

STATEMENT BY THE AUSTRALIAN NATIONAL CONTACT POINT

BHP-BILLITON – CERREJON COAL SPECIFIC INSTANCE

INTRODUCTION

1. On 2 July 2007, the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) received a specific instance regarding BHP-Billiton's involvement in the Cerrejon Coal Company (Cerrejon) in Colombia. The submission was lodged by Mr Ralph Bleechmore, an Adelaide based lawyer, as agent for parties in Colombia. The parties in Columbia include: Dr Armado Perez Araujo, a Columbian legal practitioner; Senor Jose-Julio Perez, a spokesman for the ex-residents of Tabaco, Senor Aliro Uribe Munoz, a senior legal officer with the Corporation Colectivo de Abogados *Jose Alvear Restrepo*; and other unnamed individual complainants from the five communities.
2. The submission claimed that BHP-Billiton had breached the General Policies, Disclosure and Environment sections of the Guidelines, including:
 - not respecting human rights;
 - not encouraging local capacity building and human capital formation;
 - not abstaining from any improper involvement in local political activities;
 - not supporting good corporate governance; and
 - not protecting the environment, public health and safety.
3. Specifically, the submission claimed that:
 - the owners and operators of Cerrejon attempted to depopulate an area of the La Guajira Peninsula, Colombia, by destroying the township of Tabaco and through the forced expulsion of its population.
 - five other communities in the region are suffering the effects of a policy designed to make living unviable in the area and to drive the population out.
4. The complainant sought revision of the compensation paid to, and improvements to the current living conditions of, the former residents of Tabaco. The complainant also sought to ensure that there is an appropriate process to manage the relocation of the five other communities, including adequate consultation, and that any resettlement occurs in a socially responsible manner.

ANCP ASSESSMENT

5. In accordance with the ANCP's published procedures for handling specific instances, the ANCP commenced an initial assessment as to whether the issues raised warranted further consideration as a specific instance under the Guidelines.
6. The ANCP contacted both the complainant and BHP-Billiton. A phone meeting was held between the ANCP and Ralph Bleechmore on 18 July 2007 and a face-to-face meeting was held between the ANCP and BHP-Billiton in Melbourne on 7 August 2007.

7. As the submission also involved companies in the United Kingdom and Switzerland, and with the agreement of the complainant and BHP-Billiton, the ANCP consulted with the United Kingdom National Contact Point and Swiss National Contact Point (NCP).
 - On 4 October 2007, a Swiss NGO, Arbeitsgruppe Schweiz-Kolumbien (ASK), lodged a complaint with the Swiss NCP regarding Xstrata's relationship with Cerrejon. The text of that complaint is in German and was not made available to the ANCP. However, the Swiss NCP reported that it is materially similar to that lodged by Mr Bleechmore with the ANCP.
8. On 28 September 2007, the ANCP accepted the matters raised by the complainant and relevant to the Guidelines that related to the conduct of BHP-Billiton (see Attachment 1). The results of the initial assessment were communicated to both parties and the United Kingdom and Swiss NCPs.
 - Part of the submission related to the question of whether the actions of Cerrejon were legal under Colombian law. The ANCP noted that it was in no position to assess this as it was something that could only be assessed through the Colombian legal system.

ANCP MEDIATION PROCESS

9. Consistent with its mandate to provide a forum for discussion to assist in resolving disputes, the ANCP organised a meeting in London on 9 October 2007. The meeting was attended by the complainant and representatives of BHP-Billiton, the Australian, Swiss and UK NCPs, Anglo-American, Xstrata, Cerrejon, ASK and the Colombia Solidarity Campaign (UK).
 - The meeting participants agreed that the issues should be dealt with on an integrated basis rather than as separate complaints in the local jurisdictions and the ANCP agreed to take the lead in consultation with the Swiss and UK NCPs.
10. While there was general agreement on most of the basic facts, there were some areas of disagreement on the detail. Key issues raised included:
 - the ongoing concern and distrust among some of the local communities;
 - the ongoing disagreement about the validity of the census of Tabaco residents and the values assigned to land for compensation purposes; and
 - the differing views about compensation, noting that the joint venture partners directed Cerrejon to consider community settlement as the preferred option, including cash payments as well as land and income restoration.
11. The companies provided information on an independent social review which had been established by Cerrejon to provide an independent assessment of their social engagement. The review was expected to make recommendations including addressing the legacy issues. These issues were essentially similar to those raised in the specific instance. The review was to be conducted by John Harker, President of Cape Breton University in Canada; Saloman Kalmonovitz, Dean of Economics and Business Administration, Jorge Tadeo Lozano University; Colombia; Nick Killick, Manager, International Alert, UK, an international NGO focused on peacebuilding, security and extractive industries; and Elena Serrano, Advisor, Casa de La Paz Foundation, Chile, an NGO that promotes peace, social development and environmental awareness. The review had selected the Social Capital Group (from Peru) as consultants. The review was expected to report by mid-February 2008.

12. It was agreed that, subject to the complainants consulting with their principals, the current complaint would be suspended pending the outcome of the independent review.

INDEPENDENT REVIEW

13. The independent review, *Cerrejon Coal and Social Responsibility: An Independent Review of Impacts and Intent*, was released in February 2008.¹ The report examined current and future practices of the company and addressed outstanding legacy issues. The review made numerous recommendations on steps Cerrejon should take to improve its relationships with the local community and to resolve the underlying issues.
14. Among other things, the report called for talks between the company and surrounding communities to address outstanding issues. Foremost among them was the continuing bitterness over the treatment of the township of Tabaco. The complainants and BHP-Billiton agreed that the recommendations of the independent review provided a sound basis for moving forward.
15. In April 2008, Cerrejon responded to the independent review recommendations which included a commitment to meet with the Tabaco Relocation Community (TRC).² In August 2008, Cerrejon and the TRC jointly sought Dr Harker to serve as a facilitator in talks between them. On 12 December 2008, an agreement was reached between the parties resolving the legacy issues and clearing the way for sustainable development, including:
 - contributions to indemnities totalling US\$1.8 million; and
 - a further US\$1.3 million for sustainable projects.

RESOLUTION OF SPECIFIC INSTANCE

16. On 18 December 2008, the ANCP met with Mr Bleechmore, BHP-Billiton and Xstrata to resolve any outstanding issues. The meeting provided a forum for general agreement on a range of issues, including that:
 - the serious legacy issues affecting Tabaco residents had been resolved;
 - a process should be established to provide information relating to air quality and pollution to the local communities; and
 - an independent party should be engaged to monitor the consultation process for communities potentially subject to resettlement.
17. On 2 February 2009, a phone meeting addressed these outstanding issues with BHP-B reporting that:
 - Cerrejon conducts air quality and pollution monitoring of the local communities and will release this information, consistent with processes underway at other BHP-B mines.
 - Cerrejon will engage the Social Capital Group (SCG) from 16 February 2009 as an independent facilitator to work with individual communities to provide an oversight role, including the monitoring of relocation and resettlement issues; and

¹ <http://www.bhpbilliton.com/bbContentRepository/cerrejonPanel.pdf>

² <http://www.bhpbilliton.com/bbContentRepository/cerrejonapril2008.pdf>

- Cerrejon would be making a senior appointment to their management team to oversee community engagement, community development activities and resettlement processes.
18. The ANCP was subsequently advised that BHP-B's Group Manager for Community Relations would join Cerrejon as the Social Responsibility Manager in a full-time capacity.

OUTCOMES OF THE SPECIFIC INSTANCE

19. There was agreement from all parties that the outcome for the Tabaco community provides for a viable resettlement program to be achieved. In this context it was agreed that the issues relating to Tabaco have been satisfactorily resolved.
20. There are ongoing negotiations on possible resettlements of the communities of La Roche, Patilla, Los Remedios, Chancleta and Tamaquitos. The complainants sought the appointment of a facilitator to take on a similar role to that provided by Prof Harker for Tabaco.
21. The companies have argued that while the Tabaco situation related to a specific issue that arose from past actions and omissions, the potential resettlements of the other communities are contemporary instances which require a different type of monitoring structure. The companies now have internal mechanisms in place which means that approach is not necessary. In particular, Cerrejon's new Social Responsibility Manager will be expected to improve the communications processes, helping to progress and resolve the outstanding issues.
22. The ANCP acknowledges the companies' position but is concerned that progress on resettlements still appears to be slow. In light of the positive experience of the role of Dr Harker in resolving the Tabaco matters, the ANCP believes there would be significant advantage if the companies provide similar support to the communities for the ongoing negotiations. The resettlement process is likely to be complicated and prolonged in the absence of someone to take on this role. Although the companies have provided additional supports for Cerrejon, these clearly cannot provide adequate independent support for the communities. In particular, there is likely to be a significant asymmetry of knowledge and negotiating capacity between the Cerrejon and the local community.
23. However, as a compromise position suggested by the ANCP, the companies did agree to an external process to monitor the negotiations and to report on progress. The SCG, as an independent party, was expected to provide this oversight. In April 2009, the SCG provided its first report³ which is aimed more broadly at the total package of recommendations arising from the independent review. The report notes that Cerrejon's processes "adequately follow IFC performance guidelines" but it also reports community concern at the delays against the timetables. The SCG further comments on the need to "further improve the bi-directional information, consultation and communication mechanisms between the company and communities, to strengthen trust and coordination of resettlement..."
24. The ANCP remains uncertain as to the role the SCG will play in assuring all parties that the ongoing resettlement processes are implemented adequately. However, the ANCP also acknowledges that Cerrejon's Social Responsibility Manager should be a critical element in this process and notes that he has only recently taken up his role.

³ <http://www.cerrejoncoal.com/formas/2191/scgeng.pdf>

25. The complainants also sought the ANCP to maintain an ongoing overseeing role in the process and have requested that the specific instance remain open until a binding written agreement is in place between the five communities and Cerrejon. Therefore, the complainants are opposed to the ANCP making a final determination on the five communities.
26. The complainants do not believe the ANCP should accept Cerrejon's undertakings of the effectiveness of on-going negotiations. The complainants continue to raise concerns that progress has not been as fast as they would prefer and that the process is not adequately defined. There also appears to be deep seated distrust of the companies. The ANCP is aware of the long history and resolution of issues has been slow, and indeed is still ongoing. However, further progress will depend upon good faith by all parties and the ANCP believes that it is important to encourage the community and companies to work together to resolve outstanding matters.
27. Notwithstanding the concerns of the complainants, the ANCP believes that the substantive issues raised in the complaint have now been dealt with – the Tabaco community has an agreement and there is an established process for managing further issues. These outcomes substantially meet the rectification originally proposed by the complainant.
28. A shift in the approach taken by Cerrejon provides the ANCP with some prospect that given time the company has the opportunity to deliver on their commitments and the expectations of the local communities and all parties involved in the specific instance. However, the ANCP urges the companies to take all reasonable steps to conclude the negotiations in an equitable and timely fashion. The companies have indicated their willingness and commitment to do so.
29. The ANCP process is intended to be about mediation and does not encompass managing or overseeing the negotiations or resettlement process - indeed, the ANCP cannot see how this could be achieved in any meaningful way from a distance. However, the ANCP is available to deal with further specific issues should any arise.

CONCLUSION

30. The specific instance raised significant and long standing issues. The resolution of these issues is paramount to the daily lives of the people on the ground in the local communities surrounding the mining operations of Cerrejon.
31. The agreement between Cerrejon and the former residents of Tabaco is a significant, positive outcome that has been welcomed by all parties. This outcome has provided valuable lessons for the other communities and the companies.
32. Cerrejon has appointed a Social Responsibility Manager on-site and engaged an independent organisation to monitor progress in the other communities. In addition, the companies have undertaken to ensure that Cerrejon provides environmental information to the local communities in a way that is both meaningful and consistent with international best practice.
33. While the ANCP notes the complainants' concerns about closing the specific instance at this stage, the ANCP does not believe that it can add further value to the process involving the five communities, Cerrejon and SCG.
34. The ANCP would like to thank all parties involved in the dispute for contributing in a constructive and cooperative manner. The ANCP fulfilled its primary function in providing a

forum for discussion and assisting the parties reach agreement on the issues. The ANCP does not anticipate having an ongoing role. However, the ANCP will be available, if required, as an avenue for further discussions in the event that outstanding issues remain unresolved.

35. The ANCP endeavoured to handle the specific instance as quickly and as efficiently as possible and to keep the parties informed of relevant progress.

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