

Specific Instance under the OECD Guidelines for Multi-National Enterprises

Complaint from Rights and Accountability in and Development (RAID) against ENRC

Application by ENRC for review of the Final Statement

1. Recommendation of the Review Committee

On 19 August 2015, a Request was made on behalf of ENRC for Review of the Final Statement by the UK National Contact Point issued in August 2015.

Promptly 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 and Stephen Lowe, two External members and one Internal member of the Steering Board. The Request was elaborated by ENRC on 3 September; and on a date unspecified but believed to be 4 November, the UK NCP submitted its written Response to the request for review, and invited ENRC and RAID, to submit any comments thereon. RAID commented on 11 November; and the Complainants on 12 November.

ENRC raised as a preliminary matter questions about the impartiality of the Steering Board as the body responsible for dealing with the Review. This prompted questions within the Steering Board prior to the constitution of the Review Committee in accordance with the Steering Board's procedures. This is dealt with in Section 2 of this Recommendation below.

When constituted, the Review Committee duly considered the extensive material provided, including the Final Statement, and, pursuant to paragraph 6.1 of the Review Procedure, determined how the Request may best be addressed.

Following extensive exchanges by e-mail and in person between members of the

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Committee, the Committee has agreed the following Recommendation to the Steering Board.

As usual, we note the limited role of the review process, which is solely 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 decisions.¹

2. Impartiality of the Steering Board

ENRC's Request starts by asking for confirmation of the independence of the review process. When the Complaint was filed in 2013, ENRC asked about the relationship between the UK NCP and the Steering Board, one of whose members at that time was closely identified with the complainant RAID. This was clarified at the time by a senior official within the Department for Business Innovation & Skills, familiar with the NCP and Steering Board. The Steering Board plays no role whatsoever in adjudicating on the substance of any complaint. Its tasks are setting policy and reviewing procedures for the NCP and the UK's participation in the MNE Guidelines and oversight of the NCP's diligent handling of the complaints it receives.² In the latter function, the Steering Board undertakes a review of such handling if a request is made in relation to a particular complaint. Such review is confined to ensuring that the procedure publicly set by the Steering Board has been followed and that there has been no denial of normal rules of participation.

On receipt of the Request, members of the Steering Board were asked to confirm the extent of any involvement in the Complaint or with its parties. One member

¹ See Review Procedure, in particular paragraph 3.3 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31804/11-654-review-procedure-uk-national-contact-point.pdf

² We note too that the NCP plays no part in the procedure following a request to the Steering Board for review of an NCP statement, other than to comment openly on the grounds requested.

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promptly recused himself from any involvement on the ground of a connection with RAID in a professional capacity, although without any prior involvement in the Complaint. Although the Complaint had been reported in the normal course of noting the state of all complaints filed with the NCP, the progress of this Complaint had been discussed only once in the Steering Board (in the absence of the RAID representative and, after he joined the Steering Board, of a lawyer whose firm occasionally advised RAID).

Accordingly, confirmation of the specific points raised by ENRC has been given on behalf of the Steering Board, and can be re-confirmed now.

3. The grounds for the Request

a. The mediation

Following the Initial Statement admitting the Complaint, mediation was mutually agreed and led to a second and final meeting with the mediator on 25th July 2014 at which, it is said, both sides reached full agreement on how the complainants' concerns would be met. ENRC was to produce and circulate a draft agreement reflecting what had been agreed. After a short delay, a draft was sent to the complainants, who said they needed a longer period to consult the parties most affected. Some three months passed, towards the end of which time the NCP pressed to know the outcome of the mediation. Although further drafts were exchanged, no progress was made, and at the end of January 2015 the NCP was compelled to advise the parties that it would proceed with the final investigative phase of the complaints procedure.

ENRC asserts that, in formulating its Final Statement, the NCP should have taken full account of the fact that the parties had agreed before the mediator all terms necessary to resolve the Complaint, and that this agreement was frustrated by RAID's failure to act "in good faith" on the agreement mutually reached at the July meeting. Had the NCP included reference to the terms then agreed, the NCP could not have found that ENRC had acted in breach of the MNE Guidelines.

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ENRC acknowledges that it did not implement the actions it had agreed at the July meeting, because these were part of a “composite package”, which could only work “with the cooperation of RAID and the local community”. A ‘nothing is agreed until everything is agreed’ position is not an unusual stance in such proceedings.

The NCP does not contest the account of the mediation set out by ENRC; but points out that the NCP itself plays no part in the mediation. Mediation is the preferred way to deal with admitted complaints; but, having set up the mediation, the NCP leaves it to the parties and the mediator to complete the process. The NCP played no role in this specific mediation, and knows about what occurred only because the parties chose to inform it. When the NCP established that the mediation had ended without resolution of the Complaint, it asked whether ENRC intended to act on the points settled in the July meeting. ENRC made clear that it would not in the circumstances then pertaining, re-asserting in effect its original rejection of any breach of the Guidelines in its conduct. In the Final Statement, the NCP records both ENRC’s engagement with the mediation and RAID’s sometimes unhelpful conduct during the complaints process. It points out that its procedures require good faith engagement from both parties, with the clear implication that this was lacking on both sides.

For its part, RAID rejects strongly ENRC’s charge that it did not act in good faith. But this charge is no more than peripheral for the purpose of this review. RAID also criticises both ENRC and the NCP for the way in which the former tried to press the mediator to intervene after the mediation had ended, and for those parts of the Final Statement that referred to the mediation and its content.

Having considered the representations made by ENRC, the NCP and RAID, we do not find that the NCP failed to apply the correct procedure in relation to the mediation, or to draw correct conclusions in the Final Statement from what had taken place in the course of the mediation. The NCP plays no part in the mediation beyond setting it up and later establishing its success or failure. The positions parties take in the mediation are ‘without prejudice’ to their positions

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on the complaint, and can form no part of what the NCP has to decide if the mediation fails. Here, the NCP became aware of the parties' respective positions only because they chose to inform the NCP. Once aware, it was appropriate for the NCP to enquire whether ENRC intended to act as it had proposed in the mediation; and it was appropriate to take account of ENRC's response in reaching its conclusions. But it would have been inappropriate for the NCP to draw any inferences from what either party had said were the reasons for the mediation's failure; and we have seen nothing to suggest that it did.

The fact that the parties had disclosed their positions in the mediation means that the confidentiality asserted by RAID had disappeared. We therefore find no basis for RAID's criticism of the NCP for the observations made in the Final Statement. In the section 'Engagement and good faith of parties', the Final Statement is critical of the conduct of both parties during the process, pointing out that success generally requires good faith engagement by both. The section headed 'Examples of good company practice' focus on ENRC's initial readiness to address the water supply issue and to engage in mediation. The addition of a recital of ENRC's criticism of RAID's conduct in the mediation does not implicate the NCP as endorsing such criticism. The NCP may have considered it relevant to its general responsibility to encourage mediation. The NCP complaints procedure is not to be assimilated to adversarial court proceedings, nor even as tightly confined to the parties to the complaint. The Guidelines are intended as 'live' factors to influence constructively the conduct of corporations. The result of a complaint, if upheld, is a public statement about the complaint, its remediation and the complaint process: all for the purpose of helping to resolve conduct and issues still to arise. The NCP is correct to note when parties have contributed constructively to a resolution; and equally so where the parties, by their conduct, have failed to do so.

RAID also criticises the NCP for trying to find out from the mediator why the mediation had failed. The NCP played no role in the mediation; nor has drawn any conclusions from what it subsequently was told about the mediation in reaching its conclusions on the Complaint. The NCP needed to decide whether

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the mediation had ended – evidently a matter of some contention between the parties – and this inevitably involved the NCP in a closer exchange over the content of the mediation than would normally arise. We find no basis for RAID’s criticism of the Final Statement arising from the mediation.

b. Confidentiality

ENRC objects to that part of the Final Statement critical of ENRC’s refusal to disclose information without express confidentiality undertakings from RAID. Based on how RAID had (in ENRC’s view) behaved in the mediation, ENRC took the position that it would not disclose information in the absence of “legally binding confidentiality safeguards”.

The NCP suggests that ENRC was being “over-sensitive” in its reaction to the Final Statement, which acknowledged that there can be good reasons for not sharing information. The NCP also notes that the Request specifies “sensitive security information” as being inappropriate to deliver to RAID without express safeguards; whereas the information requested by the NCP in its investigative phase covered a much broader scope of enquiry, much of marginal sensitivity. In the event, the NCP points out, ENRC withheld all information; and that the NCP’s attempts to establish alternative means of obtaining the information without disclosing any sensitive elements were refused.

For its part, RAID accepts the Final Statement as accurately reflecting the position of the parties on this point. It accepted the normal expectation of confidentiality on which the complaint process relies, and declined to provide the express undertakings requested by ENRC as endorsing the mistrust on which, it says, the mediation foundered. The positions adopted by the parties illustrate the difficulties which arise around sharing information in a low trust environment.

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We find no basis for any procedural failure by the NCP in its treatment of ENRC's unwillingness to provide requested information, or its recital of the position of the parties in paragraphs 16-17 of the Final Statement.

c. Development of the mines

ENRC takes issue with the NCP's conclusion that ENRC has not met its obligations to contribute to development and encourage capacity building. This issue, which ENRC describes as the "core of the NCP's analysis" is based on a finding that the adverse impacts on the affected communities would not have occurred if ENRC had followed up and implemented the detailed resettlement plans agreed with the communities. ENRC complains that it did not follow up with those plans because it did not proceed with the proposed mining development, although it continued to hold the right to do so and invested further in the development. ENRC says it should be no part of the NCP's function to criticise the conduct of ENRC in this respect.

The NCP rejects the criticism, which it says is based on "selective quotation": it had expressly noted that the Guidelines impose no positive obligation on parties to proceed with projects, and that the Final Statement had referred to resettlement only where necessary and appropriate, and to ENRC's failure to plan for the impacts on communities and to keep them informed. The NCP's main point, however, is that this is not a ground for procedural review. RAID agrees with this last point.

We find no basis for procedural review on this ground of the Request. ENRC are challenging a substantive finding of the NCP, which is beyond the remit of the Steering Board to review under the procedural arrangements in place.

d. Water supply

ENRC criticises the Final Statement's conclusions about water supply as "not coherent". It contrasts the NCP's account of the reliability of clean water supply

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with or without charge to the communities with the NCP's statement that it has not independently verified these accounts and draws no conclusions from them. It therefore questions how the NCP could make an adverse finding of failure to address human rights impact.

The NCP notes that this ground also provides no basis for procedural review. But it recognises that the reference in paragraph 76 of the Final Statement to the opinion of the UN Special Rapporteur could be "misinterpreted" if quoted out of context, and offers to adjust the language if the Steering Board agrees. RAID agrees that this ground is unreviewable, and would not object to the suggested alteration to paragraph 76.

We find no basis for procedural review on this ground of the Request. The criticism is substantive, not procedural, and therefore cannot be reviewed. Just as it would be inappropriate for the Steering Board to interrogate the reasons for the NCP's finding, we can have no strong position on the proposed alteration to the language of paragraph 76 of the Final Statement. This is for the NCP to decide. We note merely that the NCP believes the change would go some way towards meeting the concern of ENRC and is not objectionable to RAID, which suggests that the adjustment can properly be made if accepted by ENRC. If not, however, it is appropriate for the Final Statement to be finalised without the amendment.

4. Additional comments

This review has focused on two aspects – mediation and confidentiality – which raise issues of general relevance to the NCP complaints process. The complaints process is not coercive. Parties cannot be compelled to cooperate or participate in the process. However, it is important to understand that the NCP is a neutral party, whose sole role is to assist the parties to resolve their differences in a timely and cost-effective manner with a view to addressing any adverse impacts running contrary to the Guidelines. The United Kingdom has endorsed the MNE Guidelines, plays a constructive role in their formulation and development, and a

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leading role in promoting the UK NCP as a model means of achieving the aims of the Guidelines.

In refining the NCP complaint procedures, as the Steering Board has since 2006, the aim has been to discourage parties from treating the process as overly formal or adversarial. Mediation is a key aspect of how the process seeks to resolve complaints. The United Kingdom is fortunate to have ready access to many of the best mediators anywhere. Mediation is now an important component of many court procedures, and is called upon often to resolve even the most intractable disputes at minimal cost and delay. But mediation will work only on the basis of generating sufficient mutual confidence for the parties to trust each other. That trust can be very delicate, and can all too easily evaporate if proposals agreed are not promptly and accurately reflected in formal commitments. The longer the delay between engagement on a mediated solution and its manifestation in a straightforward written contract, the more likely it is that the mediation will ultimately fail.

The confidentiality of corporate information is often cited as grounds for withholding documents or other evidence from the NCP. Some information is of course sensitive, and may justify special arrangements if to be shared with third parties (a complainant or the NCP). But much information hardly counts as sensitive; yet its non-disclosure can have a debilitating effect on the complaints process. Where a party refuses to disclose without adequate justification, the NCP is entitled to, and will draw inferences from the failure. Moreover, as noted previously, the sharing of information in the course of a complaint entails responsibility of the party receiving the information to act responsibly with it, including in relation to respecting confidentiality arrangements. If made available to parties outside the process, the trust on which the process depends will be undermined.

The Steering Board should acknowledge its regret for the delays in completing this review, for which the parties to the Complaint are in no way responsible. The timing of the Request's submission, and the need to establish a Review

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Committee of clear independence, combined with competing pressures on the time available to the members of the Committee have all contributed to the delay. Normally, we would expect a review to be completed within 3-4 weeks after the necessary comments have been made collected and made available to the Committee. The Committee regrets any inconvenience to the parties from a failure to adhere to the Steering Board's normal insistence on timely discharge of its functions.

Recommendation

The Review Committee recommends that the Steering Board should refuse the Request for Review of the Final Statement for the reasons set out above.

Edward Bickham

Jeremy Carver (Chair)

Stephen Lowe

10th February 2016

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