

## **The “Phulbari case: lessons for future strategies” workshop, Thursday 4 June 2015, 2-5pm, Global Justice Now office**

### **1. Purpose**

The purpose of the workshop was:

- To provide an opportunity for human rights campaigners, activists and lawyers to learn more about the proposed mine and the campaign against it;
- To explore campaign strategies around corporate injustices, including the process of making a UK NCP complaint; additional/alternative strategies; and legal/policy reforms needed to improve accountability in similar cases.

As the details of the proposed mine and the Bangladeshi and UK opposition campaigns are well [documented](#) online, this note emphasises insights from the NCP complaints process, potential alternatives, and future strategies and avenues for collaboration between civil society groups.

### **2. Christine Haigh (Global Justice Now) and Rumana Hashem (Phulbari Solidarity Group) commenced the workshop with a summary of the details of the proposed mine at Phulbari and the status quo on the ground in Bangladesh<sup>1</sup>:**

- Phulbari is one of four adjacent sub-districts in North West Bangladesh – it’s in this area that London-based multinational Global Coal Management Resources (GCM) Plc is planning to build a large open-cast mine that will have hugely destructive impacts on the surrounding environment and the indigenous peoples living there. GCM is still awaiting approval from the Bangladesh government to proceed (having filed for permission in 2005).
- Estimations of the impact of the project differ, but the large open-cast mine would likely destroy 15,000 acres of land on which 80% of the local population base their livelihoods.
- Violations of multiple human rights would ensue, including the rights to food, water, housing, and of indigenous peoples.
- There have been repeated and large-scale protests against the project, including one in which three people died and many more were injured after paramilitary forces opened fire on the protesters.
- Rumana emphasised that the Bangladesh campaign in opposition to the mine has a firm commitment to remaining peaceful.
- State corruption is a significant barrier to legal redress in Bangladesh.

### **3. Christine Haigh (Global Justice Now) and Richard Solly (London Mining Network) elaborated on the various strategies employed by the UK campaign, including:**

- Targeting the mining company (GCM Resources) directly through protests at their AGMs (both from outside and with shareholder access);
- Pressuring GCM’s investors through protests at their AGMs. Subsequently Barclays and RBS withdrew.

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<sup>1</sup> Please see Christine’s slides (circulated with this document) or the Phulbari Solidarity Group’s [website](#) for full background details on the proposed mine and the local campaign.

- Using parliamentary questions to uncover that the UK government had been lobbying the UK High Commission in Dhaka on GCM's behalf – an exposure which prompted the government to distance itself from the project.
- Internationally, some US-based investors were pressured by International Accountability Project;
- In 2012, 7 UN rapporteurs also released a statement calling for an immediate halt to the mine's development.

#### 4. The NCP complaint<sup>2</sup>

4.1 The [complaint](#) was filed in 2012 on behalf of the Phulbari community by International Accountability Project with support from Global Justice Now.

4.2 During the NCP's investigation of the complaint a submission was made by the Essex Business and Human Rights Project, exposing weaknesses in GCM's defence in two key areas:

- On GCM's claim that they have a primary obligation to satisfy their shareholders – and thus cannot fulfil human rights standards - Essex argued that in company law managers aren't required to appease their shareholders at every moment in time, and that the mine would damage the company in the long-term;
- Against GCM's claim that the mine's operation would indirectly contribute to the fulfilment of certain economic and social rights by easing the energy crisis in Bangladesh, Essex argued that certain fundamental rights cannot be violated towards the fulfilment of others.

4.3 The eventual outcome (via the [final statement](#) in November 2014) was that GCM had not breached its obligations to respect the human rights of those affected by their activities nor its obligations to carry out appropriate human rights due diligence.

- It was, however, advised that GCM did breach its obligations to “develop self-regulatory practices and management systems that foster confidence and trust in the societies they operate in”, with the recommendations that GCM should undertake a human rights impact assessment, engage with affected communities and develop its communications plans.
- The statement also said that the NCP would investigate whether GCM have fulfilled these recommendations in May 2015; this update should emerge in the next couple of months.
- Obviously this was a very disappointing outcome. With particular reference to this case, Christine Haigh noted that the NCP refused to consider the inevitable impacts of the project on human rights should it go ahead, which is inconsistent with the OECD guidelines. There were also concerns about the NCP's failure to engage with expert opinions or consider the situation on the ground in Bangladesh.

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<sup>2</sup> Full materials are available online via the [Phulbari Solidarity Group](#)

4.4 Samentha Goethals presented initial findings from the RAID / Essex comparative research on the NCP complaints that have occurred to date. While the findings aren't yet ready for formal circulation, Samentha has kindly provided a couple of elaborations for this note:

- The timeline for NCP complaint assessment is generally far in excess of official recommendations.
- The NCP requires a high and burdensome level of evidence from complainants already at the initial assessment stage of a complaint. This is contrary to the principles of predictability and accessibility set out as core criteria in the OECD Procedural Guidance for Specific Instances (otherwise known as complaints). There is a disproportionate expectation that complainants fully substantiate any of their claims and references to the OECD principles they allege have been breached. In contrast, acts and guaranties of due diligence and self-regulation by the company appear sufficient as counter-evidence and lessen any allegation made against them particularly when these bear on issues of causing and contributing to adverse human rights impacts.
- The NCP has been acting in a 'selective' manner with cases citing all or most of the principles in the Human Rights Chapter of the Guidelines and arguably those that are more politically sensitive (telecommunication) or involve UK development and economic interests (extractive). It has been particularly difficult for complainants to substantiate that companies have caused and contributed to human rights abuses on their own or through a business relationship. The NCP appears reluctant to examine issues involving allegations of 'cause and contribute', and prospective adverse impacts when a company is not yet in full operation (as in the Phulbari case, but also WWF vs SOCO and RAID vs ENRC). It tends to reject such claims and to narrow the focus of examination to issues of respecting human rights. This is apparently related to an overly narrow interpretation of the concepts of cause and contribute and also due diligence.

## 5. Alternative options

5.1 Chris Esdaile (Leigh Day) contributed on the prospects for litigation in the UK:

- Abuses relating to human rights need to be framed in a manner consistent with English law (for instance using tort, negligence etc; sometimes more archaic areas); it needs to be demonstrated that a breach of duty of care has occurred which has caused harm.
- In most cases in practice, litigation cannot be pursued until the harm has already occurred, and will usually only be able to secure damages for victims. Unfortunately this means that litigation on the basis of the *potential* displacement of people or environmental damage will be difficult if not impossible.<sup>3</sup>
- Seeking an Injunction (i.e., having a court order that an action should not be undertaken by a company or one of its subsidiaries) can be a risk:
  - o Usually, in urgent cases, communities will be expected to promise to cover the costs to the company (including lost earnings) until a final decision is made.
  - o There is also the issue of policing the ruling: there needs to be a guarantee that there is full company control of the overseas situation, and also that the foreign court recognises the UK ruling. If the English courts don't believe that they can police a ruling, they won't make one.

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<sup>3</sup> For the Phulbari case three approaches were considered: i) the potential impacts in terms of displacement and the environment; ii) the terms of GCM's exploration agreement; iii) the shootings that took place at the protest in 2006. Unfortunately, none proved viable.

- It was, however, noted that seeking an injunction may prove a more viable option if used to prevent company actions during the process of existing litigation.
- Bangladesh's limitation law was another hurdle specific to the Phulbari case – this appeared to set a year's limitation for making personal injury claims, complicating the prospects for litigation as the deadline was missed.
- The key take-away: As a potential tool, litigation should be looked into promptly, because there may be limitation issues. Even if not immediately viable, however, the option of litigation should be kept under review: it may emerge as an appropriate tool as elements of the case develop. Leigh Day are always willing to sit down with NGOs to discuss.

5.2 Peter Frankental (Amnesty International UK) contributed on the general approaches of the UK government to business and human rights and how the NCP fits in:

- The NCP was originally strengthened due to strong parliamentary pressure and the work of Lord Mance who was willing to spearhead the issue. In the last 5 years parliamentary pressure has waned and the NCP were likely wary to displease the Conservative-led coalition – hence the deterioration in the NCP's effectiveness.
- Identifying a suitable individual to put the spotlight on and champion reform of the NCP may be a key goal for the next 5 years.

5.3 A few more relevant points were raised in the Q and A:

- Andy Whitmore (London Mining Network / PIPLinks) noted that there is seems to be a growing sense from the UK NCP that a successful case is only one where consensus is agreed based on dialogue, rather than the NCP having to make an adjudication. Yet, many campaign groups believe a critical adjudication will be useful to them. This makes approaching the NCP less attractive, especially for cases involving gross human rights violations, which the OECD Guidelines should be there to assist with.
- Niall Watson (WWF UK) noted that WWF had some success in applying pressure on UK oil company Soco as part of their Virunga campaign by acquiring space from a city poster firm and putting up campaign materials around Soco's offices. This was a good way to pick away at the company's reputation in full view of its peers in the sector.
- Niall Watson also advised that campaigners should not write-off the NCP avenue wholesale, as some complaints have had favourable outcomes (eg [Survival International vs Vedanta Resources Plc](#), [WWF vs SOCO](#) cases).
- Niall Watson commented that judicial review of the NCP assessment is prohibitively complex due to the unusual legal status of the NCP (but with the caveat that he'd looked into this years ago and would welcome revisiting it with legal support), while Chris Esdaile advised that there is a strict time limit on judicial review (in these kind of cases the rules say that the JR must be started "promptly, and in any event within 3 months" of the date of the decision).
- It was suggested that setting up paralegal training in the host country can be another effective option.

## 6. Final thoughts / action points and potential future meetings:

6.1 Feedback from the session:

- It was useful to bring campaigners and legal representatives together to discuss options.

- It was useful to share experiences of the NCP process.
- It will be useful to develop strategies for joint advocacy work on NCP reform as a result of the workshop.

## 6.2 General thoughts on future meetings:

- It was suggested that a future workshop could compare two or three cases – to ascertain what works in different contexts – or look at emerging cases so attendees can give advice and compare strategies early on.
- Marilyn Croser (CORE) is happy to look into organising a meeting with Danish Chopra, one of the BIS officials working in the UK NCP.
- It was suggested that a joint public statement could be released denouncing the NCPs as unfit for purpose.
- Chris Esdaile suggested that some barristers may be willing to speak on the possibility of pursuing a judicial review of an NCP decision.
- RAID and Essex are producing a research report on the NCP for Amnesty International UK, which will be released in autumn