

Complaints Committee of Dutch Agreement on Sustainable Garment and Textiles issues interim decision on union busting case at C&A supplier in Myanmar

Complainants SKC, SOMO and a Myanmar labour rights organisation give their balanced reaction

On 2 July 2020, SOMO, Clean Clothes campaign Netherlands (SKC) and a Myanmar labour rights organisation (MLRO¹) submitted a complaint to the Complaints and Disputes Committee (CDC) of the Dutch Agreement on Sustainable Garment and Textile (AGT) concerning C&A. Reason being C&A's substandard efforts to address ongoing union busting and labour rights violations at one of their supplier factories in Myanmar². C&A is a member of the AGT and therefore has an obligation to live up to the human rights due diligence obligations laid out in the AGT Agreement. The CDC accepted to take up the complaint. On 14 July 2021, the CDC published its interim decision. Below, complainants explicate their balanced reaction to the interim decision.

Prolonged unsuccessful dialogue with C&A prompted SKC, SOMO and MLRO to file a complaint

In July 2018, factory management started a union busting campaign against a newly founded factory-level union. Harassment and intimidation led to the dismissal of workers who played a key role in the union and led to a climate of fear among workers preventing them to voice their concerns or organise that is still prevalent.

From July 2018 onwards, SOMO, SKC and MLRO tried to encourage C&A to address the reported violations. When problems at the factory remained unresolved after two and a half years, SOMO, SKC and MLRO turned to the complaints committee of the AGT. We thought that such a complaint procedure could direct C&A to take its responsibility in ensuring freedom of association at its supplier and call upon the factory's management to reinstate the unfairly dismissed workers.

CDC's interim decision contains some interesting points

Complainants welcome that in its interim decision the CDC states that MLRO is a legitimate stakeholder that C&A must accept as such. This was one of the demands formulated by SOMO and SKC as part of the complaint. The CDC also acknowledges MLRO as a mandated party, meaning that MLRO is indeed entitled to act on behalf of the workers who signed proxy statements authorising MLRO to speak on their behalf. Complainants have consistently argued that it is an internationally established right of workers to choose their own representation and to request support of any NGO or any other group if they feel it is in their interest. In this case, the factory's workers sought the assistance and support of MLRO in defending their rights. The confirmation by the CDC of MLRO's role in this complaint procedure and beyond, is therefore highly important.

¹ For security reasons this organisation must remain anonymous, which is necessitated by the current situation in Myanmar since the military coup which is virulently lashing out against labour rights and human rights organisations.

² Again, in an effort to protect the workers of this factory, we have decided not to give the name of the factory here.

The complaints committee further concludes that:

- C&A should have made use of the knowledge and expertise of local and international stakeholders. The more because union busting is a well-known risk in Myanmar.
- C&A should have engaged with stakeholders to discuss risks and impact and should have agreed on steps to take to improve freedom of association at the disputed garment factory.
- C&A should have been more transparent.
- C&A should have organised a dialogue involving the workers and management amongst others.
- CDC also concludes that C&A should have increased its leverage through reaching out to involved stakeholders.

The CDC states that C&A should directly start sharing information on its actions regarding labour conditions at the disputed factory with stakeholders, including MLRO, SKC and SOMO, for instance about Corrective Action Plans.

Final decision needed

In this interim decision the CDC describes the current phase of the discussions between MLRO, SKC and SOMO, and C&A as a stalemate. To resolve this situation, the CDC now recommends all parties to engage anew in a dialogue, to start talking anew about how to improve freedom of association and labour rights at the disputed factory. MLRO, SKC and SOMO are open to dialogue with C&A, as with any company, but we think that the way forward proposed by the CDC defies logic.

It is more than three years since SOMO, SKC and MLRO reported union busting and labour rights violations at this garment factory to C&A. It is a year since the complaint was filed with the complaints committee. The factory's workers are still deprived of a union of their own choosing or a functioning Workers Coordination Committee through which they can raise concerns and try to obtain remedy for the labour rights violations in the factory. The union leaders and workers who lost their jobs are entitled to receive a final decision now, without further delay. Complainants and C&A have submitted ample materials to the CDC. Extending the procedure is not likely to bring to light other materials or views. The CDC's current interim decision offers C&A sufficient concrete leads to finally start resolving the problems at this supplier factory.

In the formal response to the CDC's interim decision, complainants have called upon the CDC to conclude the complaint procedure and publish a final decision – based on the current interim decision – without further delay. There is no excuse for C&A not to act right away, for example by sharing audit reports and Corrective Action Plans and involve us and other relevant stakeholder in upcoming conversations with the factory's management. SOMO, SKC and MLRO are the obvious choice for dialogue about lasting solutions for this case, possibly along with other relevant Myanmar and international stakeholders.

Military coup

Since a half year, the overall human rights situation in Myanmar has drastically deteriorated. This also affects this particular complaint procedure. Since the military coup of 1 February 2021, labour rights organisations in Myanmar are forced to operate very carefully and mostly under the radar. This limits their

possibilities to reach out to workers at the disputed factory and to openly engage with international brands and retailers. Other hurdles that need to be considered include the lack of secure communication channels for labour rights organisations.

Before starting up a dialogue again with C&A, SOMO, SKC and MLRO would like to have C&A's assurances that they will not leave this supplier factory, or Myanmar, without timely consultation of involved stakeholders.

CDC's interpretation of OECD Guidelines

In the CDC interim decision there are also a number of points that SOMO, SKC and MLRO disagree with. This in particular concerns the CDC's interpretation and application of the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct, the normative framework that the AGT Agreement is based upon. Instead of a structured, systematic analysis, the CDC conducts a partial, unstructured analysis on some of its own factors.

The OECD Guidelines, and particular the OECD Due Diligence Guidance, provide a clear framework for determining a company's relationship to adverse impacts – 'causing', 'contributing to' or 'directly linked to'. An enterprise's relationship to an adverse impact is not static and can shift over time, from 'directly linked' to 'contributing' for example, depending on the enterprise's own actions and the effectiveness of its due diligence. Despite acknowledging that this shift can take place, the CDC does not articulate a clear understanding of when or how this shift may take place or what specific criteria it considers to be relevant for this determination.

The OECD Guidance indicates that in order to be considered to be "contributing" to an adverse impact, the company's contribution must be "substantial", which the Guidance defines as "not trivial or minor". The OECD Guidance stipulate three factors should be used in the assessment³. Disagreeing with the CDC's interim decision, we relied explicitly on these three factors. In our view;

1. C&A's actions and omissions increased to a non-trivial degree the risk of the adverse impacts on labour rights at its supplier occurring and continuing.
2. The extent to which C&A could or should have known about the adverse impact, i.e. the degree of foreseeability, was high; and
3. The degree to which any of C&A's activities actually mitigated the adverse impact or decreased the risk of it occurring was low, because the impacts continued unmitigated and unremediated for years.

In the view of SOMO, SKC and MLRO, C&A's actions and omissions increased the risk of the adverse impacts on labour rights at this garment factory occurring and continuing. C&A could or should have known the adverse impact. Any efforts that C&A did employ to improve the situation were insufficient because the impacts continued unmitigated and unremediated for years. Based on this, SOMO, SKC and MLRO argue that C&A made a substantial contribution to adverse impacts at the factory.

³ OECD, 2018, OECD Due Diligence Guidance for Responsible Business Conduct, p. 71.

Though the complaints committee indicates that the measures taken by C&A to address the adverse impact may have not been effective, this conclusion does not appear to factor into the CDC's overall conclusion. The complaints committee does indicate that C&A must take additional measures "so that it does not end up in a situation of 'contributing to'", but since the complaints committee does not clearly define how it applies the factors it came up with or what it considers to be the threshold for "contribution" or "substantial", it remains unclear how or when this might happen or what C&A needs to do to make sure it does not happen.

Finally, the complaints committee concludes that "C&A has no responsibility with regard to remediation of adverse impacts to which it is directly linked". This is incorrect. While C&A is not expected to remedy the impacts itself, under the OECD Guidelines, companies have a responsibility to encourage their business partners to remedy impacts those business partners caused. At the very least, thus, C&A had a responsibility to use its leverage to encourage the factory's management to remedy the abuse and accept freedom of association at its factory. The complaints committee's assertion that C&A had no responsibility with regard to remedy is even more puzzling because the committee itself even identifies some examples of steps C&A could take as part of its responsibility to exercise leverage with regard to remedy.

Concluding, SOMO, SKC and MLRO welcome a number of substantive points in the CDC's interim decision, in particular the fact that MLRO is a legitimate stakeholder. On the other hand, the complainants are dissatisfied by the fact that the CDC did not issue a final decision based on all points that were brought to the CDC by the complainants. In particular, we are disappointed to see that the CDC diverges from the framework provided by the OECD, the normative framework that is supposed to form the very basis of the AGT's Agreement. We also disagree with the CDC qualifying C&A's relationship as 'linked to' and therefore choosing for the lightest responsibility scenario that the OECD provides.

In order for labour rights to prevail at C&A's disputed garment supplier, C&A is expected to urgently undertake steps, in line with the decision of the CDC. Only unless and until C&A takes such steps, it is too early for MRLO, SKC and SOMO to re-enter into a dialogue with C&A with regard to this specific case.