHR argued that, if the indications of ICTC’s involvement in the trade with

Uzbek cotton and its close relations to the State owned businesses are confirmed, by aiding and abetting the Uzbekistan authorities in perpetuating the cotton production system based on the use of forced and child labour, ICTC is complicit in these human rights breaches committed by the Government of Uzbekistan. The ECCHR further alleged that ICTC satisfies the following requirements of the concept of “aiding and abetting”: “causation” (ICTC allegedly purchased cotton from the Government of Uzbekistan and produced in Uzbekistan at very low cost thanks to the use of child labour, thus creating an incentive to perpetuate this exploitative system); “knowledge” (ICTC allegedly knew, or should have known applying a due diligence test, how cotton is produced in Uzbekistan); “proximity” (as outlined in paragraphs 3(a) and 3(c), ICTC was allegedly close to the Government of Uzbekistan and in a position to influence it);

- e) That, in light of the above, ICTC did not respect the following human rights: Articles 23(1) and 26(1) of the United Nations (UN) Universal Declaration of Human Rights; Articles 28(e), 31 and 32 of the UN Convention on the Rights of the Child; Article 24(1) of the UN International Covenant on Civil and Political Rights; Articles 6, 7 and 10(3) of the UN International Covenant on Economic, Social and Cultural Rights; Article 7(1) of the International Labour Organisation (ILO) Convention 138 (on minimum age).
4. ICTC wrote to the UK NCP on 8 February 2011 and firmly rejected all allegations. In particular, the company stated:
- a) That ICTC only has a representative office in Tashkent (Uzbekistan) with four employees/cotton classers, whose only function is to select qualities/quantities as per ICTC instructions and advise in case of problems. Purchase contracts, payments, final destinations, documentation and claims are agreed directly between ICTC and the Uzbek seller. Therefore, ICTC submitted that there is no “investment nexus” between ICTC and Uzbekistan and that, as a result, the complaint from the ECCHR falls outside of the scope of the Guidelines and should be rejected;
 - b) That ICTC abhors any form of violence, particularly against children, whether it is perpetrated by individuals or by the State. ICTC also explained that Uzbekistan’s Gross Domestic Product (GDP) has actually increased in recent years, and that Uzbekistan’s expenditure on education is the highest in the region (and above the average OECD’s spending on education in percentage of GDP). ICTC further explained that the progressive draining and pollution of the Aral Sea dates back to Soviet times when the authorities at the time decided to increase cotton production in the whole region and build a chemical plant near the Aral Sea. Therefore, ICTC disputed the ECCHR’s assertion that the Government of Uzbekistan is somehow responsible for the ecological disaster at the Aral Sea;
 - c) That ICTC on its own has no capacity to influence the Government of Uzbekistan. ICTC contended that contract terms for the purchase of cotton from Uzbekistan are impossible to modify and that, due to the relatively small/middle size of ICTC and the fact it buys only a very small part of the Uzbek production, the company has no leverage on Uzbekistan’s domestic and international affairs. ICTC however stated that it has tried, and will continue to try, to alert the Government of Uzbekistan to the alleged use of forced and child labour in cotton production. To this effect ICTC stated that it has raised the issue in private meetings with State Agency sellers. It has also

actively supported the efforts of the Association of Cotton Merchants in Europe (ACME) and of the International Cotton Advisory Committee (ICAC) to encourage the Government of Uzbekistan to adopt more cooperative and transparent behaviour. In particular, ICTC supported ACME's meeting with Uzbekistan's Deputy Minister for Foreign Economic Relations, Investments and Trade in April 2008 during which ACME encouraged Uzbekistan to improve its dialogue with the UN Children's Fund (UNICEF) and the ILO.

- d) That ICTC rejects the claims that it has breached the Guidelines through:
- i. Its supply chain. ICTC explained that it was aware of the allegations on the systematic use of child labour in Uzbekistan but that there was no hard official evidence supporting these allegations. ICTC further explained that it has been travelling widely through Uzbekistan but has not noticed any small children working in the cotton fields. In any event, ICTC contended that, in the light of paragraph 4(c) above, it has no capacity to influence the Government of Uzbekistan on the way it produces and sells cotton.
 - ii. Complicity with human rights abuses committed by the Government of Uzbekistan. ICTC clarified that it cannot exclude that some children assist their families in the cotton fields but this is very different from alleged extensive forced child labour organised by the State. Officially the Government proscribes the hiring of children under 16. Some high school children have confirmed their being called to harvest cotton but ICTC has received no information as to systematic abuses or minor aged children. ICTC clarified that working in the cotton fields dates back to Soviet times and is in fact considered complementary to the education of students in Uzbekistan. ICTC further clarified that it buys cotton from Uzbekistan at international market prices and that local farmers receive a price congruous with other producing countries taking into consideration the local conditions and harvesting organisation. In the seasons when international prices are low, farmers still receive a supportive price for the cotton they produce. ICTC pointed out that, contrary to what the ECCHR stated in the complaint, not all cotton production in Uzbekistan is bought by the state, and that it knows of one foreign private company which buys cotton directly from local farmers and sells directly to foreign buyers. ICTC explained that, due to strong competition from Asian countries (particularly China), any boycott by European companies of the cotton produced in Uzbekistan would have no impact as any inventory would be sold in Asia. ICTC submitted that this result would not benefit the internal situation and human rights in Uzbekistan because European companies, once excluded from the country, would be unable to engage with and exert any influence on the Government of Uzbekistan.
- e) That ICTC does not intend to engage directly with the ECCHR as this risks undermining ICTC's own efforts to influence, where possible, the Government of Uzbekistan on the issues of forced and child labour.

THE UK NCP PROCESS SO FAR

5. The UK NCP received the ECCHR's complaint against ICTC on 7 December 2010 (and the supporting annexes on 8 December 2010).

6. Uzbekistan is not an OECD member nor does it have an NCP, therefore it falls to the NCP of the country where the company is registered to deal with the complaint. ICTC is a UK registered company but, its parent company, Société Cotonnière Financière SA, is based in Luxembourg¹. Having consulted with the Luxembourg NCP, on 5 January 2011, the UK NCP informed the complainant that the UK NCP would be better placed to deal with the complaint against ICTC and that it would do so on the basis of the UK NCP's published complaint procedure. The reasons for this decision are that ICTC is a UK registered company and that there is evidence that it is ICTC (rather than Société Cotonnière Financière SA) that deals with Uzbekistan. The UK NCP is keeping the Luxembourg NCP updated on the status of the complaint and will seek the Luxembourg NCP's assistance where appropriate.
7. In its complaint against ICTC, the ECCHR stated that it had filed similar complaints under the Guidelines against other companies (based in the UK, Germany, Switzerland, and France). The UK NCP is therefore also liaising with the German, Swiss and French NCPs, and will keep these NCPs updated on the status of the complaint against ICTC. However, it should be pointed out that, although all NCPs operate on the basis of the Guidelines, each NCP is independently established by each adhering country, and may therefore operate within different timelines and reach different conclusions from the conclusions reached by other NCPs on the same issues.
8. On 12 January 2011, the UK NCP forwarded the complaint and the supporting annexes to ICTC. The company submitted a preliminary response to the allegations on 8 February 2011.
9. Neither party took up the UK NCP's offer to meet but remained in contact with the UK NCP.

UK NCP DECISION

"Investment nexus"

10. The UK NCP has considered ICTC's contention that the complaint falls outside of the scope of the Guidelines because of the lack of an "investment nexus" between ICTC and Uzbekistan, or between ICTC and companies owned by the Government of Uzbekistan. In reaching its conclusion, the UK NCP took the following considerations into account:
 - a) The concept of "investment nexus" is not referred to (nor is it defined) in the OECD "Declaration on international investment and multinational enterprises", the Guidelines, OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance, or in the Commentaries attached to the Guidelines. The Guidelines and OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance can only be amended respectively by all the adhering countries and by the OECD Council.

¹ Mint UK - Bureau Van Dijk, *MINT report on ICT Cotton Limited*, <http://www.bvdinfo.com/Home.aspx>, visited on 9 February 2011.

- b) The UK NCP's published complaint procedure does not contemplate the presence (or lack) of an "investment nexus" as a criterion to determine the acceptance for further consideration of a complaint under the Guidelines. The UK NCP's published complaint procedure is based on the Guidelines and on OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance. As already indicated, neither of these instruments makes an "investment nexus" a factor for determining the admissibility of complaints under the Guidelines.
- c) In the course of 2003, the OECD Committee on International Investment and Multinational Enterprises (CIME), now merged into the Investment Committee, issued a statement² reflecting the exchange of views held by the CIME (and its Working Party) in the period 2002-2003 on the issue of the "investment nexus". The statement reads:

"In considering this issue [i.e. the question of the scope of the Guidelines - the definition of activities to which the Guidelines are thought to apply], the CIME has sought to protect and enhance the credibility and effectiveness of the Guidelines and to remain true to the agreement reached among adhering governments at the 2000 Review after extensive consultations with the business, trade union and NGO communities.

The Guidelines are a multifaceted instrument and the Committee found it useful to consider this issue with reference to the following, which does not aim to change the balance reached during the 2000 Review

[...]

Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances."

In light of the above, the UK NCP considers that the arguments put forward by ICTC (see paragraph 4(c) above) in respect of the company's capacity to influence the Government of Uzbekistan and the companies controlled by this government, are likely to warrant a closer examination of ICTC's actual capacity to exert such influence, either alone or as part of a group of companies. Such examination is outside the scope of the Initial Assessment but, should conciliation/mediation not be possible, will take place as part of the Examination stage of the complaint process. The results of the examination would then be reflected in the UK NCP's Final Statement.

² CIME, *Scope of the Guidelines and the investment nexus*, 2003 (available at http://www.oecd.org/document/42/0,3746,en_2649_34889_37356074_1_1_1_1,00.html (visited on 4 February 2011)).

11. In light of the above, the UK NCP has concluded:
- a) That none of the key OECD instruments related to the Guidelines refer to the concept of an “investment nexus”;
 - b) That the UK NCP’s complaint procedure, which is based on the Guidelines, does not contemplate the presence (or lack) of an “investment nexus” as a relevant criterion to determine whether the issues raised in a complaint under the Guidelines merit further consideration;
 - c) That the company’s capacity to influence the Government of Uzbekistan and the companies controlled by this government, is likely to warrant a closer examination by the UK NCP in the context of the examination of the allegations and of the analysis of the results of the examination in the Final Statement, should conciliation/mediation not be possible.
12. Therefore, the UK NCP declines ICTC’s request that the complaint should be rejected at the Initial Assessment stage of the complaint process. ICTC had argued that the complaint should be rejected because of the lack of an “investment nexus” between ICTC and Uzbekistan, or between ICTC and companies owned by the Government of Uzbekistan.

Complaint from the ECCHR

13. The UK NCP has decided that the issues raised in the ECCHR’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 ICTC to have acted inconsistently with the Guidelines.
14. The UK NCP is accepting for further consideration the alleged breach of Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) of the Guidelines. The reasons for this decision are explained below.
15. As set out in paragraph 14 of the Commentary on the Guidelines on “Implementation in Specific Instances”³, the UK NCP took the following points into account when considering whether the ECCHR’s complaint merited further consideration:
- a) Identity of the ECCHR and its interest in the matter:

The complaint was formally submitted to the UK NCP by the London-based law firm “Leigh Day & Co. Solicitors” acting on behalf of the ECCHR. The UK NCP is satisfied that the ECCHR is a legitimate and credible body to make this complaint. The ECCHR is a non-governmental organisation based in Berlin (Germany). According to its website⁴, the ECCHR is “an independent, non-profit legal and educational organization dedicated to protecting civil and human rights throughout Europe [...] ECCHR engages in innovative strategic litigation, using European, international, and

³ OECD, *Commentary on the implementation procedures of the OECD Guidelines for Multinational Enterprises*, p. 58 (downloadable from <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - visited on 9 February 2011).

⁴ <http://www.ecchr.eu/about.html> (visited on 9 February 2011).

national law to enforce human rights and to hold state and non-state actors accountable for egregious abuses". The ECCHR primarily takes cases covering four areas: universal justice, business and human rights, counter-terrorism, and human rights, gender and human rights. The ECCHR stated in the complaint against ICTC that its "*overarching aim is to assist as far as possible with protecting the Human Rights of children in Uzbekistan*". In light of the above, the UK NCP considers that the ECCHR 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:

Within the scope of the Initial Assessment, the ECCHR has provided sufficient information for the UK NCP to conclude that the issues identified by the ECCHR are material and substantiated. The ECCHR has provided various documents in support of the complaint, including: three reports from the Environmental Justice Foundation (documenting serious human rights violations by the Government of Uzbekistan; the systematic use of forced and, in particular, child labour in cotton production in Uzbekistan; the draining of the Aral Sea partly to support cotton production in Uzbekistan; and a statement that ICTC (under the name of ICT International Cotton and Textile Trading) was listed in 2005 as one of the main partners of Uzprommashimpeks); two reports from the School of Oriental and African Studies (SOAS) University of London (documenting the use of forced child labour in cotton production in Uzbekistan and how cotton is then sold to international companies); and a collection of news releases (from various sources) confirming the systematic use of forced and child labour in cotton production in Uzbekistan. ICTC also submitted various supporting documents including: a letter from ACME to the Government of Uzbekistan (encouraging the local authorities to allow an international mission, including ILO and UNICEF representatives, into Uzbekistan to monitor working conditions in cotton production); an e-mail exchange between ACME and ICTC (confirming ICTC's participation in a meeting with the Government of Uzbekistan on the issue of forced and child labour in cotton production); a letter from ICAC to the Government of Uzbekistan (recommending an assessment of the use of child labour in cotton production in Uzbekistan, through the engagement of UNICEF and the ILO); a letter from ICAC to ICTC (identifying some factual errors in the ECCHR's allegations); a letter from ICAC to unnamed civil society activists in Uzbekistan (disputing the allegations of the systematic use of forced child labour in cotton production in Uzbekistan; identifying factual errors in the allegations, specifically on the use of defoliants in cotton production, and on the remuneration of cotton workers; but confirming the need for an objective assessment, conducted by UNICEF and ILO experts, of the working conditions in cotton production in Uzbekistan).

c) Relevance of applicable law and procedures:

According to the ECCHR, child labour and forced labour are prohibited by Uzbekistan's domestic law. In particular, according to one report annexed to the complaint⁵, forced and child labour is regulated under Uzbekistan's domestic law by:

⁵ SOAS, *Invisible to the world? The dynamics of forced child labour in the cotton sector of Uzbekistan*, London, 2009, pp. 30-31 (downloadable from <http://www.soas.ac.uk/ccac/centres-publications/> - visited on 9 February 2011).

Article 37 of the Constitution; the “Law on the Foundations of State Youth Policy”; the “Law on Guarantees of the Right of Child to Labour”; and the Labour Code.

The Guidelines represent voluntary 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 (or the parties do not wish to engage in conciliation/mediation), the UK NCP will not examine whether there has been any breach of Uzbekistan’s law.

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

The UK NCP understands from the ECCHR that the complaint against ICTC is part of a group of complaints under the Guidelines filed by the ECCHR (and other non-governmental organisations) against other European companies (based in the UK, Germany, Switzerland and France) which allegedly buy cotton from Uzbekistan.

The UK NCP will offer conciliation/mediation to ICTC and the ECCHR but, if a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will take into account as appropriate (and if available) the outcome of the relevant proceedings in Germany, Switzerland and France, as part of the UK NCP’s examination of the allegations.

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”⁶. To this effect and taking into account ICTC’s concerns as outlined in paragraph 4(e) above, the UK NCP considers that by accepting this Specific Instance, it could help both parties in reaching a conciliated/mediated solution to the complaint in relation to the issues of: ICTC and the ECCHR’s mutual recognition as reasonable partners in addressing the issues of forced and child labour in Uzbekistan; ICTC’s policy of buying cotton from Uzbekistan; ICTC’s capacity to influence the Government of Uzbekistan in relation to the use of forced and child labour; ICTC’s disclosure of information relating to its operations in Uzbekistan.

NEXT STEPS

16. The UK 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 UK NCP, with the aim of reaching a settlement. If both parties are so willing, the UK NCP will then liaise with both parties to arrange the conciliation/mediation meetings.

⁶ OECD, *Procedural Guidance*, annexed to the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises*, in OECD, *OECD Guidelines for Multinational Enterprises*, 2008, paragraph I(C), pp. 34 (downloadable from <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - visited on 9 February 2011).

17. If a conciliated/mediated solution is possible, the UK NCP will reflect the successful outcome of this process in its Final Statement without making a determination as to whether the company has acted inconsistently with the Guidelines.
18. If a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will conduct a separate examination into the complaint and will reflect in its Final Statement the outcome of this examination, and a determination of whether the company has acted inconsistently with the Guidelines.

8 March 2011

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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