

**FINAL STATEMENT BY THE UK
NATIONAL CONTACT POINT FOR
THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES**

Complaint from International
Accountability Project and World
Development Movement against
GCM Resources plc

NOVEMBER 2014

Contents

Contents.....	2
Summary of the conclusions.....	3
Background	3
OECD Guidelines for Multinational Enterprises	3
UK NCP complaint procedure	4
Details of the parties involved.....	4
The complainants	4
The company.....	4
Initial Assessment of the complaint by the UK NCP	5
UK NCP process	6
Limitations of process.....	6
UK NCP analysis.....	7
Information reviewed.....	7
Complainants	7
Company	7
Other sources	8
Information sharing.....	8
NCP findings.....	9
Did preparation and communication of plans develop and apply effective self-regulatory practices and management systems?	9
Did preparation and communication of plans respect the human rights of those affected by the company’s activities?	15
In the period from September 2011 to December 2012, did the company’s actions avoid infringing on human rights and address human rights impacts, and did the company carry out human rights due diligence to an appropriate level?	16
Limitations of this further examination	18
Conclusions.....	19
Examples of good company practice	19
Recommendations to the company and follow up.....	19

Summary of the conclusions

- The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) examined the issues accepted for further examination.
- The UK NCP considered allegations about activities of GCM in planning a mining development in Bangladesh, with regard to obligations under Chapter II, Paragraph 7 of the OECD Guidelines, , and obligations under Chapter II, Paragraph 2, and Chapter IV, Paragraphs 1 and 5.
- The NCP finds that GCM partly breached its obligations under Chapter II, Paragraph 7 (which provides that enterprises should develop self-regulatory practices and management systems that foster confidence and trust in the societies they operate in);
- The NCP finds that GCM did not breach its obligations under Chapter II, Paragraph 2 (which provides that enterprises should respect the human rights of those affected by their activities), and did not breach its obligations under Chapter IV, Paragraphs 1 (which provides that enterprises should avoid infringing human rights and address human rights impacts with which they are involved) or Paragraph 5 (which provides that enterprise should carry out appropriate human rights due diligence);
- The UK NCP recommends that GCM continues to update its plans in line with international best practice standards, and in particular to pursue the Human Rights Impact Assessment it has advised the NCP it will include in this. The NCP also recommends that GCM develops its communications plans on the basis of a full assessment of risks, including the risks of limiting local engagement, and identifies appropriate ways to re-engage with affected communities, increase the information available to them, and take account of their views.
- The NCP will issue a follow-up report to this Final Statement in May 2015.

Background

OECD Guidelines for Multinational Enterprises

1. The Guidelines are voluntary principles for responsible business conduct in areas including employment, human rights and the environment. As an OECD member government, the UK is required to maintain a National Contact Point (NCP) to promote the Guidelines and to consider complaints that multinational enterprises based in the UK, or operating there, have breached the Guidelines.
2. The UK NCP is based in the Department for Business, Innovation and Skills (BIS) and funded by BIS and the Department for International Development (DfID). A Steering Board including members from

business, trade unions and civil society has general oversight of the NCP.

UK NCP complaint procedure

3. The UK NCP complaint process is broadly divided into the following key stages:
 - a) Initial Assessment - Desk-based analysis of the complaint, and the company's response to decide whether issues raised in the complaint merit further examination;
 - b) Conciliation/mediation OR examination - If issues are accepted, the UK NCP offers conciliation/mediation to parties with the aim of reaching a settlement. If conciliation/mediation is declined or fails to achieve a resolution, the UK NCP examines the complaint further;
 - c) Final Statement – If a mediated agreement is reached, the NCP's Final Statement reports this. If the UK NCP examines the issues further, the Final Statement includes a clear finding as to whether the company breached the Guidelines with regard to the issues raised, and, if appropriate, recommendations to assist the company in making its conduct consistent with the Guidelines;
 - d) Follow up – where a Final Statement includes recommendations, or where an agreement between parties provides for it, the NCP approaches parties at a specified date to request an update. The NCP then publishes a further statement reflecting the parties' responses and any further conclusions of the NCP.

More details of the NCP's process and statements are at <http://www.bis.gov.uk/nationalcontactpoint>

Details of the parties involved

The complainants

4. International Accountability Project (IAP) is a civil society organisation based in the United States. World Development Movement (WDM) is a UK civil society organisation.

The company

5. GCM Resources plc is a UK registered company incorporated in September 2003 under the name Asia Energy plc to raise funds for and acquire companies exploring and developing the Phulbari coal project. Shortly after incorporation, it acquired the Australian company Asia Energy Corporation (AEC) operating in Bangladesh that held a contract and licences to explore the Phulbari deposit. The acquired companies

had also completed (in 2000) pre-feasibility studies that identified open pit mining as an economically viable development option for the deposit.

6. The name of the UK company was changed in January 2007 to Global Coal Management plc and in December 2007 to GCM Resources plc.

Initial Assessment of the complaint by the UK NCP

7. The complaint made allegations relating to the company's obligations under Chapters of the Guidelines dealing with General Policies, Disclosure, and Human Rights. The key allegation of the complainants is that by pursuing plans to develop a mine at Phulbari in Bangladesh, GCM is failing to respect the rights of communities in that area. The complainants say that the mine will displace tens of thousands of people who do not have access to appropriate forms of legal or other protection, and that GCM's plans do not address the adverse impact on these people. GCM denies the allegations and says that its plans have been developed with due regard to the rights and the views of affected communities, and includes appropriate measures to mitigate potential adverse impacts of the mine.
8. The UK NCP's Initial Assessment of the complaint can be found at <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-the-international-accountability-project-and-the-world-development-movement-against-gcm-resources-plc-in-ban> . The NCP accepted for further examination issues relating the company's obligations under 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 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 5 [Enterprises should...] 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.

UK NCP process

9. The UK NCP received the complaint (and its supporting annexes) on 21st December 2012.
10. On 7 June 2013, the UK NCP finalised the Initial Assessment on the complaint, accepting for further examination the alleged breaches of the provisions noted at Paragraph 8. above. The NCP decided to accept for further consideration the alleged breaches of Chapters II, Paragraphs 2 and 7, and Chapter IV, Paragraphs 1 and 5.
11. The Initial Assessment considered that issues raised in the complaint were not substantiated with regard to alleged breaches of Chapter III, Paragraph 2 and Chapter IV, Paragraphs 2 and 3. These allegations related to GCM's disclosure obligations under Chapter III, Paragraph 2 of the Guidelines, and obligations to address human rights impacts under Chapter IV, Paragraphs 2 and 3. The NCP noted that it would not examine these issues further, unless further examination of the substantiated issues uncovered new relevant information.
12. The NCP offered mediation to the parties, but neither party was willing to agree to mediation without pre-conditions unacceptable to the other party. On 19 July 2013, the UK NCP informed the parties that it would undertake a further examination of the substantiated issues, and make findings on the company's observance of the Guidelines. In response to an invitation from the NCP, both parties then submitted details of additional documents and sources they considered were relevant to a further examination, and the NCP drew on these and relevant third party sources to make its findings.
13. On 31st January 2014, the NCP shared with the parties a draft of this Final Statement. Comments were received from the company on 28th February 2014 and from the complainants on 12th and 13th March 2014, and the NCP considered these before finalising this Final Statement for publication.

Limitations of process

14. The UK NCP notes the OECD's guidance on page 86, Paragraph 29 of the 2011 Guidelines about expectations of an NCP handling a complaint arising in a non-adhering country: this guidance states that *"In the event that Guidelines related issues arise in a non-adhering country, home NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved*

together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the enterprise in the home country, and, as appropriate, embassies and government officials in the non-adhering country.”

15. The UK NCP did not visit Bangladesh or speak to representatives of the Bangladeshi government. Both the complainants and the company asked the UK NCP to visit Bangladesh in order to understand the context of the complaint and meet sources they identified. The UK NCP advised the parties that it did not consider a visit would be an effective use of its limited resources.
16. The UK NCP notes that its ability to verify information and sources were limited by the lack of UK government contacts in the Phulbari area, and also by the time elapsed since key events.

UK NCP analysis

Information reviewed

Complainants

17. In support of their allegations, the complainants provided statements (in English) signed by community representatives, and reports of their interviews with community members. The complainants also arranged and provided an interpreter for three community members to speak individually to the NCP. Additionally, they provided analyses of GCM’s planning documents by themselves and other researchers or reporters with academic or professional (as opposed to commercial) expertise about the impacts of mining projects , as well as analyses and statements on potential impacts of the mine by human rights experts from academia and international organisations.
18. The complainants also noted the withdrawal of some potential investors – notably the Asian Development Bank (ADB) – from the project and said that this was due to environmental and human rights concerns on the part of these funders.

Company

19. The company directed the NCP to its detailed published planning documents, and in particular Environmental and Social Impact Assessment (ESIA) documents, including a Public Consultation and Development Plan (PCDP), Resettlement Plan (RP) and Indigenous Peoples’ Development Plan (IPDP). The company provided contact details for independent consultants who had worked on these plans: three of these consultants provided the NCP with written or oral accounts of their work. The company also referred to independent audits of its plans made on behalf of potential investors.

20. Additionally, the company gave the NCP access to details of documents and sources updating its plans, including an opinion survey relating to communities in the project area.

Other sources

21. The NCP reviewed press reports and other online references to the project and its context, as well as relevant international standards such as those of the International Finance Corporation (IFC). The NCP also consulted UK Government representatives in Bangladesh, a Bangladeshi civil society organisation, and the office of the UN High Commission on Human Rights (whose Special Representatives had made statements about the project in 2012).

Information sharing

22. Information received by the NCP is usually shared with parties in a complaint, but a case can be made for sensitive information not to be shared. In this complaint, the following has not been shared by NCP:
 - a) Names of some individuals. Both parties asked that some individuals providing information were protected by not sharing their names, and an NGO independently consulted by the NCP asked that it was not named in order to avoid identifying its local staff.
 - b) Some information provided by GCM which the company considered commercially sensitive and was willing to provide only if it was not shared. This included an independent audit report on the company's plans, and a 2012 opinion survey.
 - c) Background information provided by UK Government sources, not shared to protect inter-governmental relationships. This information related principally to government institutions and societal conditions in Bangladesh over 2005-12, but included some information confirming the history of events relating to the project already set out by parties. The UK Government position on mining at Phulbari is noted at Paragraph 74. below.
23. Where the NCP's findings are informed by information that was not shared, this is noted. None of the NCP's findings relies only on information not shared, and the NCP notes that information not shared has generally served to provide context for or to confirm shared information.
24. The UK NCP also notes that it has no powers to require any party to provide information: as OECD guidance says "*the NCP process depends on [all] parties engaging in good faith*".

NCP findings

25. In any further examination, the UK NCP's focus is on the actions of the company concerned. As the Phulbari mine has not been developed, the actions examined by the UK NCP are GCM's actions in preparing and communicating its development plans. The NCP considered whether these actions met the company's obligations:
- a) under Chapter II, Paragraph 7 of the OECD Guidelines, to develop and apply self-regulatory practices and management systems that foster confidence and mutual trust,
 - b) under Chapter II, Paragraph 2, to respect the human rights of those affected by its activities,
 - c) under Chapter IV, paragraph 1 added to the Guidelines from 2011, to avoid infringing human rights and address human rights impacts with which it is involved, and under Chapter IV, paragraph 5 added from 2011, to carry out human rights due diligence appropriate to the size, nature and context of operations and the severity of risks.

Did preparation and communication of plans develop and apply effective self-regulatory practices and management systems?

26. The Chapter II Paragraph 7 requirement was added to the Guidelines in 2000, with the following commentary: *"An increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society....Enterprises recognise that their activities often have social and environmental implications. The institution of self-regulatory practices and management systems by enterprises sensitive to reaching these goals – thereby contributing to sustainable development – is an illustration of this. In turn, developing such practices can further constructive relationships between enterprises and the societies in which they operate"*.
27. The UK Asia Energy plc, which subsequently became GCM Resources, was formed in September 2003. Its main planning relating to social and environmental impacts of the proposed mine was completed between 2004 and 2006 (it received environmental clearance for the Phulbari Coal Project from the Department for Energy of the Bangladeshi government in September 2005). The company's AIM listing in 2004 notes that the 2000 pre-feasibility study identifies open pit mining as the economically viable option. Alternative options were analysed as part of the ESIA, but it appears the company documents had already publicly stated a presumption for open pit mining.

28. The company was initially working to a timeline that assumed it would obtain the remaining Government permissions and begin acquiring land and developing the mine in 2006, with first coal production by 2010. ESIA documents note that legislation will be required to acquire the land and that the company is assisting the Government of Bangladesh in preparing this (because the Government lacks the relevant capacity: the NCP notes that IFC guidance - and to a certain extent the OECD Guidelines - suggest that companies should assist governments that lack relevant expertise).
29. In August 2006, Government security forces opened fire on protestors demonstrating against the mine, work was suspended and company staff withdrawn from the area on Government advice. Although the subsequent (unrelated) national State of Emergency ended in 2008, the (new) Government of Bangladesh did not give permission for the project to proceed: it is therefore effectively "on hold", and the company's activities since 2006 have been focused on lobbying the Government and some limited updating of plans already developed.
30. As developed over 2004-06, the company's plans explicitly commit to applying self-regulatory practices consistent with relevant international standards. A number of standards are referred to (including environmental provisions of the OECD Guidelines). The NCP considered in particular the relevant detailed social and environmental standards applied by the World Bank and International Finance Corporation (IFC) to projects seeking their support. GCM (AEC) committed to standards applied by the World Bank/IFC to "Category A" projects (those thought to pose the highest levels of environmental and social risk), including standards relating to Indigenous Peoples and Involuntary Resettlement, and to the preparation of the ESIA itself.
31. The ESIA planning documents are extensive and detailed. The NCP focused on those elements it considered most relevant - including the Public Consultation and Disclosure Plan (PCDP), Resettlement Plan and Indigenous Peoples' Development Plan. The NCP found that the plans it examined included detailed consideration of the issues presented by the project, the measures identified to address them, the communities that are affected (including host communities for resettlement). The PCDP gave a comprehensive record of the engagement and consultation activities undertaken and planned. The NCP notes in particular that the plans record a change made to the original project design to reduce the mine area in response to community feedback.
32. Much of the ESIA work was undertaken on the company's behalf by specialist consultants (the range of consultants employed is reported in AEC/GCM's annual reports). The NCP obtained (written and oral) submissions from consultants who worked on the ESIA, and specifically on the public consultation and resettlement planning aspects. Their accounts confirmed the activities undertaken, and the

company's management and resource commitment to planning. They also commented on the company's capacity to deliver and on its engagement with affected communities.

33. Consultancies and consultants that worked on the ESIA continue to work internationally in a variety of sectors, and have a good reputation. The Australian NCP, as the home NCP for key consultancies used, confirmed that they were well regarded and it was not aware of any concerns.
34. The NCP notes that in committing to World Bank/IFC standards, the company anticipated obtaining funding from investors requiring these or similar standards. In particular, the project sought funding from Asian Development Bank (ADB) which had similar safeguard policies on environment, involuntary resettlement and indigenous peoples (and in 2004 began work to update these to reflect IFC and other best practice). GCM's 2006 Annual Report records inspection visits to the project by an ADB safeguards team in that year, and its 2007 Annual Report notes that the company is making some changes to social and environmental development plans at ADB's request.
35. The complainants have noted that ADB withdrew the project from consideration in 2008, and alleged that this was due to concerns about its social and environmental risks. The UK NCP made an enquiry to the ADB noting the allegations, and inviting the ADB to comment: the ADB replied: *"in 2008, environmental and social due diligence activities were still ongoing, notably those involving the conduct of environmental and social impact assessment and mitigation and preparation of resettlement plans for displaced persons including indigenous peoples. However, of greater relevance to the ADB's decision to withdraw the project from the pipeline was the expected new Coal Policy of the Government of Bangladesh which was being finalised at the time. Consequently, ADB was unable to take a considered view on the coal sector in Bangladesh as a whole and the project's 'fit' in this sector."* The NCP concludes that the key reason for the ADB's withdrawal was the uncertainty around the Coal Policy.
36. The author of a 2008-09 academic study about community resistance to the project was now working with the complainants and was interviewed by the NCP about her study. She noted that some community interviewees in the study said that they had not been consulted by the company or its representatives.
37. This author also arranged, and provided interpretation for, NCP interviews with two local community representatives and the President of the National Indigenous Union. Each of the local representatives interviewed said that some consultation and surveys were carried out in 2005-06 and identified some of the consultancies concerned, but made a number of specific allegations about the adequacy and transparency of consultation:

- a) that the decision to pursue open pit mining and its implications were not clear at an early stage;
 - b) that project information more generally was not available in Bangla at an early stage;
 - c) that company representatives sometimes recorded community responses in pencil, leading to a suspicion that responses might be altered subsequently.
38. The President of the National Indigenous Union made similar points, saying that contact with indigenous groups living in the project area had not been early or sustained, and that these groups had not fully understood the nature of the proposed project. The NCP notes that this representative also explained that communities of indigenous people in the project area included communities not indigenous to that area but displaced from other areas. He also noted that indigenous communities had grown in recent years.
39. The NCP has noted at Paragraph 24. above that open pit mining appears to have been identified as the preferred option in the pre-feasibility study carried out in 2000 before the UK AEC took over the project. The Public Consultation and Development Plan (PCDP) records that an information sheet on open pit mining was provided to communities in March 2005, and the Project Information Centre, which had a model of the mine, opened in April 2005. Local consultation meetings had begun several months before this point, although consultation was ongoing.
40. GCM's own account acknowledges that some documents were not initially available in Bangla. For example, the Resettlement Plan was not available in Bangla until after August 2006 and the company decided that it should not be distributed because of the risk of inflaming tensions following the August 2006 violence (although it was made available online). GCM's 2007 annual report records the launch of a Bangla website in April 2007.
41. Both the complainants and the company note, however, that a significant percentage of the people affected by the mine are illiterate and so written information would in any case need to be supplemented. The company notes that it provided oral information and tools such as the mine model.
42. The NCP notes that there could be a variety of reasons for recording of comments in pencil. The NCP did make a sample enquiry to an NGO listed as having taken part in consultation – the NGO did not recall any meeting with the company. Given the time elapsed, the NCP could not draw any conclusions from this single enquiry and concluded it was not practical to pursue additional enquiries.

43. Community accounts make more serious allegations that company representatives may have inappropriately influenced opinions and intimidated opponents of the project (see the NCP's discussion of these at Paragraph 59. below). They note that their opposition to the project focused initially on the government, but switched to the company because of the perception that it was exercising undue influence.
44. The NCP notes here, however, that the company's corporate communications plan (in a July 2005 version included in the PCDP) suggests a strategy for addressing what it describes as "*well organised opposition*" to the project (then assessed to represent 10% of the population in Phulbari itself), with short term responses including meeting opposition leaders individually or jointly, and seeking opportunities to contribute to the local community. The complainants confirm that actions of this kind by the company have been interpreted by some local people as attempts to exercise undue influence.
45. After the August 2006 events, in which three protestors were killed, and subsequent attacks on property of the company and locals working with it, the community sources who spoke so the NCP say that company staff have been unable to return to the area without risking further violence and that the company has not renewed communications with communities. A Bangladeshi NGO independently consulted by the NCP notes that local communities feel they currently lack information about the project.
46. GCM itself reports that it deliberately limited its local engagement from August 2006 to minimise risks of violence (although the company considers that this violence arises from political opposition to the project rather than community views and concerns). The company says that its communication activities focused on lobbying at national government level. It had made some updates to its plans, and provided the NCP with some details of this work. Paragraphs 51.-52. below record the company's comments on its re-engagement from 2008.
47. Based on its analysis of information provided in further examination, the NCP is satisfied that GCM (AEC) initially developed (or adopted) robust self-regulatory practices with regard to environmental and social standards, and that it engaged experts and provided adequate resources to prepare plans in line with international best practice standards. In general, the NCP is satisfied that the company applied these standards up to August 2006.
48. The NCP believes that there were inadequacies in the company's communication of its plans, however. Some key documents were not available in local languages until a point after it had initially intended that approvals for the project would have been obtained, the company's responses to initial opposition to its plans appear to have been open to misinterpretation, from August 2006 until 2008 it had no

direct engagement with communities directly affected by its proposals, and from 2008 to early 2012 limited engagement.

49. The NCP accepts that the company's initial suspension and subsequent limitation of community engagement was motivated by a concern to minimise risks of further violence, and that the company could have felt unable to provide information about the project's future without further clarification from the Government of Bangladesh. Restricting its activities to lobbying nationally appears to the NCP to rely too much on the national government to foster trust with affected communities, however.
50. The NCP therefore considers that GCM's communications did not apply practices or systems that foster confidence and mutual trust with the [local] society in which it [seeks to] operate, and in this limited respect the company breached Chapter II, Paragraph 7 of the Guidelines for a period beginning after August 2006 and continuing until 2012 when the Bangladeshi government authorised the resumption of activities locally and increased re-engagement began.
51. In its comments on this Final Statement in draft, GCM has offered new information about its activities from 2006. The company asked the NCP to note that its withdrawal from the project area from 2006 was advised by the Bangladeshi government, and it had no official permission to continue with any field activity until September 2012. Nonetheless the company says that from 2008 it began to re-engage, appointing two managers based in the wider region (around 40km from Phulbari). GCM says that these regional managers worked with local NGOs to increase links with communities in the project area from 2008.
52. Noting the constraints placed on it by the Government of Bangladesh, and its responsibilities to shareholders in an uncertain period, GCM considers that its limited engagement activity, and its continued presence in Bangladesh fully met its Chapter II obligations. The company has asked the NCP to identify the additional actions companies should take in similar circumstances to meet these obligations. Although this request relates to past events, the NCP has treated it as a request for a recommendation and makes the relevant recommendation at Paragraph 81. below.
53. The NCP has not pursued further enquiries about the new information submitted by GCM at the comment stage. The new information about suggests that the company made some additional efforts to re-engage, but these are not visible in the third party information considered by the NCP in its further examination, and the NCP does not consider that the new information changes its conclusions with regard to Chapter II, Paragraph 7.

Did preparation and communication of plans respect the human rights of those affected by the company's activities?

54. Chapter II Paragraph 2 was added to the Guidelines from 2000, with the following commentary: *“while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.”*
55. The NCP notes the general character of the Guidelines provision and commentary. More specific guidance to businesses on meeting human rights obligations was available to businesses from 2010 under the UN Guiding Principles, and in the updated OECD Guidelines in 2011. At the time AEC (GCM) initially prepared its ESIA documents, guidance with an explicit human rights focus was limited – human rights concerns were incorporated within broader international systems such as the IFC standards.
56. The NCP has considered above the company's commitment to these international standards. Whilst ESIA documentation does not currently include a stand alone document on human rights impacts, these impacts and measures to address them are identified in other ESIA documents. The documents also consider wider potential impacts of the project on the people of Bangladesh generally (the NCP notes that benefits to one group do not cancel out adverse effects on another, but the general wording of Paragraph 2 implies that enterprises should consider both).
57. In addition to Universal Declaration rights, the NCP notes that the company's plans recognise the ILO standard on Indigenous Peoples. This preceded the UN Declaration on Rights of Indigenous Peoples adopted in 2006-07 (Bangladesh abstaining from adoption).
58. As noted at Paragraphs 48. to 50. above, the NCP considers that there were some inadequacies in the company's communication activities. In general, however, the company committed proper resources and expertise to its planning and communications. The NCP has not seen evidence of a failure to engage with affected communities that indicates a failure to respect the rights of people affected by the company's activities nor has it identified adverse human rights impacts arising from inadequacies in the company's communication activities.
59. As noted at Paragraph 43. above, community representatives alleged that the company inappropriately influenced opinions and intimidated

opponents of the project. These are serious allegations, and the NCP considers that if proven they would demonstrate a failure to respect human rights. Interviewees who made these allegations did not claim they themselves had been offered any inducement or threat by the company, however, and allegations in letters signed by community members were expressed in general terms rather than citing any specific example of the company's actions. The NCP has seen no evidence substantiating these allegations.

60. The NCP considers that in limiting its activities within the project area after August 2006, GCM considered the human rights of the local communities, as well as the rights of the company's own staff.
61. Following its withdrawal, the company focused on higher level political lobbying. A 2009 research study referred to by the complainants notes that local people opposed to the mine considered their protests successful in persuading the Government to re-consider. A local representative was elected to Upazilla Chairmanship on an anti-mining platform, and media reports and third party information confirm that the project was openly debated. While the company's withdrawal had some communications impacts (as the NCP has noted above), it does not appear that its lobbying affected the rights of opponents to express their views.

In the period from September 2011 to December 2012, did the company's actions avoid infringing on human rights and address human rights impacts, and did the company carry out human rights due diligence to an appropriate level?

62. The OECD Guidelines were updated in 2011 to take account of the development of the UN Guiding Principles on Business and Human Rights, adding a new Human Rights chapter (Chapter IV) which gives enterprises more specific obligations with regard to having human rights policies, and to identifying and addressing human rights impacts of their activities.
63. The UK NCP applies the new obligations to actions of enterprises from 1st September 2011 and to impacts known to enterprises and unresolved at that date. In considering the allegations in relation to breaches of these provisions, the NCP has therefore considered GCM's actions between 1st September 2011 and December 2012 when allegations were madeⁱ.
64. In addition to the UN Guiding Principles, other standards to which the company committed in the ESIA have also been updated in this period: the NCP notes that the IFC issued new performance standards in 2012. GCM told the NCP (and its Annual Reports also record) that it has engaged consultants to review its ESIA documents in the light of these revised standards. This work is still in progress, and the

consultants who worked on the initial ESIA documents told the NCP that these would require considerable updating to ensure compliance with updated standards.

65. The complainants do not cite specific actions of the company during 2011-12: their allegation is that the company breached the Chapter IV provisions by continuing to pursue the project at all, because of its human rights impacts. The complainants drew the attention of the NCP to an October 2012 circular from the Bangladeshi Home Ministry instructing administrators and police services in the project area to cooperate with GCM's conduct of a survey locally: the complainants note that there were protests against this instruction and that the Bangladeshi government subsequently used laws criminalising public meetings against protestors. .
66. GCM reports that it increased its activities to re-engage with local communities during 2012, including meetings, focus group discussions, workshops and a survey (this does not appear to be the survey referred to by the complainants). The company provided the NCP with details of the survey, and the survey leader also provided background information to the NCP on how it was conducted. This information was not shared with the complainants (see Paragraph 22.). The NCP considers that the survey appears to have provided GCM with a genuine sample of current community views: the NCP makes no conclusion about its findings.
67. The complainants also note statements raising concerns about the project by seven UN Special Rapporteurs on human rights in February 2012. The NCP made an enquiry to the Office of the High Commissioner for Human Rights (OHCHR), and understands that the Rapporteurs based their statements on allegations made by the complainants. The Rapporteurs had previously requested a response to these allegations from Government of Bangladesh and published their statements because this was not received. GCM notes that the Rapporteurs did not invite any response or verification from GCM before making their statements. The Rapporteurs continue to await a substantive response from the Government of Bangladesh.
68. The OHCHR website records correspondence between GCM and the Rapporteurs during 2012, in which the company provided information and answered Rapporteurs' questions about relevant aspects of its plans. GCM advised Rapporteurs that it would undertake a Human Rights Impact Assessment (HRIA) before proceeding with the project. The company has re-iterated this commitment to the NCP.
69. The Special Rapporteur for Indigenous Peoples published further statements about the Phulbari project in September 2012 and September 2013: he has advised that the company notes the full extent of obligations to respect the rights of indigenous people affected by the project. GCM notes that the Rapporteur did not communicate his

statements to GCM, and asked the NCP to note the company's wider concerns that Rapporteurs have not verified information provided to them before making statements.

70. The NCP considers that GCM's actions meet its responsibilities under Chapter IV, Paragraph 2 to respect human rights.
71. GCM's obligations under Chapter IV Paragraph 5 require it to undertake human rights due diligence appropriate to the "*size, nature and context of operations and the severity of the risks of adverse human rights impacts*". In the absence of firm information about the timing of a decision by the Government of Bangladesh on the project, the NCP cannot conclude that GCM's actions in the period do not demonstrate a level of human rights due diligence appropriate to the "*nature and context of operations*". The NCP notes, however, that, according to recent Annual Reports, the company expects to start work on the mine quickly once it obtains Government permission. The NCP considers that to continue meeting its Guidelines obligations, GCM will need to complete its updating of its plans, including making and publishing the HRIA it has committed to, before it begins work to acquire land for and develop the mine.
72. The NCP notes that GCM's plans will also need to consider the 2007 UN Declaration on Rights of Indigenous Peoples, which included the right to Free, Prior and Informed Consent (FPIC).

Limitations of this further examination

73. Information offered by the complainants included critical analysis by academic experts of GCM's conclusions about potential impacts. In its Initial Assessment of the complaint, the UK NCP had noted that its remit did not extend to making an independent assessment of potential impacts. The NCP's approach to information about potential impacts was therefore limited to deciding whether the company's assessment was properly conducted and took appropriate account of its operating context from 2011 (when obligations to address potential impacts were added to the Guidelines). The NCP considers that provided the company properly performs its due diligence, it is entitled to rely on it to meet its obligation to address potential impacts.
74. From the evidence reviewed by the NCP it is clear that there is a wider political debate about energy policy in Bangladesh, including debate about (and opposition to) the use of open pit mining and the involvement of foreign owned companies. Debate about the potential impacts of the Phulbari project, and whether it should proceed is part of this wider debate. The NCP notes that the (then) Government of Bangladesh initially produced a draft coal policy in December 2005, but to date no policy is confirmed. The NCP notes that the UK Government's position is that the decision about whether to allow open

pit mining at Phulbari is a matter for the Government of Bangladesh, but the UK Government would expect all environmental and human rights issues to be addressed.

75. Third party sources (including UK Government sources, media reports and other sources) also establish that over the period considered in the complaint, political and protest activities in Bangladesh have generally carried risks of violence. The NCP notes that past reports by OHCHR have referred to allegations of abuses by the Bangladeshi Rifles/Rapid Action Battalion (the Government security forces reported to have fired on protestors against the proposed mine in August 2006).
76. In assessing GCM's actions, the UK NCP has considered relevant reports of UK Government sources and international bodies qualified to comment on the wider issues in Paragraphs 74. and 75. above. The UK NCP does not consider that its remit extends to making any findings on these issues.

Conclusions

77. On the basis of the analysis of the evidence outlined above, the UK NCP has concluded:
 - a) That, for the reasons set out above, GCM partly breached Chapter II, Paragraph 7.
 - b) That, for the reasons set out above, GCM did not breach the obligations in Chapter II, Paragraph 2.
 - c) That for the reasons set out in D, above, GCM did not breach the obligations in Chapter IV, Paragraphs 1 and 5.

Examples of good company practice

78. The UK NCP notes the company's commitment to (or adoption of) international best practice standards at the time of its initial ESIA planning. The NCP commends the company for its willingness to engage with the NCP process and make documents and senior personnel available, and notes that it has shown a similar willingness to engage with other international bodies that have raised concerns about the project such as the UN Special Rapporteurs.

Recommendations to the company and follow up

79. Where appropriate, the UK NCP may make specific recommendations to a company so that its conduct may be brought into line with the Guidelines going forward.

80. Subject to any decision from the Government of Bangladesh on the project's future, the UK NCP recommends that GCM continues to update its plans in line with current international best practice standards, and in particular to pursue and publish the Human Rights Impact Assessment it has advised the NCP it will include in this. The NCP also recommends that GCM develops its communications plans on the basis of a full assessment of risks, including the risks of limiting local engagement, and continues to identify appropriate ways to re-engage with affected communities, increase the information available to them, and take account of their views.
81. GCM also asked the UK NCP for guidance on how its past conduct could have fully met the obligation under Chapter II Paragraph 7 to "*develop and apply self-regulatory practices and management systems that foster a relationship of confidence and mutual trust.*" Specifically, the company asked the NCP to identify how its actions between 2006 and 2012 could have been more consistent with this Guidelines provision, given the unavoidable constraints on its access to the Phulbari area. The NCP considers that the company should have done three things. Firstly and most importantly it should have ensured that communication channels it had developed (including online written information and relationships with NGOs and other organisations operating in the area) remained open so that people potentially affected by the mine could access up to date information and receive answers to questions about the project's status, the company's current activities and its intentions. Secondly, it should have re-appraised its earlier communications plans to see whether these had contributed to community impressions that it exercised undue influence. Thirdly, it should have appraised the new risks to communities arising from political opposition to the project and updated its plans to address these.
82. The UK NCP will request an update from both parties in May 2015 on the implementation of the UK NCP's recommendations listed in this Final Statement. The UK NCP will then publish on its website a Follow-up Statement reflecting the parties' responses.

November 2014

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

**Steven Murdoch
Danish Chopra
Liz Napier**

ⁱ FURTHER NOTE ON THE APPLICATION OF THE 2011 GUIDELINES TO ONGOING ACTIVITIES AND IMPACTS: At the complainants' request, the NCP's Steering Board conducted (between June and October 2014) a review of the NCP's procedure in this complaint. The review recommendation (which is published alongside this Final Statement) was that the NCP should re-examine how it had applied the 2011 Guidelines in the complaint, and in particular should confirm whether it had applied the 2011 Guidelines to ongoing activities and impacts. The NCP made this re-examination. For the avoidance of doubt, the UK NCP states that it considers that the 2011 Guidelines will generally apply to actions of a company continuing after 1st September 2011 but begun before that date, and to impacts (including potential impacts and risks) arising before 1st September 2011 that are known to a company at that date and are not already resolved or addressed. The UK NCP confirms that the provisions of the 2011 Guidelines have been applied to such activities and impacts in its examination of this complaint.