Ruling in Response to Stakeholder Complaint, somo and others v. C&A Nederland C.V.

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Introduction

The Complaints and Disputes Committee (cdc) for the Dutch Agreement on Sustainable Garments and Textile received a complaint from the Centre for Research on Multinational Corporations (Stichting Onderzoek Multinationale Ondernemingen, or somo) – the Netherlands, Clean Clothes Campaign (Stichting Schone Kleren Campagne, or skc) – the Netherlands, and z and four former workers (z) – Myanmar as stakeholders against C&A Nederland C.V.

somo, skc, and z are each admissible as a stakeholder within the meaning of Article 1.10 of the Procedural Rules, which stipulate that legal persons may be regarded as stakeholders if the interests they represent in their activities and objectives as stated in their articles of association have been damaged because of a breach of the AGT.1 This applies to both somo and skc. z is an organization in Myanmar. According to its mission statement, z was founded to protect worker rights. Although z has no formal legal personality, it can be considered an informal legal entity and is therefore admissible.2 z is also admissible as a mandatory within the meaning of Article 1.7 of the Procedural Rules because it has been mandated by four former employees of the production site identified in the case documents.3

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1 somo and others v. C&A Nederland C.V., 5.2.
2 Ibid., 5.2.
3 Ibid., 5.3.
C&A has signed the Declaration by Enterprises Concerning the Agreement on Sustainable Garments and Textiles (AGT Declaration by Enterprises). C&A works with a supplier in China (Supplier). The latter uses a production unit in Myanmar, to manufacture garments (Production Site).4

The complainants assert that C&A has failed in its human rights due diligence and International Responsible Business Conduct (IRBC). As a major buyer, C&A has a clear obligation to ensure that the rights of employees are respected. SOMO, SKC, and Z assert that employees’ rights at the Production Site have been disregarded and violated.5 They assert that C&A has failed to ensure that freedom of association and the right to free collective bargaining are respected at Production Site.6 C&A has also failed, they allege, to use its influence to correct management’s unlawful actions. C&A has contested this assertion, stating that IRBC is an essential component of its corporate policy.7 C&A holds that it has neither caused nor contributed to violations of workers’ rights and that it has taken appropriate measures for its position in the supply chain.8

In its interlocutory ruling, the CDC recommends that the parties first conduct a dialogue following the instructions of the CDC, and that C&A then reports the results of the dialogue to the CDC no later than six months after the date of this ruling.

Analysis

This ruling is a good example of the scope of the covenant’s obligations regarding responsibilities for the company’s supply chain. C&A has indicated that it has only a second-tier relationship with Production Site, that its contractual relationship is with Supplier, not with Production Site. Its influence on the Production Site’s management is therefore indirect. Supplier must comply with C&A’s Code of Conduct and ensure that the suppliers it engages for C&A comply with it as well. Supplier has received permission from C&A to engage Production Site. Before this, in 2016, C&A conducted an audit at Production Site. According to C&A, an anti-union climate was not apparent at the time. In

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4 Ibid., 2.2–2.3.
5 Ibid., 3.2.
6 Ibid., 3.3.
7 Ibid., 5.4.
8 Ibid., 5.9.
the summer of 2018, SKC informed C&A of union busting and the dismissal of several workers involved in the union.9

One of the basic principles of due diligence is that it does not involve any shifting of responsibility. Obligations of an enterprise are directly linked to the nature of the involvement of that enterprise in the violation. In a business relationship, each enterprise remains responsible for identifying and addressing adverse impacts. One example of such an impact is a lack of freedom of association. The responsibility for the impact remains with the entities that cause or contribute to it. However, when an enterprise cannot deal with the impact itself, it should try to persuade its business partner to prevent or mitigate it.10

Because the situation in Myanmar had changed, C&A had several investigations carried out in the summer of 2018 and afterward in response to the complainants’ reports. In those investigations, it failed to confirm a number of the complainants’ allegations, including union busting and a link between trade union activities and the dismissal of several former trade union leaders. C&A has ensured that, beyond training in social dialogue begun at Production Site, it has been promoting improvement in the Workplace Coordination Committee and its elections and is encouraging Production Site to sign the relevant guidelines.

A factor that complicates matters is the political situation in Myanmar. From 1962 to 2011, Myanmar was under a military dictatorship, one that has recently resurfaced. Since 2012, workers in Myanmar have been permitted to form a trade union. Many employers, however, are resisting and engaging in anti-union activities. Further, Myanmar’s labor laws do not provide adequate protection for trade union leaders, as the right of trade union leaders to organize is only protected once a trade union has been officially registered. Moreover, the registration procedure for trade unions is long and complicated. Trade unionization in Myanmar’s garment industry is therefore quite low.11

Conclusions

The CDC issued another ruling to a complaint by stakeholders, clarifying the various obligations arising from the Covenant Sustainable Garments and

9 Ibid., 5.18.
10 Ibid., 5.19.
11 Ibid., 2.5.
Textile In this case, the CDC refers to an earlier ruling, *Arisa v. C&A Nederland NV*,\(^{12}\) in which it explains the extent of a company’s disclosure obligations.

In this ruling, as in *Arisa v. C&A Nederland NV*, the nature of C&A’s involvement is explained in detail: the degree of involvement determines how far the obligations of a company go in terms of “protect and remedy.”

It becomes clear from the ruling that the CDC finds itself on a balance beam: on the one hand, the CDC approaches the business with caution and positivity; on the other hand, sometimes a reprimand or direction is needed. Because it chooses its words in its rulings with care, it does not deter companies from joining a covenant, yet the complainants are taken seriously.

What made issuing a ruling especially difficult for the CDC in this case is that the file was built between July 2018 and April 2020, and that the military coup occurred not long after, on February 1, 2021. Political unrest is prevalent, and protests are frequent across the country. They often end in violence, which has also resulted in deaths. One of the complainants, Z, has been allowed to act anonymously because of this tense situation.\(^{13}\) The CDC is realistic when it notes in response that “within this context, the question becomes whether the risks of negative impact of freedom of association can be limited or prevented.”\(^{14}\) Against this background, the choice for an intermediate solution – an interlocutory ruling – is understandable. The parties have been given six months for dialogue and must report back to the CDC. If they reach an agreement as a result, the case will be closed. If not, a final ruling will follow.

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\(^{12}\) Yvonne Erkens, “First Ruling of the Complaints Committee of the Dutch Agreement on Sustainable Garments and Textile in Response to a Stakeholder Complaint: Arisa vs C&A Nederland C.V.,” *International Labour Rights Case Law* 7 (2021): 367–371.

\(^{13}\) Ibid., note 3.

\(^{14}\) Ibid., 5.52–5.54.