

19 June 2018

Decision

This is a decision made by the Danish National Contact Point to the OECD (the NCP) after the completion of the preliminary examination (step 3 of the case handling process for the Danish NCP, prescribed by the Act on the Danish NCP¹).

The specific instance (case) was raised by two NGO's (complainants) concerning a financial institution (the respondent).

The NCP received the complaint on 19 September 2017. Information meetings were held on 3 November 2017 by Skype with the complainants and at the Danish Business Authority in Copenhagen with the respondent.

Subsequently additional information has been submitted by the complainants on 5 and 6 March 2018 and by the respondent on 16 March 2018. The information submitted by the respondent was presented orally at a meeting at the Danish National Contact Point on 20 March 2018 in order to give an introduction to the comprehensive written materials which was submitted by the respondent as documentation of the respondent's due diligence.

The NCP has conducted a preliminary examination of the complaint on 12 April 2018 in accordance with section 7 of Act on the Danish NCP.

Following this examination, the Danish NCP has assessed the due diligence processes of the respondent against the complaint and OECD's Guidelines for Multinational Enterprises. The NCP finds that the respondent has carried out due diligence in accordance with the OECD Guidelines for Multinational Enterprises and sought to prevent and miti-

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¹ Act no. 546 on a Mediation and Complaints-Handling Institution for Responsible Business Conduct of 18 June 2018. <https://businessconduct.dk/file/298159/act-on-mediation.pdf>

gate actual and potential adverse impacts cf. MNE Guidelines, Chapter II. General Policies para. 10 and para. 12.

On this basis the NCP finds that the issues raised do not merit further examination.

Facts of the specific instance:

The complaint concerns the respondent involvement in company A, which is a company operating a mine in Armenia.

As the respondent provided the guarantee for the financing of the mining company, the complainants allege that the respondent is responsible for not observing the OECD Guidelines for Multinational Enterprises and that the respondent is subject of the complaint.

The issues raised in the complaint concern the principles of the OECD Guidelines of enterprises' duty to carry out risk-based due diligence and to identify, prevent and mitigate actual and potential adverse impact and in this case the respondent's exercise of due diligence in regard to the impacts of the mine project in Armenia.

Responding to a request of the Danish NCP on 1 February 2018, the respondent submitted a report and documentation and other details concerning the respondent's involvement in the mine project.

- A report on due diligence on environmental and social (human rights and labour rights) due diligence.
- Excerpt of the bilateral contract between the respondent and company A on environmental and social (human rights and labour rights) requirements.
- List of key documents on the respondent's environmental and social due diligence.
- Documents concerning the follow-up to dialogue with the complainants.
- Documents concerning follow-up to dialogue with citizens in the region and other relevant stakeholders.

Assessment of the Specific Instance

The NCP has taken into consideration that it is not the intention of the OECD Guidelines for companies to not become involved in high-risk projects.

Para. 10 of the OECD Guidelines, Chapter II. General Policies states: *Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraph [...] 12, and account for how these impacts are addressed.*

Para. 12 of the OECD Guidelines, Chapter II. General Policies states: *Enterprises should seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*

In accordance with the OECD Guidelines companies should carry out risk analysis and assess individual projects, sectors and countries in order to identify challenges and risks. By use of commitment and use of influence, companies can contribute to improve social and environmental conditions and promote the OECD Guidelines for Multinational Enterprises.

The role of the respondent in the project

The role of the respondent in this project was to provide a financial guarantee to Danish Pension Fund's financing of the loan to a Russian bank. The bank financed a loan to company A, which is operating a mine in Armenia.

Thus, the Danish NCP has concluded that the respondent is directly linked to the project through its operations. According to the OECD Guidelines, the respondent in this situation has a responsibility to identify and mitigate adverse impact through the value chain.

Bilateral contract directly with the mine, company A

Prior to accepting to provide the financial guarantee, the respondent set as a condition that company A enter into a legally binding bilateral contract.

The respondent has observed standards in accordance with the OECD's Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence. According to these, the respondent is to apply IFC's Performance Standards (International Finance Corporation²) to benchmark projects in relation to due diligence. The standards were included as requirements in the contract between the respondent and company A and accepted by the parties and concern operation of the mine in accordance with IFC standards and IFC ESH standards.

² International Finance Corporation is part of the World Bank Group

The contract includes the deployment of an Environmental & Social Action Plan Implementation Plan (ESAP) describing all actions, responsibilities and timelines for actions in the construction phase as well as the operational phase and should be developed by a third party (an internationally recognized consultant) cf. the respondent's submission.

The contract included obligations to involve qualified third parties in developing the project, access to information and reporting.

During the deployment phase and before the mine became operational the respondent became aware of problems concerning company A's compliance with IFC standards, including the environmental and social requirements. When such situations occurred, the respondent used its leverage to influence the management of company A and the owners in the Russian bank. Issues to be improved were identified by referring to the ESAP and an agreement on how to obtain progress was reached between the management of company A and the respondent.

The respondent claims to have continuously been seeking to ensure that company A report to the respondent how they handle adverse impacts by requiring the mining company to publish all reports and follow-up reports on company A's website.

After the mine became fully operational in 2015, the development and progress in terms of compliance of the bilateral contract ceased. Around the time when the mine became operational, company A was reorganized. Consequently, the follow-up on the contract was no longer anchored with one person but instead was divided into several different parts of the organization. The respondent was not informed about the reorganization. The respondent experienced a decrease in the progress of compliance with the requirements of the bilateral contract. The new management in company A did not comply with the requirements and did not meet deadlines. In addition, the international consultants who had been in charge of conducting follow-up on the progress in relation to the ESAP were replaced by company A with local employees. As a result, the subsequent progress reports did not live up to the agreements with the respondent.

Stakeholder engagement

As part of the respondent's due diligence, the respondent has documented extensive stakeholder involvement before the contract was signed with the mine as well as after.

Before the conclusion of the bilateral contract with company A in March 2012, the respondent met with a number of NGOs, local officials and representatives from towns in the region, all of which are located close to the mine. The respondent decided to include the input received from

the stakeholders in the follow-up process with company A and ensure that steps were taken to improve the issues.

In the summer of 2013 the contract with company A was signed. During the subsequent on-site-visit, the respondent held meetings with stakeholders and the input they received was included in the follow-up with company A.

In 2014 the respondent met with representatives from the complainants in Armenia, at the request of one of the complainants. Based on the concerns raised by the two NGOs, the respondent held a meeting with members of the local community and a local NGO in order to follow up on the critique made by the complainants.

Based on correspondence with citizens from the region, the respondent held another meeting with one of the complainants in June 2015. The respondent has documented that the issues raised by the citizens were all covered by the respondent's ongoing follow-up work and monitoring.

It has been documented that the respondent has conducted extensive stakeholder engagement and has used leverage to raise the concerns of the local citizens and NGOs in the follow-up with the complainants and has sought to include the stakeholders' concerns into the agreements to ensure progress.

Leverage

In 2016 the respondent experienced that company A had difficulties in complying with the requirement and monitoring. At the same time there was a lack of documentation for activities which had been agreed upon between the respondent and company A during the annual site-visit. Nevertheless, the respondent chose to remain in the project, attempting to use leverage to improve the conditions.

In early 2017 the respondent organized an extraordinary visit to Armenia to meet with the management of company A. The respondent also met with the Russian bank in order to use its leverage further. The purpose of the meeting was to make it clear that failure to comply with social and environmental requirements in the contract would lead to the respondent withdrawing the guarantee and consequently require early repayment of the loan.

Withdrawing the guarantee

In August 2017 the respondent concludes that company A was not able to present a credible plan for compliance with the requirements of the contract. The respondent informed the Danish Pension Fund and the Russian bank that the respondent intended to terminate the loan.

On October 13, 2017, the Russian bank offered early termination of the loan. The respondent and the Danish Pension Fund accepted.

See also the description in the respondent's submission to the NCP, dated 16 March 2018

Conclusion

In this case, the Danish NCP has examined the role of the the respondent and not the role of the other parties in the mining project in Armenia.

The role of the respondent in this project was to provide a financial guarantee to a Danish Pension Fund's financing of the loan to a Russian bank. The bank financed a loan to company A, which is operating a mine in Armenia.

On this basis the Danish NCP has concluded that the respondent is directly linked to the project through its operations. Therefore, the respondent must conduct due diligence in accordance with para. 12 of the OECD Guidelines.

The respondent has sought to identify and prevent actual and potential negative impacts by setting social and environmental requirements in a contract directly with company A, which operates the mine.

In conclusion the NCP finds that the respondent has:

- Carried out risk-based due diligence in accordance with princ. 10 in Chapter II General Polies of the MNE Guidelines and
- Sought to mitigate adverse impact, when the impact was directly linked to the respondent's operations in accordance with princ. 12 Chapter II General Polies of the MNE Guidelines.

The NCP wants to emphasize that:

- The respondent already prior to its involvement with the mine project made a legally binding bilateral contract on environment, health and social requirements in accordance with IFC Performance Standards directly with company A.
- The respondent has had close contact and collaboration with company A and the mine project throughout the entire process.
- The respondent has ensured that the progress has been measured and verified by third parties from international consultant agencies
- The respondent has conducted onsite visits to verify the annual progress report.
- The respondent has established dialogue with the local community and civil society.

- The respondent has continuously followed up on the progress made by the mine to fulfill the bilateral contract which in the out-set was in annual cycles but when issues were raised shorter timelines and milestone planes were set.
- The respondent has continued to use its leverage despite difficulties of the mine to fulfill the requirements and
- The respondent has withdrawn after repeatedly attempting to mitigate adverse impacts through using leverage, and finding that results did not materialize

On this basis, the NCP finds that the respondent's due diligence in terms of company A and the mine project has been in accordance with the OECD Guidelines for Multinational Enterprises.

The NCP has completed the preliminary examination and on this basis, the NCP assesses that this specific instance does not merit further examination, cf. the Procedural Guidance of the OECD Guidelines. According to section 7 of the Act on the Danish NCP, this means that the NCP must reject the case.