

Findings by the review committee of the UK National Contact Point (UK NCP) for the OECD's guidelines for multinational enterprises in a complaint against the KPO Consortium (KPO).

A complaint from Crude Accountability (CA) and others against the KPO Consortium (KPO)

Background

1. In September/October 2016, a Request was made on behalf of CA for Review of the Final Statement by the UK National Contact Point issued in August 2016.
2. On receipt of the Request, the Steering Board were notified and invited to declare their availability to participate in a Review. A Review Committee was established, comprising Edward Bickham, Jeremy Carver, both External members of the Steering Board, and Jenny Carlen of DfID, an Internal member. The Request was elaborated by means of an Opinion of Tim Cooke-Hurle dated 6 September 2016. On a date subsequent to this, the UK NCP submitted its written Response to the request for review. KPO submitted its comments by letter of 23 October 2016; and CA submitted further comments by letter of 30 November 2016.
3. The Review Committee has duly considered the material provided, including the Initial Assessment, and, pursuant to paragraph 6.1 of the Review Procedure, has determined how the Request may best be addressed. Following initial exchanges by e-mail and a meeting between members of the Committee, the Committee has agreed the following Recommendation to the Steering Board.

The Request

4. The Complainants, a US-based civil society organisation together with two environmental bodies based in Kazakhstan, seek review of the Final Statement on several points. The Final Statement upholds a complaint about actions of KPO as operator of the Karachaganak oil and gas condensate field in Kazakhstan in respect of the treatment of two households whose properties were located within a protective zone around the field facilities, and entitled to be resettled and compensated by the Kazakh authorities. The households were willing to be resettled, subject to being compensated; but both KPO as operator and the Kazakh authorities questioned the need in view of the uncertain definition of the boundaries of the

zone. This was clarified by court proceedings, confirming the original boundaries, holding that it was illegal for the households to remain, and ordering their resettlement. In the event, the authorities neither resettled the households, nor required their removal. Nevertheless, the effect on the households was significant: one ceased its business, pressed for resettlement, eventually moving and selling the property for a fraction of its prior value. The other remained, and was eventually resettled with the rest of the surrounding village some years after the complaint had been filed.

5. Under Chapter II of the OECD Guidelines, multinational enterprises should address adverse impacts specified by the Guidelines, i.e. impacts that they cause or to which they contribute and those linked to a business relationship. The complaint sought findings based on that ground; and also for the failure of KPO to address the human rights impacts suffered by the households. Mediation was proposed and agreed; but did not resolve the complaint. Accordingly, the NCP conducted an examination and made findings:
 - a. That KPO had failed to address impacts to which it was linked by its business relationship with the Kazakh authorities, in that it had not taken adequate steps to promote prompt resettlement of the households according to applicable international standards; and
 - b. That there was “no clear and authoritative guidance to establish that the situation as examined affects the households’ human right to an adequate standard of living”, and that accordingly the complaint that KPO had not met human rights obligations under the guidelines was rejected.
6. The NCP recommended that KPO regard both households as entitled to resettlement arrangements consistent with the current IFC Standard, and follow the steps specified in order to remedy any deficiencies in the arrangements offered to them; such actions to be completed by May 2017.
7. Although at the Initial Assessment stage the NCP had accepted that the asserted adverse impacts on the households appeared to relate to their human rights: specifically, their right to an adequate standard of living, these rights were confined to their entitlement to resettlement, not as to whether KPO had failed to fulfil any wider obligations. The NCP considered that this trespassed into the responsibilities of the Kazakh authorities to the households.

8. Although holding that KPO should apply the IFC Performance Standards on Involuntary Resettlement, the NCP did not find that these were human rights standards; nor, after research, that any other human rights standards were relevant in the alleged circumstances of the two households. No threat to evict or otherwise impact on the households was issued. The NCP found that “[t]he human rights risk that is identified in connection with economic rights and resettlement is forced eviction”, from which the NCP concluded that “there was no clear guidance to establish that the impacts as examined are human rights impacts and/or that KPO should have considered them as triggering its human rights obligations under the Guidelines” (Final Statement, paras. 77, 78).

9. CA’s review request identifies a number of grounds on which it says the NCP has failed to apply its own procedures correctly:
 - a. It failed to “further the effectiveness of the Guidelines” by failing to identify and apply the correct human rights standards.
 - b. It failed to procure for itself relevant specialist legal expertise to advise it on the relevant human rights standards.
 - c. By failing to identify and apply the correct human rights standards, it has acted in a manner that is “unpredictable and incompatible with” the Guidelines.
 - d. By failing to apply the correct human rights standards, it has not acted “in accordance with applicable law” [original emphasis].
 - e. Acknowledging the various sources listed by the NCP, it is said that the NCP failed to consult the right experts, and the OECD Investment Committee.
 - f. Finally, by failing to provide an “argued rationale” for its conclusions.

10. It is evident from this catalogue that the basis for the review request rests on whether the NCP did, or did not, identify and apply the correct human rights standards. Much of the remainder of the request – submitted as a lengthy “Opinion” by an English barrister – argues for what it says are the correct standards by reference to various findings of the European Court of Human Rights. Much of this misses the point of the NCP’s finding that, although derelict in supporting the households’ entitlement to resettlement by the Kazakh

authorities, KPO's failure was to address the impacts arising from its business relationship in Kazakhstan, not human rights impacts.

11. The NCP noted that there might be little difference between KPO's obligations arising from its business relationship and its obligations in respect of a failure to address any human rights impacts. The only human rights risk identified in the complaint was that arising from forced eviction. The NCP found it "debatable" whether the delay in implementing the Kazakh court's ruling became a 'constructive eviction' (Final Statement para. 77). This was the basis for the finding that "there is no clear guidance to establish that the impacts as examined are human rights impacts and/or that KPO should have considered them as triggering its human rights obligations under the Guidelines."
12. In its comments on the review request, the NCP disputes the charge of failing to apply the NCP's own procedures correctly, and the assertion of providing no rationale for its ruling. It re-states the rationale for its conclusions, noting that the human rights impacts claimed in the Complaint, affecting the households' health and safety, had not been accepted in its Initial Assessment. It had accepted the possibility of other human rights impacts in the absence of other information; but no such information emerged during the detailed examination.
13. To the charge that it failed to seek guidance on human rights from experts, the NCP points out that its function is to test the Complaint against the situation known to, or that should have been known to, KPO. It is not the NCP's function to try to build a case for human rights violation. This was an option open to the complainants; but they did not do so. In its absence, the NCP examined what it considered the most relevant and accessible human rights instruments. It considered that these justified its finding of "no clear guidance" to establish that the impacts as examined gave rise to human rights obligations.
14. In its letter of 23 October 2016, KPO comments from a premise that no review request has been made. It does not treat the opinion sent by CA to be a proper request. KPO summarises the procedure followed by the NCP to show that that procedure was reasonable and fair in the circumstances of this case. KPO characterises the alleged failures by the NCP: to promote effectiveness and to act compatibly with the Guidelines and according to

applicable law, as challenges to the substance of the NCP's findings, not raising procedural issues.

15. CA limited its final comments in its letter of 30 November 2016 to a plea that the Steering Board have regard to the "merits of the arguments raised", and "reflect on the impacts on their [sic] family, property and other rights" in a comparable situation. Otherwise, the letter merely repeats passages of the opinion on which the Request was based.

Role of the Review Committee

16. The review process is intended to identify any procedural errors in the NCP's decision-making, and to ensure that, if identified, they are corrected to the extent possible. It is not the function of the Review Committee to examine or rule upon the substance of the NCP's decision. The Request does not directly seek review of the NCP's decision that the Complaint is not supported by sufficient evidence or fails to identify infringement of the Guidelines. The Request is based, largely, on the premise that the NCP failed to apply the procedures and standards required under its own procedural rules. But the root of this asserted failure is that the NCP did not apply the correct human rights standards as argued in the legal opinion on which the Request was based. Seemingly intertwined with this is the charge that the NCP failed to provide reasons for its conclusions. We proceed to treat these complaints together.

The review committee's conclusions

17. The Committee does not find this Request to be well founded. The Request is unusual in relying exclusively on an opinion obtained by CA arguing a case for the application of different human rights standards. No doubt there is some merit in some of the points in the opinion; but they have little relevance for the only issue the Steering Board can review, namely whether there has been a procedural failure. This is not to deny the possibility that conclusions based on a mistaken appreciation of human rights might amount to a procedural failure; but that is not the case here. The relevant facts established by the NCP, set out in its Final Statement, are largely accepted by both complainant and KPO. There is no dispute

about the entitlement of the households to resettlement, nor about the obligation of the Kazakh authorities to resettle them. KPO has acknowledged the NCP's finding that it has obligations to both households arising from its business relationship, and the extent of its compliance with the NCP's recommendations will be verified by the NCP (if not already done).

18. In this light, the argument over which human rights impacts apply in the precise circumstances of this case appear somewhat sterile. It is not our function on review to say what KPO should do to implement the NCP's recommendations; but in practical terms there may be little difference between what is expected from KPO in the light of the NCP's finding that it is in breach of its Chapter II obligations, and what might have been expected had the standards asserted in the Request applied: in the actual circumstances of this case.

19. The criticism that the NCP failed to seek appropriate legal or other expert advice on human rights, or to consult the OECD Investment Committee as progenitor of the Guidelines, seems to be a make-weight to the main argument of the opinion. Additionally, it raises the issue whether the NCP made sufficient enquiry about the human rights standards alleged in the Complaint. In an earlier review, the Steering Board has observed:

Nothing in the Procedures requires the NCP to undertake independent research in considering a complaint, although we are aware that the NCP has, and will, inform itself about the facts and circumstances raised by the complaint. Where relevant, the NCP will cite such material in its draft statements, which are in all cases made available in advance to the parties so that they can comment on them.

Here, the NCP set out sufficiently the sources on which it relied; and there are no grounds for impugning the exercise of its discretion in so doing.

20. The alleged failure by the NCP to provide reasons for its conclusions carries little weight. CA may disagree with the reasons given; but the only basis for review is a failure to provide reasons altogether. Such an accusation here would be baseless. The NCP does not purport to have expertise in human rights law. Nor is such expertise required. The issue the NCP had to address was not whether a case for human rights abuses might be made; but whether KPO had acted contrary to the obligations set out in Chapter IV of the Guidelines in its treatment of the two households. If KPO had proceeded with operations so as to

threaten the health and safety of the two un-resettled households, the NCP would no doubt have reached a different conclusion. No such risk arose.

21. It is difficult to avoid a sense that, in requesting this review, CA is seeking to make a political point, rather than one designed to assist the two households. That sense is heightened by the plea that the Steering Board members reflect on their personal reactions to the households' plight. The acceptance of human rights obligations in the updated Guidelines was an important milestone in establishing a proper balance between the interests of multinational enterprises and of those impacted by their activities. But the mere invocation of human rights is insufficient to establish their abuse. Each case has to be examined appropriately; and we consider that the NCP conducted the somewhat extended procedures required by this Complaint with due care, and without any failure requiring review in this case.

Recommendation

22. The Review Committee recommends that the Steering Board should decline this request for review.
23. We also recommend that this recommendation should be communicated to the parties, together with the Steering Board's regrets for the delay in completing this review. The Request became available for consideration just prior to the end of last year. The Committee met to discuss the review and reached preliminary conclusions; but there was a failure to follow up promptly with a written report. The Committee regrets any inconvenience to the parties from a failure to adhere to the Steering Board's insistence on timely discharge of its functions.

29 June 2017