

A Case Study of the Dutch NCP

The Netherlands National Contact Point (“NL NCP”) is widely regarded as a leader among NCPs. The purpose of this case study is to expose serious problems with the NL NCP’s treatment of a specific instance request submitted by Accountability Counsel’s clients, Complainants from Sakhalin Island, Russia. The Complainants went to the NL NCP aware of its good reputation and with the expectation that it would treat their concerns with a high level of professionalism. They were, however, extremely disappointed with both the NL NCP’s ultimate decision and the inconsistent and unclear reasoning that pervades much of the Initial Assessment.

Several key decisions and rationales used by the NL NCP in this case call into question its functioning as a problem solving institution and raise issues that are relevant for all NCPs. The following comments on the NL NCP’s Initial Assessment are aimed at addressing areas in which we believe that the NL NCP’s reasoning and interpretation of the issues at play stymied the full and effective implementation of the OECD Guidelines.¹

I. Background

On March 20, 2013, the NL NCP published its Initial Assessment regarding a July 31, 2012 notification and request for mediation (the “Notification”) about the involvement of Royal Dutch Shell (“Shell”) in the Sakhalin II Prigorodnoye Production Complex (the “Project”), operated by Sakhalin Energy Investment Company Ltd. (“SEIC”).

Complainants had filed the Notification on behalf of community members living just 1.2 kilometers away from the Project, which is part of one of the largest integrated oil and gas projects in the world. These community members, who live in dachas, traditional Russian seasonal and retirement homes, have suffered from exposure to harmful pollutants, threats to community safety and food security and the loss of local environmental resources. Additionally, their dachas have been devalued by the Project to the point that they cannot sell them and buy other dachas in safer locations. Despite these significant adverse impacts, community members have not been resettled or justly compensated.

Shell is currently a significant shareholder in the operating company SEIC, with a 27.5% stake. Moreover, during much of the construction of the Project, when several decisions with detrimental impacts on community members were made, Shell was the controlling shareholder, with a 55% stake, as well as the lead Technical Advisor, providing “advice and services in respect of the design, engineering, construction, commissioning, start up and operation” of the Project.²

¹ Substantially similar comments were shared directly with the NL NCP prior to the finalization of the Initial Assessment.

² See Sakhalin Energy, 2007 Annual Review at 9, *available at*: http://www.sakhalinenergy.ru/en/documents/Annual_Review_2007_eng.pdf, (hereinafter, “SEIC 2007 Annual Review”).

The Notification requested the assistance of the NL NCP in facilitating a mediated resolution to outstanding issues relating to community members' lack of resettlement or just compensation. In its Initial Assessment, the NL NCP concluded that the Notification did not merit further examination.³

II. The Initial Assessment lacks transparency and predictability of process regarding important issues surrounding the applicability of the 2011 Guidelines

The Initial Assessment suffers in part from a lack of clarity regarding which version of the Guidelines is applicable to the Notification and why. For example, the Initial Assessment discusses the fact that many of the specific activities and decisions discussed in the Notification occurred well before the current Guidelines were adopted and faults Complainants for “fail[ing] to substantiate how the issues raised could find a basis in the 2000 Guidelines,” stating that the NL NCP could have rejected the Notification on this point alone.⁴ The following paragraph, however, states that “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.”⁵

The rule that the NL NCP articulated regarding the applicability of the new Guidelines was not known to Complainants prior to filing the Notification, nor is it clearly stated anywhere on the NL NCP's or the OECD's websites. Moreover, the NL NCP never gave Complainants an opportunity to explain either why the ongoing nature of harm makes the 2011 Guidelines applicable or that the abuses detailed in the Notification were equally a violation of the 2000 Guidelines.⁶

The NL NCP's failure to give Complainants an opportunity to clarify or amend their Notification to conform with the NL NCP's unarticulated standard is significant, as there is likely to be ongoing confusion for potential users of all NCPs regarding which version of the Guidelines to use when. The NL NCP's approach in this case resulted in a nontransparent and unpredictable process for Complainants. Absent clear, easily accessible clarification from the NCPs on this subject, NCPs should provide an opportunity for complainants to correct any notifications that may refer to an incorrect version of the Guidelines.

Moreover, in addition to the above stated problems regarding transparency and predictability of process, the NL NCP's Initial Assessment in this case misunderstands the relevant timeframe for the concerns raised in the Notification. The Notification focused on the 2011 Guidelines and the ongoing harm to the dacha community precisely because NCPs take a “future oriented

³ NL NCP, Initial Assessment: Notification and request for mediation to the Dutch and UK National Contact points for the OECD Guidelines for Multinational Enterprises, 1 (Mar. 20, 2013), *available at*:

http://www.oecdguidelines.nl/wp-content/uploads/nl_ncp_initial_assessment_stroitel_sakhalinenvironmentwatch_shell_200313.pdf, (hereinafter, “Initial Assessment”).

⁴ *Id.* at 3.

⁵ *Id.*

⁶ In contrast, the UK NCP gave Complainants an opportunity to explain these points prior to drafting its Initial Assessments regarding the UK-based financial institutions that were the subject of the same Notification.

approach.”⁷ The background information about the decisions made and actions taken prior to the adoption and implementation of the 2011 Guidelines served as a basis for explaining and substantiating the ongoing harm and violations that were at the root of the Notification.⁸ The violations and resulting harms described in the Notification continue to the present day, and show lack of action by Shell to bring the Project into compliance with the 2011 Guidelines.

Given the lengthy discussion preceding the release of the revised Guidelines in May 2011 and the delay in implementation, Shell should have known about the new Guidelines and had time to work with SEIC to bring the Project into compliance with those standards. Instead, there has been no change in the situation of the dacha owners, who continue to suffer the harms described in the Notification and who still have not been resettled or adequately compensated for those harms. Shell has, since the date on which the 2011 Guidelines went into effect, failed to “prevent or mitigate an adverse impact...linked to their operations...by a business relationship.”⁹

Nonetheless, the Initial Assessment entirely fails to acknowledge that the Notification raised questions of ongoing violations and harm. Instead, the Initial Assessment portrays the Notification as complaining about decisions made in the past, which neither Shell nor the NL NCP have any power to change. The NL NCP’s misrepresentation of the Notification leads to a poorly reasoned ultimate decision to reject the case.

Many NCPs will likely confront similar situations in which complainants assert ongoing violations and harm under the 2011 Guidelines, even though decisions leading to the harm may have been made prior to 2011. The NL NCP could have used this case to show leadership on this important issue, but instead refused to even acknowledge the ongoing nature of the harm described in the Notification. As a result, there is no further clarity for future complainants regarding similar situations.

III. The Initial Assessment applies an unduly heightened standard for “substantiating a claim” with regard to alleged violations of domestic and international laws, undermining the 2011 Guidelines’ human rights standards

In the section entitled “Are the issues raised material and substantiated,” the Initial Assessment at times applies an inappropriately rigorous interpretation of the word “substantiated.” Specifically, the Initial Assessment implies that substantiation requires that a claim first be adjudicated in court before the NCP will offer its good offices.¹⁰ In doing so, the Initial

⁷ See Initial Assessment at 3.

⁸ Complainants believed that all of the actions described in the Notification breached the requirement in the 2000 Guidelines that enterprises encourage their business partners “to apply principles of corporate conduct compatible with the Guidelines,” but did not explain the connection to the 2000 Guidelines because the focus of the Notification was the ongoing harm that violated the 2011 Guidelines. Complainants assumed that any Notification would need to include relevant background information to provide context and substantiation.

⁹ OECD Guidelines for Multinational Enterprises, II(A)(2) (May 25, 2011), *available at*: <http://www.oecd.org/daf/inv/mne/48004323.pdf>, (hereinafter, “2011 Guidelines”).

¹⁰ See Initial Assessment at 4 (“the notifying parties fail to substantiate [allegation b.] with a corresponding court decision”) and (“[w]ith 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.”).

Assessment appears to create a rule requiring substantiation of law – legalistic proof of the claims raised in a Notification – rather than substantiation of the facts underlying the claim.¹¹ The NL NCP appears to create a possible exception to this rule if victims describe obstacles, such as risk of reprisals, that prevented them from using their domestic legal system.¹² Such an exception, however, does not explain the creation of a heightened standard for assessing whether claims regarding alleged non-compliance with domestic and/or international law have been substantiated.

The Guidelines Commentary states that during the initial assessment phase, the NCP should determine “whether the issue is *bona fide* and relevant to the implementation of the Guidelines” (emphasis in original).¹³ The term “substantiated” must be read in the context of the overall purpose of the initial assessment phase. It should require that the factual allegations that form the basis of a Notification have been reasonably affirmed to have actually happened. This is consistent with the NL NCP’s own description of this factor, which it describes as assessing “which aspects of the OECD Guidelines have been/are being violated according to the reporting party, and to which [sic] extent the facts of the matter have been described in a clear and substantiated matter.”¹⁴ The requirement of substantiation would thereby prevent fabricated or frivolous claims from advancing in the NCP process, but would not require adjudication by a court.

Additionally, in focusing only on the fact that Complainants had not taken their claims to court, the Initial Assessment never addresses Shell’s failure to respect human rights. Multinational enterprises have a duty under the Guidelines to “respect human rights” and to address any adverse impact on these rights as a result of their activities.¹⁵ Shell, as a significant SEIC shareholder, has an obligation to respect internationally recognized human rights standards and to use its leverage to ensure that SEIC mitigates the adverse human rights impacts of its actions. SEIC’s actions in constructing and operating the Project have caused violations of human rights norms including: the right to the protection and enjoyment of property,¹⁶ the right to take part in cultural life,¹⁷ and the right to a healthy environment.¹⁸

In response to these grave allegations, the Initial Assessment states only that Complainants “fail to show that any Russian court has confirmed their claims, nor have they provided information

¹¹ We note that the NL NCP may have been creating this rule to address the fact that it may be difficult for NCPs, who presumably have limited knowledge of the laws of other countries, to apply the provisions of the Guidelines that reference violations of national law. That being said, we do not believe that NCPs need to definitively determine, during the initial assessment phase, whether such laws have in fact been breached.

¹² See Initial Assessment at 4. The NL NCP does not explain the scope of this exception. It is unclear, for example, what type of obstacles a complainant would have to describe.

¹³ 2011 Guidelines, Commentary on the Procedural Guidance for NCPs, *Initial Assessment*.

¹⁴ NL NCP, *Filing a specific instance (procedure)* at §4.2, available at <http://www.oecdguidelines.nl/ncp/filing-specific-instance/> (last visited Jun. 13, 2013) (hereinafter, “NL NCP procedures”).

¹⁵ 2011 Guidelines at II(A)(2); IV(1). See also Notification at 34-35.

¹⁶ See Universal Declaration of Human Rights, Article 17(2); UN International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and Protocol 1, Article 1(2); European Convention on Human Rights, Article 1.

¹⁷ See ICESCR, Article 15(1)(a).

¹⁸ Constitution of the Russian Federation, Article 42 (Dec. 12, 1993), available at

[http://www.venice.coe.int/docs/2003/CDL\(2003\)018--0e.pdf](http://www.venice.coe.int/docs/2003/CDL(2003)018--0e.pdf).

on possible efforts that were undertaken in this respect.”¹⁹ We do not dispute that no case has been brought or adjudicated in a Russian or international court regarding the specific allegations of human rights violations at issue in this Notification. But whether a case has been brought or adjudicated in Russian court is irrelevant to the claim that Shell failed to respect the human rights of the dacha owners.

The reasoning articulated by the NL NCP risks creating an unstated exhaustion standard, presenting a barrier to access to remedy – and in most cases an outright bar.²⁰ To the extent that the Netherlands relies on the NL NCP to meet its duties under the United Nations Guiding Principles on Business and Human Rights, this Initial Assessment is inconsistent with that obligation. Moreover, such an exhaustion requirement would undermine the 2011 Guidelines’ new section on human rights, as it would significantly curtail NCPs’ abilities to review specific instances alleging human rights violations.

IV. The Initial Assessment misunderstands the purpose of an NCP and the scope of the Guidelines

The Initial Assessment includes the following statement in the section regarding whether the issues raised in the Notification are material and substantiated: “with regard to the notifier’s [sic] 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.”²¹ This statement is baffling.

The Notification clearly asked that the NL NCP “[f]acilitate a resolution through mediation of the outstanding issues raised.”²² According to the Guidelines, one of the principle purposes of an NCP is to “[o]ffer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.”²³ It is therefore particularly difficult to understand why the Initial Assessment appears to find this request to have no basis in the Guidelines.

Additionally, it is unclear why the Initial Assessment requires that the Notification include substantiation of the requested next steps. Complainants fear that the implication is that the NL NCP was questioning their commitment to resolving the ongoing harm being experienced by the dacha community through a dialogue process. It seems particularly inappropriate that the NL NCP may have come to this conclusion without ever contacting Complainants to determine their good faith desire for dialogue. Had the NL NCP done so, it would have found them extremely eager to participate in such dialogue, with the hopes of resolving the longstanding issues confronting the dacha community.

¹⁹ Initial Assessment at 4.

²⁰ Many complainants file specific instances with NCPs because they do not have other viable options for addressing their concerns. Potential complainants with the ability to use a functional domestic court system would likely do so, rather than turn to an NCP, which can provide only limited relief in comparison to a court.

²¹ Initial Assessment at 4.

²² Complaint and Request for Mediation to the Dutch and UK National Contacts Points for the OECD Guidelines for Multinational Enterprises, 39 (Jul. 31, 2012), available at: <http://www.accountabilitycounsel.org/wp-content/uploads/2012/03/7.31.12-Complaint-Sakhalin-II-Dutch-UK-NCPs-Final.pdf>, (hereinafter, “Notification”).

²³ 2011 Guidelines, Procedural Guidance at I(C)(2)(d).

To the extent that the NL NCP may have been questioning whether Shell would be willing to engage in dialogue, and may have rejected the Notification in part on that basis, we believe that such factors should not have been considered. Whether a company is willing to engage in dialogue should never be a factor in whether a notification moves past the initial assessment phase. Instead, per the instructions in the Procedural Guidance, an NCP should determine whether a notification merits further consideration based on several factors, none of which include a company's willingness to engage.²⁴ If the notification does merit further consideration, the NCP should then make an offer of its "good offices."²⁵ If, at that point, a company indicates that it is unwilling to participate, the NCP should produce a final statement, which would include the identity of the parties, the issues involved, the date on which the notification was filed, any recommendations by the NCP and any observations by the NCP regarding why an agreement was not reached.²⁶

Further, it is our understanding that, in line with best practices for NCPs, the NL NCP views itself as a problem-solving entity. We are therefore disappointed that it was unwilling to take a problem-solving approach in this case. In particular, the NCP's insistence that dialogue would not contribute to the effectiveness of the Guidelines in large part because the Project was approved in 2003 demonstrates the NCP's failure to think creatively about how it can facilitate positive resolutions to Guidelines violations.²⁷

Moreover, this line of reasoning is particularly troubling because, followed to its logical conclusion, it suggests that NCPs should not accept cases regarding projects that have been previously approved by host country governments. Such reasoning directly contradicts the Guidelines, which explicitly acknowledge that the Guidelines "extend beyond the law in many cases."²⁸ Whether a project has host country approval, and when that approval took place, is therefore not relevant to the question of whether the Guidelines have been violated and whether an NCP can, as a problem-solving entity, contribute to a positive resolution of the issues raised in a notification.

V. The Initial Assessment misrepresents Shell's role in this case and fails to apply a fair and predictable standard in assessing all relevant issues

The Initial Assessment determines that Shell, as a shareholder of SEIC, lacks "the ability to exert substantial influence" over the issues raised in the Notification because of "the history of Shell's relation to Gazprom and the government of the Russian Federation and the present tensions between the companies involved."²⁹ The NL NCP provides no further explanation for this statement, which is inexplicable considering that the Notification made no suggestion of this history and the Initial Assessment specifies that the NL NCP did not consult with Shell before

²⁴ 2011 Guidelines, Commentary on the Implementation Procedures at ¶¶ 25-26.

²⁵ *Id.* at ¶ 28.

²⁶ *Id.* at ¶ 35. *See also* NL NCP procedures at §§4-8.

²⁷ *See* Initial Assessment at 5.

²⁸ 2011 Guidelines at I(2).

²⁹ Initial Assessment at 4.

drafting the statement.³⁰ Thus, the NL NCP makes a key determination without even explaining the source of its information.

In doing so, the NL NCP fails to apply a fair and predictable standard to all allegations relevant to the Notification. Specifically, while the Initial Assessment appropriately considers whether the issues raised in the Notification were material and substantiated, it does not apply the same standard when considering the extent of Shell's leverage over SEIC. It remains unclear whether Shell told the NL NCP that it lacked leverage due to its history and ongoing tensions with Gazprom, or whether the NL NCP based this statement on some undisclosed personal knowledge of the situation. Either way, such information should have been disclosed to the Complainants in a transparent manner, and Shell should have been required to substantiate any claims regarding its lack of leverage over SEIC. The NL NCP should have then analysed those claims under the same "material and substantiated" standard applied to the issues raised in the Notification. The Initial Assessment should have provided a detailed explanation of both Shell's claims and the NL NCP's analysis.

Moreover, even if Shell has little leverage over SEIC, it *still* has a duty under the Guidelines to seek to prevent or mitigate negative impacts linked to it through this relationship to the extent possible, and to demonstrate that it has done so.³¹ In this case, the Initial Assessment does not even discuss whether Shell, at any point in its long business relationship with SEIC, has attempted to use what leverage it has to prevent and mitigate the impacts to the dacha community. As discussed in the Notification, Complainants do not believe that Shell has ever complied with this provision of the 2011 Guidelines.³²

Additionally, at points, the Initial Assessment relies on Shell's shareholder status when rejecting allegations about decisions that were made when Shell was actually the *controlling* shareholder, as well as the lead Technical Advisor on the Project.³³ For example, the Initial Assessment states that it is "unclear" how Shell, as a shareholder, could have influenced SEIC regarding the contradictory messages SEIC sent to the communities.³⁴ The contradictory messages referred to, however, were sent between 2001 and 2004,³⁵ when Shell was a majority shareholder of SEIC. In fact, Shell was a majority shareholder and/or lead Technical Advisor when many of SEIC's relevant actions were carried out, and it therefore had a greater ability to encourage SEIC to modify its actions and a correspondingly greater responsibility to do so under the Guidelines.

³⁰ See *id.* at 1.

³¹ See 2011 Guidelines at II(A)(2).

³² Nor do Complainants believe that Shell ever attempted to encourage SEIC, as its business partner, "to apply principles of corporate conduct compatible with the Guidelines," as required by the 2000 Guidelines. Complainants would have been willing to engage in a mediated dialogue with Shell to ensure that it brought itself into compliance with these provisions.

³³ See SEIC 2007 Annual Review at 9 ("Royal Dutch Shell remains Sakhalin Energy's lead Technical Advisor. The agreements in place with Shell cover . . . advice and services in respect of the design, engineering, construction, commissioning, start up and operation of the LNG Facilities."). See also Sakhalin Energy, 2006 Annual Review, 9-10 (referencing Shell's past and ongoing significant contributions to "Sakhalin Energy management" and its role as a "Technical Advisor"), available at:

<http://www.sakhalinenergy.ru/en/documents/2006%20annual%20review%20eng.pdf>.

³⁴ Initial Assessment at 4.

³⁵ See Notification at 13.

The Initial Assessment should have acknowledged Shell's status as a majority shareholder and/or lead Technical Advisor at the time when many of SEIC's relevant actions were carried out. Additionally, it should have comprehensively addressed the Guidelines provision requiring that Shell prevent and mitigate harm linked to it through its business relationship with SEIC. Even if Shell may not currently have significant leverage over SEIC – a claim that, as noted above, has not been substantiated – the NL NCP should have facilitated a dialogue process to explore how Shell, as a significant shareholder, could best exert its influence over SEIC to remedy the harm to the dacha community and to bring the Project into compliance with the Guidelines.³⁶

In basing its determination regarding Shell's lack of sufficient leverage over SEIC on unsubstantiated claims from an unnamed source, the NL NCP failed to give appropriate consideration to the scope and significance of the standard set forth in the 2011 Guidelines regarding a company's responsibility for negative impacts linked to it through a business relationship. It is important going forward that the NL NCP, and other NCPs, more thoughtfully consider the obligations of shareholders under the 2011 Guidelines, as well as potential ways in which NCP-facilitated dialogue can help these shareholders explore how to best exert their leverage in business relationships.

VI. The Initial Assessment applies a problematic interpretation of “sustainable development”

The Initial Assessment states that because the Notification only alleged impacts on 37 dacha residents, it “remains unclear” how the project “might adversely impact the sustainable development of the wider Sakhalin region.”³⁷ However, as articulated in the Notification, the Project's impacts on the dacha communities themselves constitute a failure to uphold sustainable development.³⁸

Sustainable development is defined in the Guidelines as “[d]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁹ Here, the Project has caused, and continues to cause, environmental harm, which in turn has decreased local crop yields. SEIC has inadequately disclosed the Project's environmental impacts and related safety measures to the public and has failed to ensure public participation in the Project. Each of these failures constitutes a violation of the Guidelines' sustainable development requirement by interfering with the ability of present and future dacha owners to meet their basic needs.

³⁶ Complainants believe there are many things that Shell could have done to influence the behavior of SEIC regarding the dacha community. For example, Shell could have simply communicated with SEIC its disappointment with SEIC's behavior and its strong desire that the situation be resolved quickly. It is possible that such communication would have been effective, considering Shell's substantial holdings in SEIC. Or, more drastically, Shell could have threatened to divest from the Project if SEIC did not take immediate action to rectify the situation and to publicly announce that it was doing so because of ongoing harm being caused to the dacha community. It seems unlikely that SEIC would not have considered changing its stance with regard to the dacha community if Shell made a credible threat of that nature.

³⁷ Initial Assessment at 4.

³⁸ See Notification at 35-37.

³⁹ 2011 Guidelines, Commentary on General Principles at ¶ 3 & n.4 (defining the term sustainable development as found in the 1987 World Commission on Environment and Development (Brundtland Commission)).

The definition of sustainable development makes no exception for Projects that have unsustainable impacts on a small number of people and their future generations. We therefore do not understand why the number of dacha owners is relevant to the issue of sustainable development. This is yet another example of the potentially dangerous precedents set by the NL NCP in this case. There is no basis in the Guidelines for the NL NCP's narrow interpretation of sustainable development, and any further use of such a standard could potentially undermine the overarching goal of the Guidelines "to enhance the contribution to sustainable development made by multinational enterprises."⁴⁰

VII. Conclusion

Taken together, these issues represent a series of poorly reasoned decisions by the NL NCP that could, if treated as a precedent by the NL NCP or other NCPs, undermine several of the core principles and key advances of the 2011 Guidelines. In particular, these decisions touch on issues as important to the 2011 Guidelines as sustainable development, human rights and corporations' responsibility for negative impacts associated with them through their business relationships. Moreover, the Initial Assessment reveals problems with the transparency, predictability and fairness of the NL NCP's specific instance process.

⁴⁰ 2011 Guidelines, Preface at ¶ 1.