

INITIAL ASSESSMENT
Notification and request for mediation to the Dutch and UK National Contact points
for the OECD Guidelines for Multinational Enterprises
20 March 2013

Netherlands NCP's conclusion

On the basis of an analysis of the notification, as received in light of the considerations provided for by the Commentary on the Procedural Guidance for NCPs:

- Is the Netherlands NCP the right entity to assess the case;
- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- [whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.]
- the relevance of applicable law and procedures [, including court rulings];
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines, e.g. Sections I, II, IV and VI.

The Netherlands NCP concludes that this specific instance does not merit further examination¹

The decision not to further examine this specific instance does not entail a substantive research or fact finding nor does it entail a judgement on whether or not the company in question has violated the Guidelines. In this specific instance notification, the NL NCP has not consulted parties involved before the drafting of this initial assessment.

In conformity with the Netherlands NCP's procedure², the provisional initial assessment has been sent to the parties involved, inviting them to respond to the assessment in writing within a four weeks' notice, after which the provisional initial assessment has been determined and published on the NCP's website www.oecdguidelines.nl. The notifiers commented on the draft, the company did not.

Summary of the Notification

On 31 July 2012 the Non-Commercial Gardening Association 'Stroitel' and the Non-Governmental Organisation 'Sakhalin Environment Watch' (SEW) notified a specific instance with the National Contact Points of the United Kingdom (UK NCP) and the Netherlands (NL NCP) with regard to the involvement of Netherlands-based Royal Dutch Shell (Shell), and a number of UK-based financial institutions concerning their involvement in the development and operations of the Sakhalin II Project.

¹ *Initial Assessment*, Implementation procedures of the OECD Guidelines, para 25. The bracketed text concern the additions made during the 2011 update of the Guidelines, which will be left out of the assessment of this notification.

² Attachment I: Survey Specific Instance Procedure Netherlands NCP

The notification concerns issues that arose from the phase 2 of the Sakhalin II project, which was initiated in 2001 and of which Sakhalin Energy Investment Company Ltd. (SEIC) is the operator. The Russian, partially state-owned, enterprise GazProm is the majority shareholder of SEIC, while Shell's subsidiary Shell Sakhalin Holdings BV has a 27,5% stake. 'Stroitel' and SEW allege that the construction and operation of the Prigorodnoye Complex has decreased the value of the land and structures owned by Stroitel Association members, and threatens these individuals' health, livelihood and cultural heritage. They also state that this harm has, in effect, led to the displacement of members of the dacha community associated in Stroitel, while these dacha owners have not been resettled or justly compensated for this displacement.

The notification is based on the text of the Guidelines from 2011 and entails the alleged non-observance of the following sections of these OECD-Guidelines:

- a. "Sections II and IV: failing to prevent or mitigate adverse impacts directly linked to a business relationship."
- b. "Sections I and II: failing to adhere to Russian Law regarding resettlement or compensation of the displaced dacha community."
- c. "Section II: failing to comply with relevant self-regulatory policies and mutual agreements, inaccurately disclosing information material to the resettlement of the affected dacha community, and engaging in bad faith negotiations with community stakeholders."
- d. "Section IV: failing to respect internationally recognized human rights in accordance with Russian law and relevant international agreements."
- e. "Section VI: failing to contribute to sustainable development or adequately account for the protection of the environment, public health and safety."

The "requested steps and expectations" from Stroitel and SEW from the NCP are:

1. "Facilitate a resolution through mediation of the outstanding issues raised, in particular a remedy to the problems of the inadequate compensation and resettlement of Stroitel Association dacha owners;"
2. "Undertake a full examination of the construction, testing, commissioning, and operation of the Prigorodnoye Complex;"
3. "Undertake a field visit, as part of the examination of the case, to the Prigorodnoye Complex, including to the affected dacha residents;" and
4. "Monitor the implementation of relevant commitments under any future resolution agreement in order to ensure proper implementation of the Guidelines in an efficient and timely manner and in accordance with applicable law."

Explanatory Memorandum of the Initial Assessment

In accordance with the OECD Guidelines and the Dutch NCP Survey for handling notifications, the Netherlands NCP concluded that the notification does not merit further examination, after analysing the following considerations:

Is the Netherlands NCP the right entity to assess the alleged violation?

The Netherlands and UK NCP were the recipients of the notification concerning the Netherlands-based Royal Dutch Shell (Shell), and UK-based financial institutions concerning their involvement in the development and operations of the Sakhalin II Project. The NCPs decided to conduct the initial assessments separately per enterprise involved that is headquartered on its territory and on the basis of their differing relations to the project. This means that the NL NCP is the right entity to the matter as far as Royal Dutch Shell is concerned.

What is the interest of the non-commercial gardening association 'Stroitel' and the Sakhalin Environment Watch and RDS plc. in the matter?

- 'Stroitel' is a non-commercial Gardening association that includes the owners of dachas located adjacent to the Sakhalin II project's Prigorodnoye Production Complex and supports its members in the alleged harm to their dachas, or seasonal homes, and their health and well-being from the Complex.
- Sakhalin Environment Watch is a Sakhalin Island-based regional environmental non-governmental organisation.
- Royal Dutch Shell is a publicly listed company headquartered in The Hague, the Netherlands, and is incorporated in England and Wales. Shell, through its subsidiary Shell Sakhalin Holdings B.V., is a shareholder in SEIC with a 27.5 percent minus one share stake.³ Shell, through its holding company for the Sakhalin project, was the controlling shareholder (55%) of SEIC at the time the Sakhalin II Phase 2 Project, including the Prigorodnoye Complex, was initiated and constructed, before it was forced to reduce its majority stake in a 2007 sale of shares to partially state-owned Gazprom, headquartered in the Russian Federation.

Are the issues raised material and substantiated?

The activities and related decision making processes underlying the issues raised in the notification date back as far as 2001, with the Prigorodnoye Complex becoming operational in 2008. This is well before the current Guidelines were adopted, which was done May 2011 at the annual OECD Ministerial Council Meeting. During the negotiations on the 2011 update of the Guidelines, in which also the NGO community participated, it was specifically stipulated that (1) a six-month adaption period would be respected for the business sector to bring its operations in consistence with the new recommendations and (2) that notifications based on circumstances that occurred before the end of this adaption period, would not merit further examination of an NCP based on the 2011 Guidelines. In their notification however, the notifying parties held the issues they raise against the 2011 Guidelines.

This means that the NCP only considering this formal point could decide not to further examine the specific instance.

The notifiers fail to substantiate how the issues raised could find a basis in the 2000 Guidelines. However, since the NCP procedure is also a future oriented approach with regard to notifications, the Netherlands NCP has assessed the notification against the 2011 OECD criteria, in order to consider whether through a mediation type of process the further implementation of the 2011-OECD Guidelines could be promoted.

With regard to allegation a. "Sections II and IV: failing to prevent or mitigate adverse impacts directly linked to a business relationship". Chapter II of the 2011 Guidelines recommends enterprises to *seek to prevent or mitigate adverse impacts to which they are directly linked to a business relationship*.⁴ The NCP does not see how within its own procedures a mediation could successfully bring the company in its present role as shareholder to reconsider decisions of the company that have been taken such a long time ago. The NCP will nevertheless bring this point to the attention of the company.

Even when Shell's present ownership of 27.5% of SEIC can be considered to be significant by any standard or measure, the question is whether or not Shell has sufficient leverage to effect change in the practices of SEIC. The NCP does not believe

³ Royal Dutch Shell has confirmed this.

⁴ OECD Guidelines for Multinational Enterprises, Chapter II, paragraph A.12

that, given the history of Shell's relation to Gazprom and the government of the Russian Federation and the present tensions between the companies involved, Shell has the ability to exert substantial influence.

With regard to allegation b. "Sections I and II: failing to adhere to Russian Law regarding resettlement or compensation of the displaced dacha community", the notifying parties fail to substantiate this allegation with a corresponding court decision or information on possible efforts that were undertaken in this respect that confirms that SEIC is indeed acting in violation of national law. This is relevant since seeking compensation for damages in most countries normally takes place in a court case. The NCP cannot get successfully involved in handling a notification if a court case might follow, and use is made of the results of the NCPs involvement.

Regarding allegation c. concerning self-regulatory practices, Stroitel and SEW claim non-observance of the not publically available *Common Terms Agreement*, which appears to comprise of standards of the International Finance Corporation (IFC), the World Bank and Russian law.

Allegation c. concerning 'inaccurately disclosing information material to the resettlement of the affected dacha community' and not acting in good faith with stakeholders, notifying parties state that SEIC has sent contradicting messages to the local community which could have created an impression of bad faith. However, in how far Shell as a shareholder has played or could have played a role in this, e.g. by encouraging its business partner – SEIC – to apply the same principles of responsible business conduct compatible with the 2011 Guidelines including Chapter III on Disclosure, remains unclear.

With regard to allegation d. "failing to respect internationally recognized human rights in accordance with Russian law and relevant international agreements," notifying parties fail to show that any Russian court has or could have confirmed their claims, nor have they provided information on possible efforts that were undertaken in this respect. The NCP is aware of the fact that victims of violations of law in some countries often face obstacles to pursuing justice through domestic legal systems. Such obstacles often include the risk of reprisals against those seeking justice through the court system. Any reference to such a possibility in this specific instance is not available.

Concerning the allegation of not contributing to sustainable development, it should be noted that in this case, the alleged adverse impacts effect 37 dacha residents.⁵ In how far this might adversely impact the sustainable development of the wider Sakhalin region remains unclear, causing the NCP to doubt whether this allegation is sufficiently substantiated.

Lastly, with regard to the notifier's requested steps and expectations that are included in the notification and addressed to the NCP, the NCP concludes that these are not material in terms of substance, because they find no basis in the Guidelines of 2011.

Does there seem to be a link between the enterprise's activities and the issues raised in the specific instance?

On the basis of the information provided there appears to be a link between the enterprise's activities - for the purpose of this decision those are Shell's activities - and the issues raised.

⁵ Notification, page 14

What is the relevance of applicable law and procedures and how have similar issues been, or are being, treated in other domestic or international proceedings?

On the basis of considering both the relevance of applicable law and procedures and how similar issues have been treated in other domestic or international proceedings, SEW/Stroitel rely on the Guidelines in stating that enterprises should comply with national law. From their notification it does not appear that any court decisions on the displacement, resettlement or compensation exists, let alone SEIC and with it, its business partners, are acting in violation of such decision nor has information been provided on possible efforts that were undertaken in this respect.

Would the consideration of the specific instance contribute to the purposes and effectiveness of the Guidelines?

NCPs have been established to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.⁶

The NCP is of the opinion that dealing with this notification and requests is not likely to contribute to the purposes and effectiveness of the 2011 Guidelines, not only in light of the above, but also due to the fact that the Sakhalin II project has been approved already in 2003. The NCP is therefore of the opinion that an intervention as requested has a too little chance to be successful and to offer at this time its good offices to the parties to further discuss the issues raised in this notification would not contribute to the effectiveness of the guidelines.

Attachments

1. The Netherlands NCP Survey for Specific Instances
2. The OECD Guidelines

⁶ Decision of the Council on the OECD Guidelines for Multinational Enterprises, section I, paragraph 1