



Initial Assessment Odoh Family vs The Shell Petroleum Development Company of Nigeria Ltd.

Date: 10 February 2022

Notification to the Netherlands National Contact Point by the Odoh family, Nigeria concerning an alleged violation of the OECD Guidelines for Multinational Enterprises by The Shell Petroleum Development Company of Nigeria Ltd.

The objective of the initial assessment process under the Procedural Guidance is to determine whether the issues raised in the specific instance merit further examination. If so, the NCP will offer, or facilitate access to, consensual and non-adversarial procedures, such as dialogue, mediation or conciliation (e.g. ‘good offices’) to the relevant parties. As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a conciliation or mediation process.

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1. Executive summary

On May 6, 2021 the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP) received a notification of a specific instance from the Odoh family, Nigeria with regard to an alleged violation of the OECD Guidelines for Multinational Enterprises (hereinafter: the Guidelines) by The Shell Petroleum Development Company of Nigeria Ltd. (hereinafter: SPDC).

The issues raised concern 1) not acting in line with the local laws and regulations; 2) the acquisition of land and water without appropriate prior engagement with the owners, i.e. the Odoh family; 3) the denial of the right to own and use properties; and 4) oil spillage on land and water which is used for livelihood purposes. The issues raised in this submission relate to the OECD Guidelines Chapters I Concept and Principles para 1 and 2, II General Policies para A.2, IV Human Rights para 1, 2, 3 and 6, and VI Environment para 2B and 5.

Coordination with other NCPs

Since the parent company of SPDC moved on 31 December 2021 from the Netherlands to the UK, the Dutch NCP discussed with the British NCP which NCP should continue handling the notification. Both NCPs agreed that the Dutch NCP will continue handling the notification as the initial assessment took place at the time the parent company was still based in the Netherlands and handing the notification over would not benefit the effectiveness of the procedure.

Brief overview of the timeline

The notification was received 6 May 2021. The first virtual meeting with the notifying parties took place on September 10, 2021, the first virtual meeting with the enterprise took place on November 16, 2021. The draft initial assessment was shared with parties on November 26, 2021, parties could provide comments by December 13, 2021. The initial assessment was published on February 10, 2022.

Conclusion

The Dutch NCP concludes that the notification concerning SPDC merits further consideration based on the following criteria:

- the Dutch NCP is the right entity to assess the alleged violation.
- the notifying parties are concerned parties with a legitimate interest in the issues raised in the notification.
- the issues raised are material and prima facie substantiated.
- there is a link between the enterprise's activities and the issues raised in the specific instance.
- the consideration of this specific instance may contribute to the Guidelines' objectives and enhance their effectiveness.

The decision to accept this specific instance for further consideration is not based on conclusive research or fact-finding, nor does it represent a conclusion as to whether the enterprise observed the Guidelines or not.

2. Substance of the submission

This section provides an overview of the issues raised in the submission against the enterprise, how the issues relate to the Guidelines, and the enterprise's initial response.

The parties

The party submitting this specific instance is the Odoh family of Peretorugbene community, based in Bayelsa State, Nigeria.

The submission concerns SPDC, an oil company based in Nigeria and 100% subsidiary of the holding Royal Dutch Shell, which has its headquarters in the Netherlands.

The submission

According to the notifying party, SPDC is not acting in line with local laws and regulations, as it acquired land without engaging in consultation, negotiation and payment of compensation to the persons concerned, and it acquired a lake belonging to the Odoh family without due consultation, negotiation and payment of compensation.

In 1971 SPDC acquired an oil field which had a fishing lake that was owned by the Odoh family and was used for livelihood purposes. According to the notifying party, the lake was silted due to the canalization works of SPDC and eventually became unfit for livelihood purposes. The Odoh family notified SPDC of the situation, however, they claim it was not remediated.

In 1996, according to the notifying party, SPDC constructed a pipeline across the aforementioned lake, without regard for the local legislation or regulations, which led to distortion of the natural flow and purposes of the lake.

Furthermore, the notifying party states, that in 1997, an oil spill occurred which adversely affected the lake. SPDC did make attempts to compensate the Odoh family, however its offers were rejected as the family found they were inadequate and not made in accordance with the due process requirements, such as the conduct of an impact assessment. In 2001 a joint impact assessment was carried out, resulting in a joint investigation report (JIV), where, according to the notifying party, SPDC accepted responsibility for the siltation and the oil spill, however, nothing was done to remediate the situation.

To date, the Odoh family claims it has not accepted any compensation, because the company failed to comply with due process, offer the commensurate compensation and meet with the appropriately appointed representatives of the family. Furthermore, the family believes the company tried to instigate a crisis by negotiating with not appointed representatives. The family states that it raised the issues several times over the years with SPDC, yet no substantial action followed.

The notifying party expects the following from the company:

- A thorough clean-up of the affected oil spillage sites, to be confirmed by the Odoh family;
- Remediation of the affected areas of the community and its environments, and to restore the fishing rights of members of the Odoh family;
- A caution to the SPDC to effectively work on its equipment to avoid future oil spill;
- Monetary compensation for the damages suffered specifically to the Odoh family;
- Specifically and directly relate with the Odoh family on all subsequent transactions on the said area;
- Renegotiate the acquisition and occupation of the lake and land or pay damages for decades of continuous trespass.

Provisions of the Guidelines referred to in the specific instance

Chapter I. Concepts and Principles, paragraphs 1 and 2.

“1. The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the Guidelines by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the Guidelines may also be regulated by national law or international commitments.

2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.”

Chapter II. General Policies, paragraph A.2

“A.2. Enterprises should: Respect the internationally recognised human rights of those affected by their activities.”

Chapter IV. Human Rights, paragraphs 1, 2, 3 and 6

“1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.

6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

Chapter VI. Environment, paragraphs 2b and 5.

“2b. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

5. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.”

The enterprise’s initial response

Concerning the alleged acquisition of land belonging to the Odoh family without due consultation, negotiation, and compensation payment the enterprise states: *“SPDC (then known as Shell-BP Petroleum Development Company of Nigeria Limited) pursuant to applicable legal provisions and due negotiation acquired the parcel of land used as its Akarino 1 location (Akarino location) from Odoh family of Peretorugbene Community sometime in 1971. SPDC made a payment to the Odoh family of the sum of 1.000 English pounds for the Akarino location land on the 14th of September 1971. The receipt of payment clearly states they had no further claim whatsoever to make against Shell in view of this payment.”*

Regarding the alleged canalization of the lake resulting in siltation of the lake and loss of livelihood, the enterprise claims: *“SPDC carried out dredging activities on its Right of Way (ROW) within the Akarino location sometime in 1976. Following the said dredging activity on 19 Nov 1976 negotiation was carried out with the Odoh family for compensation payable to them by SPDC for damages resulting from the Silting of Akologbein lake. Similarly, another family of another community subsequently put up a claim for the same payment and in respect of the same lake. They were also invited for negotiation with SPDC after which they agreed to be paid the same amount of compensation as the Odoh family. Both families disputed who was entitled to the payment as a result of this, SPDC was forced to deposit the compensation money with the Accountant General of the then Bendel State for the benefit of the family who will be ultimately adjudged to be entitled to same.”*

Concerning the non-compensation for the 1997 oil spill and attempt to compensate without proper assessment, the enterprise responds: *“ No spill is acceptable to us and we work hard to prevent spills from our operations. SPDC follows due process in managing spills when they occur. Following an oil spill incident occurred on 17 January 1997, the community executives were authorized to negotiate and receive payment of Compensation from SPDC on behalf of the affected individuals, groups, and families. A creek with dimension 6,111sqm was lightly impacted. The executive committee of communities represented 255 claimants impacted. Based on the outcome of the negotiation, compensation of the value of 12.222 Nigerian naira was paid to all claimants. 254 claimants accepted and only 1 rejected compensation as inadequate.”*

Regarding the construction leading to disturbance of the natural flow of the lake and which was allegedly done without any regard for local legislation or regulations, the enterprise claims that there is no delivery line which causes the alleged disturbance and the line which is in said area is in accordance with local regulation.

With regard to the alleged joint investigation report (JIV) and alleged lack of remediation, the enterprise denies the validity of the report and underlines that irrespective of the cause of the spill, after every spill clean-up and remediation is commenced.

3. The proceedings of the NCP to date

Since the receipt of the submission on 6 May 2021 the NCP has carried out the following actions.

On 20 May 2021, the NCP has sent a confirmation of receipt to the notifying parties and has informed the enterprise of the notification. Both parties also received the NCP procedure.

On 10 September 2021, the first video meeting with the notifying parties took place. On 24 September the NCP received additional documents on its request.

On 16 November 2021, the first video meeting with the enterprise took place.

On 26 November 2021, the first draft initial assessment was sent to both parties for comments, to be provided by 13 December 2021. In the accompanying mail, the NCP offered its good offices and asked the parties to respond.

On 23 December 2021, the second draft initial assessment was sent to the notifying party and on 27 December to the enterprise for factual corrections, to be provided within 14 days.

On 7 Februari 2022, the final version was sent to both parties with a proposal for a date of publication.

On 10 February 2022, the initial assessment was published.

4. Initial assessment by the NCP

The NCP has decided to accept the submission. This decision has been taken following an assessment of the criteria below, as outlined in the commentary to the Procedural Guidance, para 25.

What is the identity of the submitter(s) and what is the nature of their interest in the submission?

The party submitting this specific instance is the Odoh family, based in the Bayelsa state, Nigeria. The notifying party claims that it owns and uses the land and water where SPDC's operations have taken place and that it therefore has been directly affected by the enterprise's operations. Based on the above, the Dutch NCP is of the opinion that the notifying parties have a legitimate interest in the issues raised in the notification.

Are the issues raised by the submitter(s) material and substantiated?

Based on the information received the NCP finds the issues raised material and substantiated, meaning they are plausible and related to the chapters I Concepts and Principles, para 1 and 2; II General Polices, para A.2; IV Human Rights V para 1, 2, 3 and 6; and VI Environment para 2a and 5 of the Guidelines.

Is there a link between the activities of the enterprise and the issues raised?

The notification concerns issues which, according to the notifying party, have taken place under the responsibility of SPDC. Therefore, the Dutch NCP believes there to be a link between the enterprise's activities and the issues raised in the specific instance.

Is the Dutch NCP the right entity to assess the alleged violation against SPDC?

The Guidelines note that "generally, issues will be dealt with by the NCP of the country in which the issues have arisen", which in this specific instance is Nigeria. Nigeria does not have an NCP. According to Royal Dutch Shell's 2020 annual report, SPDC was a wholly owned subsidiary of Royal Dutch Shell plc and Shell headquarters was based in the Netherlands at the time the initial assessment took place. Following Shell headquarters' move to the UK per 31 December 2021, the Dutch NCP discussed the further handling of the notification with the British NCP. Both NCPs concluded the Dutch NCP should continue the handling of the case, as the initial assessment took place at the time the headquarters were still based in the Netherlands and handing the notification over to the British NCP would not benefit the effectiveness of the procedure. Based on the above, the Dutch NCP is the right entity to assess the alleged violation.

What is the relevance of applicable legislation and procedures, including court rulings?

With regard to the issues raised, in principle, Nigerian law is applicable. The NCP notes that it will not assess whether domestic law requirements were met by the company or the notifying party. The Guidelines expect companies to act in line with domestic law. However, even if the company is compliant in terms of Nigerian domestic law, this is not equivalent to observing the Guidelines, as the Guidelines "extend beyond the law in many cases" (OECD Guidelines 2011, Chapter 1, para 2).

The NCP draws attention in this context to the ruling of the Court of Appeals ('Gerechtshof') of The Hague (Netherlands), which delivered its judgement on 29 January 2021 in the case of Four Nigerian Farmers and Milieudefensie vs Shell. In its judgement, the Court ruled that Shell's Nigerian subsidiary, SPDC, was responsible for several oil leaks and therefore had to compensate the complainants, and also ruled that the parent company, Royal Dutch Shell, had violated its duty of care.

How similar issues have been, or are being, treated in other domestic or international proceedings?
The NCP is not aware of any past or ongoing parallel proceedings.

Would considering this submission contribute to achieving the Guidelines' objectives and enhancing their effectiveness?

The Guidelines aim to ensure that the operations of "enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate" (Preface, para 1). The NCP is of the opinion that the consideration of the underlying submission can contribute to the fulfillment of SPDC's responsibilities towards the communities affected by their operations as well as to Royal Dutch Shell's responsibilities to exercise due diligence throughout its subsidiaries in accordance with the Guidelines' provisions.

The NCP believes it can facilitate a mediation process between the parties with the aim to resolve outstanding issues between the parties.

As the issues raised occur at various points in time the respective versions of the Guidelines apply.

5. Conclusion

The NCP concludes that this specific instance merits further consideration. The conclusions reached by the NCP in this initial assessment rest on the criteria laid out in the commentary to the Procedural Guidance, para 25 and are based on the information received from both parties. The NCP does not express an opinion on the correctness of the statements of the parties or the validity of the documentation provided by them.

In accordance with the Dutch NCP Specific Instance Procedure, the NCP has accepted this case for further examination and offered its good offices to the parties. The NCP asked both parties whether they are willing to engage in a mediation/conciliation process, with the aim of agreeing how the issues can be satisfactorily remediated.

6. Next steps

The notifying parties have accepted the NCP's good offices, the enterprise has not. The enterprise has expressed willingness to conduct a dialogue with the notifying parties within the framework of its operational grievance mechanism (Community Feedback Mechanism). As no dialogue will take place within the framework of the NCP procedure, the NCP will, in accordance with its procedure, examine the issues raised and may provide recommendations concerning the observance of the Guidelines. It will complete the procedure by issuing a final statement, which it will publish on its website.

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP, which is responsible for its own procedures and decisions, in accordance with the Procedural Guidance section of the Guidelines. In line with this, the Dutch NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on the [NCP Website](#)

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