

Ruling in the case of SOMO, SKC, Z - C&A Nederland C.V.¹

Ruling by the Complaints and Disputes Committee for the Dutch Agreement on Sustainable Garments and Textile (hereafter: "the CDC") within the meaning of Clause 1.3 of the Dutch Agreement on Sustainable Garments and Textile [*Convenant Duurzame Kleding en Textiel*] (hereafter: "AGT" or "the Agreement")

in the case of:

Stichting Onderzoek Multinationale Ondernemingen [*Centre for Research on Multinational Corporations*] (hereafter: SOMO) – the Netherlands, represented by Ms P. Overeem, Ms M. Theus, Mr J. Wilde-Ramsingh,
Stichting Schone Kleren Campagne [*Clean Clothes Campaign*] (hereafter: "SKC") – the Netherlands, represented by Ms Ch. De Bruin, Mr B. Joanknecht, Ms I. Kelly,
Z and four former workers (hereafter: "Z") – Myanmar, represented by Mr X and Ms Y²; complainants;

versus

C&A Nederland C.V. (hereafter: "C&A"), a limited partnership [*commanditaire vennootschap* (C.V.)] having its registered office in Amsterdam, the Netherlands, represented by Ms K. Köklü, Ms R. Feldmann, Mr A. Busquets Gonzalez and Mr M. Reidick;
respondent.

1. Proceedings

- 1.1 The CDC has taken cognisance of the following documents:
 - From SOMO, SKC and Z the statement of complaint dated 2 July 2020 with two appendices, additional information by e-mails dated 10 July 2020 with three attachments, dated 14 July 2020 with one attachment, dated 10 November 2020 with five attachments, dated 14 December 2020 with one attachment and the final statement by e-mail dated 19 January 2021 with one attachment.
 - C&A's statement of response dated 14 September 2020 with two appendices, supplementary documents by e-mails dated 19 November 2020 with one attachment, dated 8 December 2020 with one attachment and the final statement dated 18 January 2021 with one attachment.
- 1.2 On 23 July 2020, the CDC declared SOMO and SKC provisionally admissible in their complaint as a Stakeholder. On 3 August, Z was also declared provisionally

¹ This is a translation of the Ruling in Dutch. In case the Dutch and the English text can be interpreted differently, the Dutch text prevails.

² The name of the organisation Z and the names of the Z representatives are known to the litigants and the CDC, but in view of the tense situation in Myanmar since February 2021, they have been kept anonymous in this ruling.

admissible in the complaint as a Stakeholder and as a Mandatory of four former employees of the Production Site.

- 1.3 The hearing was held in three parts on 20 November 2020, 3 December 2020 and 15 January 2021. All parties appeared via an Internet connection. On the complainants' side, two former employees, an expert and two anonymous witnesses were present. The former employees and the expert made statements. The witnesses have been heard. In order to protect the privacy and interests of witnesses, the names of the witnesses were shared only with the CDC. Finally, all parties submitted a memorandum of oral arguments (SOMO, SKC and Z submitted a joint memorandum of oral arguments) and a final statement.

2. The facts

- 2.1 SOMO, SKC and Z are not parties to the Agreement.
- 2.2 C&A has signed the "Declaration by Enterprises Concerning the Agreement on Sustainable Garments and Textile" (hereafter: "AGT Declaration by Enterprises").
- 2.3 C&A works with a supplier in China (hereafter: "Supplier"). The latter uses a production unit in Myanmar, to manufacture garments (hereafter: "Production Site")³.
- 2.4 In the period from July 2018 up to and including April 2020, there was regular contact between SKC, Z and C&A about the alleged malpractices at the Production Site, among other things in connection with freedom of association. As of October 2019, SOMO joined up with SKC and Z. C&A conducted investigations into the complaints during the periods September 2018 up to and including January 2019 and August 2019 up to and including December 2019. In February 2020, C&A engaged MXX for further investigation. The parties failed to reach a solution⁴.
- 2.5 Myanmar had a fairly young democracy. From 1962 to 2011, Myanmar had a military dictatorship, which has recently returned. Since 2012, workers in Myanmar have had the opportunity to form a trade union. Many employers are resisting and engaging in anti-union activities. Myanmar's labour laws do not provide adequate protection for trade union leaders. The right of trade union leaders to organise is protected once a trade union has been officially registered. It is important to note that the registration procedure for trade unions is long and complicated. Trade unionisation in Myanmar's garment industry is very low.

3. Position of the complainants

- 3.1 The complainants outline the situation as follows:
In June 2018, the 1,000 workers at the Production Site protested against a new bonus system that reversed the effects of the newly increased statutory minimum wage. Employees feared that the performance bonus system would increase work pressure. The dispute was submitted to the local Township Conciliation Body (TCB). The TCB mediated and ruled in favour of the striking employees that Production Site's management must reinstate the existing bonus system. After the

³ The names of the supplier and the production unit are known to the litigants and CDC, but in view of the tense situation in Myanmar since February 2021, they have been kept anonymous in this ruling.

⁴ The name of the organisation MXX is known to the litigants and the CDC, but in view of the tense situation in Myanmar since February 2021, it has been kept anonymous in this ruling.

strike and the TCB's ruling, Production Site employees felt encouraged to form a trade union at factory level. It was founded by 40 employees in June 2018 and another 128 employees joined it. Employees hoped to find a solution to, among other things, the implementation of leave arrangements and health and safety problems. However, after its establishment, employees, union leaders and members were systematically harassed and intimidated. Management pressured employees to sign a revocation declaration stating that management was not obliged to implement the agreement reached on the bonus system. Within a short time, between June 2018 and October 2018, three union leaders and one activist were dismissed or pressured to resign. These four former employees are parties to the present proceedings. One year later, another activist was dismissed. Currently, there are no trade union activities, no social dialogue and fewer negotiations on working conditions and employment terms.

- 3.2 SOMO, SKC and Z assert that C&A has failed in its human rights due diligence and IRBC. As a major buyer, C&A has a clear obligation to ensure that the rights of employees are respected at Production Site. C&A has failed to use its influence to correct the unlawful actions of the management.
- 3.3 SOMO, SKC and Z are of the opinion that employees' rights at the Production Site have been disregarded and violated. They assert in the statement of complaint that C&A has failed to ensure that the freedom of association and the right to free collective bargaining are respected at Production Site. The witness and the former employees state that union leaders and members were systematically intimidated and pressurised in the form of detecting small errors of employees, taking photos without permission, shouting, swearing, demotion and forced dismissals.

The complainants state that a union leader was forced to sign her dismissal notice after she refused to sign the bonus scheme revocation declaration. She was summarily dismissed and had to sign for back pay when she was dismissed. This signed paper is being used against her as proof that she resigned voluntarily. In the final settlement, the union leader was assisted by a local employment agency. Another union leader was taken to a room and forced to sign her resignation. She was falsely accused of collecting union dues with a false statement. According to the management, she allegedly told employees that the money was for a charity project. In the room, she was told that she was not to leave until she had signed. Two other employees were bullied to such an extent that they could no longer cope with the pressure. Small mistakes made in the performance of their work were met with abuse and disciplinary action. Finally, a fifth union member was dismissed for allegedly having contact with Z. These dismissals have led to a culture of fear in the workplace. Employees want to form a trade union but fear for their jobs. The complainants expect C&A to assume its responsibility and exert its influence in solving and preventing the problems identified and expressed by the employees, including the establishment of a (factory) trade union with free elections and reinstatement of the dismissed and departed trade union leaders and members.

- 3.4 C&A has not made sufficient effort to address the violations reported. The purpose of due diligence is to address potential risks through prevention. According to the OECD guidelines, an enterprise that identifies a risk of contributing to an adverse effect should take the necessary steps to stop or prevent that contribution and use its influence to the best of its ability to reduce the remaining adverse effect. The complainants are of the opinion that by not taking sufficient action over the past two years, C&A has allowed the situation worsen. The degree of responsibility

of C&A has therefore increased from being linked to the damage to making a contribution to the damage.

- 3.5 C&A has also failed to take action in response to complaints from employees. Three workers, who were members of the newly formed union, had written a letter to the Department of Workplace and Labor Law inspection on 28 August 2018 expressing their concerns about various issues: reinstatement of the old bonus system, leave being refused, lack of a grievance mechanism, lack of tables forcing workers to sit on the floor during (lunch) breaks, lack of clean drinking water, dirty and faulty toilet facilities and lack of trained nurses and adequate medicine supply in the factory clinic. During MXX's investigation from 3 to 5 February 2020, these problems were again identified. It can therefore be concluded that C&A has failed to exert influence on the poor working conditions.
- 3.6 C&A has failed to ensure that a credible Workplace Coordination Committee (hereafter: "WCC") was set up. The management did not follow the formal procedures to establish a WCC. At the production site, the election of employees' representatives was entirely in the hands of the factory management. The employees were not given a chance to put themselves forward as candidates. Instead, the line supervisors chose an employee from each operational line. From this group of preselected employees, the management chose two representatives and appointed them to serve on the WCC. The WCC existed in name only and had no significant role. The re-elections that took place at the end of 2020 did not follow the formal procedures either. During the elections, photos were taken of employees. While counting the votes, an employee (witness) noticed that names on the ballot papers had been changed. The fact that the chosen employee is a relative of the supervisor confirms her statement, according to the witness.
- 3.7 C&A has impeded meaningful stakeholder engagement, as required by the UNGP/OECD guidelines, by not cooperating with Z. Four of the dismissed workers were represented by Z. Nevertheless, C&A refused to meet with Z. The reason given by C&A is its preference for legal entities such as trade unions. Z is not a trade union, but works very closely with trade unions. Z provides advice, assistance and education to employees in the garment industry in Myanmar. Registered trade union federations in Myanmar hardly represent trade unions at factory level. Accepting Z in its role as a labour rights organisation, which the employees themselves have decided is best placed to defend their interests, is, according to the complainants, part of the meaningful engagement of stakeholders.
- 3.8 C&A has denied and downplayed the seriousness and urgency of the violations of workers' rights at Production Site. C&A did not accept that Z accompanied the dismissed workers to the interviews conducted by C&A's Sustainable Supply Chain ("SSC") Team in 2019. The reports of the interviews show that they were flawed. For example, the intimidation of workers in connection with the establishment of the trade union at factory level was not discussed in any of the interviews. In addition, the employees interviewed gave similar answers to the questions asked. SKC and SOMO consider this as possible indications that these workers received instructions from the enterprise management.
- 3.9 The complainants are of the opinion that C&A did not act in a sufficiently transparent and timely manner. C&A has had its own SSC team conduct more than 20 audits and investigations. The complainants have not received any information about the structure and purpose of these audits. They were also denied access to the audit findings. C&A has failed to involve employee

representatives and relevant stakeholders in assessing the findings of the audits. They could have confirmed whether these findings were correct. In addition, C&A unilaterally decided to engage MXX for further investigation without the consent of SOMO, SKC and Z.

- 3.10 The complainants argue that the three most important points in this case are the violation of freedom of association, the failure to accept Z as a legitimate stakeholder and a trusted organisation, and the insufficient action taken by C&A over the past two years. According to the complainants, the attitude of C&A has made the situation worse. The degree of responsibility of C&A has therefore shifted from 'linked' to 'contribution'.
- 3.11 The complainants are requesting the CDC to uphold the complaint and to request C&A to ensure that freedom of association and collective bargaining are respected, to ensure that five named and dismissed union leaders and members are reinstated with full seniority and benefits, to recognise Z as an interlocutor, to actively oversee a fair and open re-election of the WCC, and to provide full disclosure to stakeholders including the factory trade union and WCC employee members about recent and future audits and investigations at Production Site.

4. C&A's Response

- 4.1 C&A outlines the situation as follows:
In July 2018, C&A received a report from SKC about malpractices allegedly taking place at the Production Site. C&A has taken these complaints very seriously and examined the situation at Production Site carefully. Initially, the investigation was carried out by C&A's experienced SSC team based in Myanmar. The local monitoring team supported the investigation with its knowledge of practical circumstances in Myanmar, local legislation and the social landscape. During the period from September 2018 up to and including September 2019 and the period from August 2019 up to and including December 2019, multiple investigations were conducted into the complaints. According to SKC and SOMO, the investigations and measures taken were insufficient. For this reason, in February 2020 C&A commissioned an independent organisation, MXX, to further investigate the dismissals, social dialogue and working conditions.
- 4.2 To summarise briefly, C&A states that it takes its responsibility very seriously. IRBC has been a structural component of its policy for more than ten years. It focuses on long-term partnerships and has its own Code of Conduct for the Supply of Merchandise (hereafter: "CoC"), which clearly indicates what it expects of suppliers. The CoC is part of every business relationship. C&A monitors and sanctions violations of the CoC.

C&A supports suppliers in meeting and implementing the requirements of the CoC. Through its Supplier Ownership Programme, it also encourages suppliers to develop the competencies needed to proactively address important issues.

C&A asserts that it complies with the due diligence obligations set out in the OECD guidelines and the AGT, and that its due diligence measures go beyond the minimum standards. It regularly carries out unannounced audits at production sites. If CoC requirements are not complied with, the supplier must draw up and implement a Corrective Action Plan (hereafter: "CAP"). C&A regularly checks implementation of the CAPs. Failure to adequately resolve shortcomings in complying with the CoC may lead to a lower assessment of a production unit. In the event of a serious or repeated breach of the CoC, sanctions may be imposed

regarding the contractual relationship, ranging from a reduction in the size of orders to temporary suspension or even termination of the business relationship. C&A is reluctant to carry out the latter because it strives for long-term partnerships with suppliers.

- 4.3 C&A claims that – contrary to what the complainants assert – it has conducted proper due diligence and taken appropriate measures at Production Site to ensure that trade union freedom and collective bargaining are respected. C&A has been working with its own office in Myanmar for four years now, because it recognised at an early stage the challenges with regard to freedom of association. Indeed, C&A has informed all suppliers in Myanmar that violations of freedom of association will be treated as a zero tolerance case. This shows that C&A takes its duties seriously and puts in a lot of effort compared with other competitors. By contrast, the complainants have not substantiated their allegations. The investigations by its SSC Team and MXX show no evidence that management undermined the factory trade union, nor that intimidation of employees, union leaders and union members actually took place. Many employees were interviewed during the investigations and none of them recognised these accusations. The results of the investigation show that there is no connection between the dismissal of employees and union activities. Two employees did not turn up for work for three days. Under Myanmar national law, if an employee is absent for three days without cause, the employment contract is terminated. The other employment contracts were terminated by mutual agreement, with the employees also receiving severance pay. C&A would also like to emphasise that in two of the cases, the local municipality and the court have investigated the matter. Quite apart from this, the reinstatement of the employees is legally problematic and goes beyond the powers and duties of C&A.
- 4.4 C&A indicates that the measures taken were appropriate. All the findings from investigations have been addressed. Together with the management, action plans have been drawn up for this purpose. Most of the shortcomings identified have been corrected over time. Neither in their written statements nor at the oral hearings did the complainants set out what C&A should have done differently, better or what more it should have done regarding the specific points highlighted in the complaint. This question is still unanswered. C&A emphasises that none of the circumstances mentioned by the complainants were caused by it, nor did it contribute to them in any other way. In addition, C&A has no direct contractual relationship with the Production Site.
- 4.5 C&A has never denied or downplayed the seriousness and urgency of the violations of workers' rights at Production Site. On the contrary, C&A has taken the allegations very seriously and investigated the situation at Production Site carefully. Since C&A became aware of the accusations and possible risks of violations at Production Site, the factory has been constantly monitored regarding that specific point by C&A and its SSC team. C&A also offers support in setting up the right processes through MXX. Shortcomings were found in the grievance mechanism. Action has been taken and improvements have been made. C&A does note, however, that it is not a simple process. Due diligence is a continuous learning and adjustment process – for all parties. The careful examination and implementation of measures takes some time. C&A is committed to continuous improvement of conditions and sustainability throughout the chain.
- 4.6 Following doubts expressed by SOMO and SKC about the investigations carried out by the SSC team, C&A commissioned MXX in early February 2020 to carry out an independent investigation as an independent party. MXX is one of the most

reputable workers' rights organisations in Myanmar. SKC and SOMO were not happy with this decision and to this day maintain that MXX is not independent. SOMO and SKC have not substantiated this accusation. During the hearing, SOMO said only that it was their subjective impression that MXX was not a pro-employee organisation. C&A emphasises that MXX is funded by the European Commission, which operates a very strict procedure. As MXX is one of the few reliable organisations in Myanmar, C&A has started to cooperate with them. Factory training courses on labour rights and social dialogue have been set up and provided. C&A emphasises that it has no influence over MXX's programmes, investigations or decisions.

- 4.7 C&A indicates that, together with MXX, it is supporting the management of Production Site to establish a WCC in accordance with statutory provisions. During the SSC team's investigation in September 2018, the WCC members were found to have been appointed by the management. That was a violation of Burmese law. C&A then asked the management to re-elect the WCC members by open and fair re-election. During a second visit, 11 days later, shortcomings were again identified and Production Site's management was asked to take corrective action. Finally, the re-elections were held in December 2020. MXX was present to guide and observe the election process. It was reported that the election had been conducted in a democratic manner. An additional audit by the SSC team in January 2021 confirmed this picture. MXX and C&A will now continue to monitor the implementation of the new WCC, as well as the regular Corrective Action Plan. C&A seeks to establish long-term business relationships with its suppliers, supporting them in complying with and implementing the standards set out in the CoC before sanctions are imposed on the manufacturing enterprise. The measures taken by C&A were therefore appropriate.
- 4.8 C&A claims that it has taken the alleged employee complaints seriously and has ensured that shortcomings have been corrected or will be corrected in good time. The complaints in the letter of 28 August 2018 were investigated by the SSC team in 2018 and later by MXX. MXX conducted interviews with employees and checked wage sheets and leave statements. According to these, all employees had received the statutory holidays. In September 2018, water filters appeared to have been installed. During measurements, the water quality was adequate. The toilets were clean. Some shortcomings were discovered, which included the grievance mechanism. To this end, improvements were proposed and an action plan was launched. The SSC team and MXX are monitoring the implementation of the action plan.
- 4.9 C&A was aware of the strike that took place at Production Site on 4 June 2018 and the agreement that was signed on 5 June 2018 after mediation by the TCB. Since the strike had gone peacefully and was resolved, C&A saw no need for further action. The SSC team's audits and MXX's evaluation report showed that the new bonus system did not have a negative impact on the statutory minimum wage. The new bonus system meant that all salaries were at or above the minimum wage.
- 4.10 C&A has indicated that it respects the involvement of Z, but does not see it as a partner with whom it can reach binding agreements; Z is not a trade union and is therefore not entitled to represent employees in trade union matters, which is why C&A believes that no effective results can be achieved. C&A does not wish to discuss individual cases with Z, but rather the situations of workers in general in Myanmar. It is also willing to discuss with Z what solutions would be possible to improve the workers' situation. For negotiations, C&A prefers to use recognised

legal entities such as trade unions, because the results of such negotiations (such as binding agreements) are more effective in securing improvements.

- 4.11 C&A provided timely information and acted in a transparent manner. After the allegations became known, C&A sent its SSC team on site to investigate the matter. As the complainants were not satisfied with the investigation, C&A then engaged MXX for further investigation. The findings of the investigations by the SSC team and MXX were openly shared with SKC via e-mail and in face-to-face meetings.

If C&A has imposed a restriction on Z with regard to transparency, this is not reprehensible in its opinion. C&A believes that it should be free to choose the organisation with which it wishes to cooperate. C&A should also be allowed to decide for itself what internal information it shares and with whom, especially when it comes to non-AGT parties like the complainants.

- 4.12 C&A is considering taking further measures to improve its human rights efforts. It emphasises that it considers that no duty of care or other obligation has been breached. The additional measures are being taken in the context of improving C&A's due diligence performance. One of the measures is to start negotiations with its supplier and the production site to stress the importance of Production Site signing the FFOA guideline.

5. Assessment

Based on the written information exchanged and the explanations given at the hearing, the CDC arrives at the following decision.

A. Admissibility

- 5.1 The complaint was submitted by SOMO, SKC and Z, each as a Stakeholder, and by Z also as a mandatory of four former employees of the Production Site.
- 5.2 SOMO, SKC and Z are each admissible as a Stakeholder within the meaning of Article 1.10 of the Procedural Rules. The CDC bases this opinion on the following considerations:

Legal persons may also be regarded as a Stakeholder within the meaning of Article 1.10 of the CDC Procedural Rules if the specific interests which they represent according to their activities and objectives in accordance with their articles of association have been damaged as a result of a breach of the AGT.

SOMO and SKC are foundations under Dutch law. According to its articles, the core mission of SOMO is to strive for sustainable economic, social and ecological development, to improve the position of workers, to offer a counterweight to multinational corporations and to combat exploitation, poverty and inequality worldwide on a long-term basis. According to its articles, SKC's aim is to contribute to the improvement of working conditions in the garment industry worldwide, particularly in low-wage countries.

Z is an organisation in Myanmar. According to its mission statement, Z was founded to protect work rights. Although Z has no formal legal personality, it can be considered an informal legal entity in view of the following aspects: 1) there is continuity, Z has been in existence for quite some time and in this time has carried out various actions on the theme of its mission statement; 2) there is an organisational structure, it works with a coordinator, staff and volunteers; 3) it presents itself as an organisation to the outside world, for example it has an office, a mission statement, website and a Facebook page; 4) it is recognised by other

organisations and institutions that are reputable organisations including the Dutch Trade Union Confederation (FNV), which is one of the signatories of the AGT, and the Solidarity Center in the USA.

- 5.3 Z is also admissible as a mandatory within the meaning of Article 1.7 of the Procedural Rules. It has been mandated by four former employees of Production Site named in the case documents. The CDC has obtained the proxy statements of these four people. Two of them attended the hearing.

B. Human rights, due diligence and IRBC

- 5.4 The complainants assert that C&A has failed in its human rights due diligence and IRBC. C&A has contested this, stating that IRBC is an essential component of its corporate policy. The CDC finds as follows on this point.
- 5.5 Due diligence in International Responsible Business Conduct (IRBC) refers to the process by which enterprises identify, prevent and mitigate the actual and potential adverse impacts of their actions, and by which they can be held accountable for their approach to those impacts as an integral part of their decision-making process and risk management systems. In implementing the due diligence, the emphasis is not on the risks that the enterprise is facing but rather on the rights of other stakeholders, such as employees and local communities, and the potential and actual risk of adverse impacts on them.
- 5.6 Under the UNGPs and OECD guidelines, due diligence is not a one-off event, but rather – as part of the business operations – an ongoing activity. In summary, this process comprises the following six steps: formulating human rights policy in the enterprise, analysis and determining precautionary measures, embedding in the enterprise, monitoring progress and results, remediation and remedy, communication. The nature and scope of due diligence may depend on factors such as the size of the enterprise, the context of its operations, business model, position in the supply chain and the nature of its products or services.
- 5.7 In so far as the complainants intended to argue that C&A was failing to adequately fulfil its due diligence obligations in all its supply chains and therefore not only in respect of Production Site, they did not specify and substantiate this sufficiently, and the complaint is unfounded. C&A's policy is not generally inadequate. This is in light of what C&A has argued about its general human rights policy and its actions with regard to suppliers, including the CoC, the establishment of its own monitoring facilities at country level and its (justified) efforts to monitor the human rights situation at further links in the chain, which are not its direct suppliers, and to take measures with regard to them too. Also in light of the fact that C&A has engaged independent third parties to carry out investigations. In this context, it is important that the due diligence obligations in the Agreement, compared with the general OECD due diligence, are made more concrete, but not so specifically as to indicate what exactly can be expected in practice from an affiliated enterprise with regard to specific problems. Affiliated enterprises therefore have some freedom, within the frameworks set and monitored by the Agreement and the secretariat, in how they shape their policies and measures with regard to practical cases and specific problems. The CDC assesses whether an affiliated enterprise has complied with the Agreement, also in view of this freedom. Good practices developed within the framework of the Agreement and the guidelines drawn up by the secretariat, on the basis of which it assesses affiliated parties, play an important role in this assessment.

- 5.8 In so far as the complainants intended to argue that C&A had failed to adequately fulfil its due diligence obligations in respect of some of the issues specifically identified in this complaint, this is dealt with below.

C. Nature of the involvement

- 5.9 The complainants assert that C&A's involvement in Production Site's lack of freedom of association has shifted from 'linked' to 'contribution'. C&A asserts that it has neither caused nor contributed to violations of workers' rights and that it has taken appropriate measures in view of its position in the supply chain. The CDC finds as follows on this point.

General

- 5.10 One of the basic principles of due diligence is that due diligence does not involve a shifting of responsibility. In a business relationship, each enterprise remains responsible for identifying and addressing adverse impacts. An example of an adverse impact is the 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 relation to prevent or mitigate the adverse impact⁵.

Nature of involvement

- 5.11 The OECD Due Diligence Guidance for RBC identifies as step two in the due diligence process: "Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services".
- 5.12 Part of this step is to assess the enterprise's involvement in the identified actual or potential adverse impacts in order to determine the correct approach. It should be specifically assessed whether the enterprise caused (or would cause) the adverse impact; or contributed (or would contribute) to the adverse impact; or whether the adverse impact is (or would be) directly linked to its operations, products or services by a business relationship. These terms are understood to have the following meaning:

Cause: An enterprise "causes" an adverse impact when the activities in themselves are sufficient to lead to the adverse impact.

Contribute: An enterprise "contributes to" an adverse impact if its activities in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivise another entity to cause an adverse impact. Contribution must be substantial, meaning that it does not include minor or trivial contributions.

Assessing the substantial nature of the contribution and understanding when the actions of the enterprise may have caused, facilitated or incentivised another entity to cause an adverse impact may involve the consideration of multiple factors. The following factors can be taken into account:

- The extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.
- The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.
- The degree to which any of an enterprise's activities actually mitigated the

⁵ OECD Due Diligence Guidance for RBC, section Characteristics of Due Diligence

adverse impact or decreased the risk of the impact occurring. The mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not necessarily represent a relationship of contribution. The activity in question should substantially increase the risk of adverse impact.

Directly linked: "Linkage" is defined by the relationship between the adverse impact and the enterprise's products, services or operations through another entity (i.e. business relationship). "Directly linked" is not defined by direct contractual relationships, for example "direct sourcing", but can also exist outside of it, for example with actors further down the supply chain.

Expectations

5.13 The relationship between an enterprise and an adverse impact (e.g. whether the enterprise caused or contributed to it or whether there is a direct link through a business relationship) is important in determining how the enterprise should respond to the adverse impact and whether it is responsible for arranging or cooperating in its recovery. The UNGPs stipulate the following about the level of involvement in the adverse impact and related expectations⁶:

Cause: If an enterprise is at risk of *causing* an adverse impact, then the enterprise should mitigate/prevent the risk of the impact and, if the impact occurs, provide remediation and/or remedy for the violation.

Contribute: If an enterprise is at risk of contributing to an adverse impact, the enterprise should mitigate/prevent the risk of the impact and use its influence (leverage) on other responsible parties to mitigate/prevent the impact and, if necessary, increase its leverage and, if the impact occurs, contribute to providing remediation and/or remedy for the violation.

Directly linked: If an enterprise is at risk of being linked to an adverse impact through its activities, products or services (*directly linked*), the enterprise should use its influence (leverage) on other responsible parties to try to mitigate/prevent the impact and, if necessary, increase its leverage. The enterprise is not responsible for remediation and/or remedy, but the enterprise can opt to assume that responsibility.

Not static

5.14 The relationship between an enterprise and adverse impacts is not static⁷. This may change, for example, as a situation evolves and depends on the severity, scale and irreversibility of the human rights impact and on the extent to which and the effectiveness with which identified risks and adverse impacts are addressed through due diligence and other measures aimed at mitigating and further preventing these impacts.

Application in this case

5.15 The complainants argue that C&A's inability to resolve the damage in more than two years, since the case was first reported to them in July 2018, has exacerbated the case and increased C&A's level of responsibility in this case from a link to the damage to contributing to the damage⁸. The complainants point in particular to

⁶ Appendix 6 AGT

⁷ OECD Due Diligence Guidance for RBC Q29 p. 71.

⁸ Memorandum of oral arguments 3 December 2020 p. 7.

C&A's refusal to identify the problem, C&A's lack of action to address the risk, its refusal to cooperate meaningfully with Z and its lack of communication regarding its due diligence. The complainants also point to C&A's refusal to recognise Z as a legitimate representative of some workers, which has encouraged Production site to do the same and not to allow Z to assist in organising trade unions and collective bargaining.

- 5.16 As indicated above under *General*, the relationship between an enterprise and adverse impacts can change. In assessing whether the relationship has changed in a particular case, the CDC considers that the following factors are important: the extent to which the enterprise has identified the risks, the measures taken to address the risks and their consequences and the effects of those measures, the period of time that the enterprise has been addressing the risks, the severity, scale and irreversibility of the adverse impacts, the position of the enterprise in the supply chain and the extent to which influence and leverage are possible.
- 5.17 As stated above under *General*, for the involvement of an enterprise to qualify as "contributing to", there must be activities of the enterprise that cause, facilitate or incentivise another entity to cause an adverse impact. The contribution must be substantial. This has not become evident to the CDC in this case. The points made by the complainants in this regard are insufficient, also in view of the defence put forward by C&A.
- 5.18 C&A has indicated that it has a 'second tier' relationship with Production Site. It has no contractual relationship with Production site. Its influence on the Production Site's management is only indirect. C&A has a contractual relationship with Supplier. This supplier has to comply with the CoC and also has to ensure that the suppliers it engages for C&A comply with it. Supplier engages Production Site. It has received permission to do so from C&A. Prior to this, C&A conducted an audit at Production Site in 2016. According to C&A, an anti-union climate was not apparent at the time.

In the summer of 2018, SKC informed C&A of union busting and the dismissal of several workers involved in the union.

C&A has indicated that it is aware that freedom of association is an issue in Myanmar. It had several investigations carried out as a result of the complainants' reports in the summer of 2018 and later. First by its own Myanmar-based SSC team and in 2020 by MXX. In those investigations, it failed to receive confirmation of 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 training in social dialogue was started at Production Site, it has been working to promote improvement in the WCC and its elections, and it is encouraging Production Site to sign the FFOA guideline. C&A states that it respects and accepts Z as an interlocutor, but not as a partner to binding agreements.

- 5.19 Also in the view of the complainants, C&A's level of responsibility in mid-2018 was 'directly linked'. The CDC concludes that with regard to the actual events that occurred during this period, such as the change in the bonus scheme, the alleged union busting and the (voluntary or involuntary) dismissal of several employees, C&A was therefore under no obligation to remediate or redress the violation and neither could such an obligation arise at a later point in time.

The issue of whether C&A's level of responsibility has changed therefore only arises in the assessment of ongoing measures, such as the promotion of a trade

union-friendly climate and of a correctly elected and functioning WCC.

- 5.20 The CDC is of the opinion that C&A, given its knowledge and the foreseeability of the impact, must continue to make efforts to get Production Site to improve the situation (which unsatisfactory situation it had also established itself or had established by MXX). If, at any time, it concludes that no improvement is taking place, it must take further measures, including (responsible) termination of the relationship as an ultimatum remedium if previous measures prove ineffective. In the absence of sufficient effort and/or the taking of more effective measures if previous measures have not led to the desired result, the responsibility of C&A may change to 'contributing to'. It is also important to note that the greater the severity, scale and irreversibility of the human rights impact, the shorter the period within which improvement must occur and, if this is not possible, responsible termination of the relationship must be considered. If that does not take place, the responsibility for the impact may change.

In view of the above and the measures taken by C&A, however, it has not yet become evident that C&A is already in a situation of 'contributing to'. However, the CDC notes that the issues raised in the complaint have been occurring at Production Site since mid-2018 and had not yet been resolved or resolved in full at the time the complaint was being handled. In view of the above, it is therefore important for C&A to carefully assess the effectiveness of the measures it has taken, so that it does not end up in a situation of 'contributing to'.

- 5.21 The CDC therefore concludes that C&A's involvement to date must be qualified as a directly linked relationship.

This means that, when dealing with adverse impacts, C&A can be expected to use its influence (leverage) on other responsible parties to try to mitigate/prevent the impact and, if necessary, increase its leverage. It could use its influence to urge Production Site to create a positive climate for freedom of association and therefore create the preconditions for forming or joining a trade union. Forming or joining a trade union would then be at the discretion of the employees.

In view of the above, C&A has *no* responsibility for remediation and/or remedy, for example with regard to the employment relationships of the four ex-employees named in the proceedings, if it should be the case that their dismissal is connected with their trade union activities. For the sake of completeness, it is also considered that, apart from the fact that C&A has denied that these employees were dismissed because of their activities in the context of trade union freedom and has also substantiated this with the MXX report, such a restoration of employment relationships by C&A is also difficult in practical terms because C&A does not have a contractual relationship with Production Site, the employment contracts were at the time signed between the employees and Production Site and their dismissals were in accordance with Myanmar law, and the dismissals were also upheld by local courts or an arbitration board. C&A could, however, use its influence and urge Production Site to take back the four ex-employees, if necessary with the threat of termination of sourcing from Production Site, if it has concluded that the dismissals are indeed linked to the activities of these employees for trade union freedom.

In view of the above, C&A is therefore subject to a best-efforts obligation to exercise leverage. The issue of whether C&A used its influence (leverage) on other

responsible parties to a sufficient extent to try to mitigate/prevent the impact and, if necessary, increase its leverage will be addressed later in this ruling.

D. Stakeholder engagement

5.22 The complainants assert that C&A wrongly refuses to recognise and speak to Z as a legitimate stakeholder. C&A states that it respects Z as an awareness-raising organisation that helps employees to know their rights better, but that Z is not a trade union and is therefore not authorised to represent (individual) employees in trade union matters.

Furthermore, the complainants claim that C&A acts in isolation without informing or involving the complainants in a timely and transparent manner. Contacts between the complainants and C&A have not led to a meaningful dialogue. C&A states that it is transparent and has shared a lot of information. The CDC finds as follows on this point.

General

5.23 Due diligence is characterised by stakeholder engagement, with stakeholders being persons or groups who have interests that could be affected by an enterprise's activities. Stakeholder engagement is characterised by two-way communication. It requires the timely sharing of the relevant information needed for stakeholders to make informed decisions in a format that they can understand and access. Engagement is only meaningful if all parties show good will. Meaningful engagement with relevant stakeholders is important throughout the due diligence process. In particular, when the enterprise may cause or contribute to, or has caused or contributed to an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important. For example, depending on the nature of the adverse impact being addressed, this could include participating in and sharing results of on-site assessments, developing risk mitigation measures, ongoing monitoring and designing of grievance mechanisms⁹.

5.24 More specifically, stakeholders should be involved – meaning that they should actively participate in their design and implementation – in the following due diligence processes:

- On-site supplier assessments.
- Development of corrective action plans.
- Verification, validation and monitoring of impacts.
- Design of operational-level grievance mechanisms.

In practice, this means that workers and trade unions and representative organisations of the workers' own choosing should be involved in the above due diligence processes for labour risks.

Enterprises are also encouraged to consult stakeholders – meaning that their input and feedback is requested – during the scoping of risks in the enterprise's operations and its supply chain.

Practically, there are a number of ways in which enterprises may engage with

⁹ OECD Due Diligence Guidance for RBC under Characteristics of due diligence.

stakeholders. Together enterprises and stakeholders are encouraged to identify methods for engagement that are effective for them¹⁰.

- 5.25 Impacted and potentially impacted stakeholders and rightsholders may include, for example, employees and (local) trade unions. Relevant stakeholders for meaningful engagement may also include NGOs, local civil-society organisations, national human rights institutions, local organisations and human rights defenders¹¹.

In the garment and footwear sector an enterprise's stakeholders likely include

- the enterprise's own employees, other workers performing work on behalf of the enterprise and trade unions and representative organisations of the workers' own choosing
- the workers and trade unions and representative organisations of the workers' own choosing in the enterprise's supply chain that are affected by the enterprise's activities
- the enterprise's suppliers
- community members that are affected by the enterprise's operations
- governments of the jurisdictions that the enterprise operates in or sources from¹².

Application in this case

Position of Z

- 5.26 Z is a local NGO that provides training, advice and support to workers in raising awareness and protecting workers' rights and in establishing a trade union. Z is not a trade union itself but works closely with trade unions. It is recognised by and cooperates with various national and international organisations. Z supported the start-up of a factory trade union at Production Site, still wants to do so, and is familiar with the local situation. Z is assisting four former trade union leaders/activists at their request.

- 5.27 In the opinion of the CDC, Z qualifies as a relevant stakeholder in this case, taking the following into account:

It can act as a representative for the four former employees who have authorised Z. Employees are free to choose by whom they wish to be represented.

Z, as a local NGO in its own right, is a relevant stakeholder as it informs workers about their rights, including the right to freedom of association, provides training for such, and in 2018 supported workers at Production Site in forming a trade union and continues to engage with workers at Production Site to support them in bringing about this right.

To the extent that complainants intend to argue that Z acts as a representative of all Production Site employees, the representativeness of Z in this case has not yet been sufficiently established. There is no evidence that all/a majority of Production Site employees have directly agreed to this, for example through the granting of a

¹⁰ OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, p. 27-28.

¹¹ OECD Due Diligence Guidance for RBC under Q8.

¹² OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, p. 27-28.

mandate. Nor has it emerged that Z was solicited through workers' representatives within the meaning of ILO conventions¹³.

- 5.28 The above means that Z must be regarded by C&A as a legitimate stakeholder in the discussions on freedom of association and workers' rights, and that negotiations may also be entered into with Z where appropriate. Z is authorised to make binding agreements in respect of the four former employees it represents. No binding collective agreements can be made with Z for all Production Site employees. In consultations and negotiations with Z on freedom of association and workers' rights, however, agreements could be made about the way in which a possible result of the negotiations could be laid down in a binding manner, for example by agreeing that this would be done through a nationally recognised trade union or by seeking, together with Z, membership of a recognised trade union.

In this context, the complainants also indicated that they recognise the special position of trade unions in collective bargaining on behalf of workers, but pointed out that in this case Z was not requested to conduct collective bargaining on working conditions, but to help set up a trade union¹⁴.

Sharing information

- 5.29 The parties are divided on the issue of whether sufficient information has been shared and whether C&A has been sufficiently transparent. The complainants believe that they should have been given more information. C&A asserts that it has shared a lot of information and that it should be allowed to judge for itself what internal information it shares and with whom, especially when it comes to non-AGT parties like the complainants. The CDC first provides a general framework in this regard.
- 5.30 With regard to the question of what information companies are expected to share, the OECD guidelines state that enterprises should ensure that timely and accurate information on all relevant aspects of their activities, structure, financial situation, results, ownership and control is disclosed. Furthermore, enterprises are encouraged to provide additional information which could include information on internal audits, risk management and legal compliance systems¹⁵.

In the case of significant adverse impacts caused by business relationships, sharing the results of investigations or audits relating to working conditions, human rights or the environment with rightsholders who are or may be affected may be an appropriate form of communication. The information should, on the one hand, be sufficient to demonstrate the adequacy of the enterprise's response to adverse human rights impacts and, on the other hand, not pose risks to affected

¹³ In the OECD Due Diligence Guidance for RBC, the terms employee representatives, trade unions and representative organisations are used in accordance with international labour standards: ILO Conventions No 87 (Freedom of Association and Protection of the Right to Organise), No 98 (Right to Organise and Collective Bargaining) and No 135 (Workers' Representatives).

ILO Convention 135, Article 3 reads:

For the purposes of this Convention, the term "workers' representatives" means persons recognised as such by national law or practice, whether they are:

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or

(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

¹⁴ Memorandum of oral arguments 3 December 2020.

¹⁵ OECD Guidelines for Multinational Enterprises (2011), Article 11

stakeholders, staff or legitimate demands for commercial confidentiality¹⁶.

- 5.31 The CDC finds as follows in this context. The starting point is that an enterprise affiliated to the Agreement is responsible for conducting a proper due diligence. It is therefore, in principle, up to the enterprise to decide how it wants to organise this due diligence and what input from others it will include. With regard to the way in which this is given form and content, the enterprise must consider whether this is compliant with the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. It is generally recommended that it seeks input from relevant stakeholders for audits in the general/generic structure of its due diligence process. It should also involve relevant stakeholders in audits. The relevant stakeholders in such cases are those who are sufficiently directly involved with the production site where the audit is carried out. Therefore, an organisation that represents the interests of stakeholders worldwide or in parts of the world cannot demand to be involved in all audits carried out by an enterprise worldwide or in a certain part of the world. However, if it is directly concerned with the interests of stakeholders at a specific production site, it may request to be involved as a relevant stakeholder in the audits carried out at that specific site.

Relevant stakeholders can hold the enterprise accountable for how it has conducted due diligence.

In view of the above, an enterprise is not generally obliged to share the structure and results of all audits performed or the content of CAPs with organisations representing the interests of stakeholders worldwide or in part of the world. In cases where problems are identified by relevant stakeholders with regard to a specific production site, an enterprise may be required to share information from audits and CAPs, including with the organisations just referred to, in so far as they are directly concerned with the interests of stakeholders at the specific production site.

- 5.32 In a previous ruling, the CDC considered as follows in this respect regarding the extent of the obligation to provide information to NGOs with a view to offering the necessary transparency¹⁷:

“The Agreement entails that a commercial party that is a party to the Agreement, such as C&A, must basically share information that it possesses relating to the issue raised with that party which relates to social circumstances and/or the environment and which relates to a specific production site from which that party purchases, with non-commercial parties (other than the State) that are parties to the AGT or which can demonstrate that they are sufficiently representative to represent interested parties in the specific issue raised, in so far as those non-commercial parties have requested the provision of specific social and/or environmental information relating to the issue raised and have a legitimate interest in receiving it.

However, the aforementioned basic obligation does not apply if the commercial party that is a party to the Agreement can demonstrate plausibly that it is unable to provide the social and/or environmental information concerned because doing so would lead to a breach of privacy rules and/or would create a risk of retaliation against interested parties, such as employees, or because the information is company confidential or because its provision could lead to unacceptable

¹⁶ OECD Due Diligence Guidance for RBC p.89

¹⁷ Ruling of 9 December 2020 in the case of Arisa – C&A Nederland C.V.

detriment to its good name. However, if a commercial party is able to demonstrate such obstacles, it does not mean that it can simply refrain from providing information. In such cases, it must be determined whether the information could not be provided entirely or partly and/or in another form, for example anonymised.

If the information concerned is not held by the commercial party that is a party to the Agreement but only by the owners or operators of the production site, and otherwise complies with the above requirements for disclosure, the affiliated party may be expected to make reasonable efforts to obtain that information. Information is not deemed to be held by a commercial party that is a party to the Agreement or the operator or owner of a production site if it does not already exist and can only be obtained through further investigation. This does not alter the fact that pursuant to the Agreement a commercial party that is a party to the Agreement may, under certain circumstances, be required to carry out such further investigation."

- 5.33 If there is a specific problem at a specific production site about which a relevant stakeholder has expressed specific complaints or concerns to the enterprise, the following applies in the opinion of the CDC. The enterprise should share a CAP that addresses that issue, including the results of the underlying audits, with the relevant stakeholder subject to the above limitations. The enterprise should also discuss the CAP with the relevant stakeholder and consult it regarding the effectiveness of possible measures proposed in the CAP and whether additional measures are necessary. Organisations that are directly concerned with the interests of stakeholders at a specific production site may also be considered relevant stakeholders.

In these cases, an enterprise should therefore proactively discuss a CAP with relevant stakeholders, including an employee committee, subject to the restrictions referred to above. This will also help to identify which stakeholder representatives can be consulted in order to find solutions. The fact that an enterprise has no contractual relationship with the employees of the production site or with the production site itself does not affect this. This contractual relationship is relevant to the issue of the extent to which it can oblige the production site to take certain measures, but consultations with relevant stakeholders on possible measures to be taken can provide relevant insights into the issue of which measures could be taken and to what extent they are effective. It is then up to the enterprise to decide to what extent it actually wants the production site to take and enforce these measures, also in view of the contractual relationship.

- 5.34 In line with the above, it is up to C&A to share with the complainants the CAPs and the results of the underlying audits on the specific points about which the complainants have lodged complaints and expressed concerns, subject to the restrictions outlined above. C&A should also discuss the CAPs with the complainants. Complainants can provide further input on the CAPs. For the sake of completeness, it should be noted that Production Site should draft and implement the CAPs. C&A can, however, exert influence, especially where this is possible on the basis of the contractual relationship (with Supplier). If the Production Site management so wishes, C&A can also help with the drafting and implementation of CAPs.

The extent to which this information was shared and discussed is not sufficiently clear from the documents. From what has been exchanged in the documents and

at the hearing, it at least follows that C&A shared and discussed with the complainants the findings of the audits and the integral MXX report. However, the documents seem to indicate that C&A did not want to discuss the CAPs with the complainants. Where this has not been the case, C&A must do so, subject to the restrictions outlined above, in respect of current and future CAPs.

E. Freedom of association

5.35 The complainants assert that C&A has failed to secure trade union freedom and the right to collective bargaining at Production Site. C&A claims that it performed proper due diligence and took appropriate measures at Production Site to ensure that freedom of association and collective bargaining were respected. The CDC considers as follows.

General

- 5.36 According to the OECD guidelines, enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards:
- a) Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing;
 - (b) Respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment¹⁸.
- 5.37 In the Dutch Agreement on Sustainable Garments and Textile (AGT or Agreement), freedom of association is one of the nine specific themes currently identified with regard to IRBC that deserve priority attention from enterprises operating in the garment and textile sector in the Netherlands. Enterprises that participate in the Agreement are expected to perform due diligence and to focus particular attention on these themes.
- 5.38 The prioritisation of this theme in the AGT is based on the following considerations:
- Trade union freedom is vital as the starting point for a meaningful stakeholder dialogue at factory and sector level;
 - In production countries, it is extremely important to enter into a dialogue with local trade unions to conduct negotiations between suppliers and local trade unions and conclude collective labour agreements to arrive at a balanced assessment of the socio-economic risks and to jointly find permanent solutions to violations in the production or supply chain;
 - Trade union freedom and the right to negotiate also result in agreed working conditions, such as in the area of occupational health and safety (OHS), outsourcing of work, working hours, pay, non-discrimination and minimum age limits.

The following is expected of enterprises that participate in the Agreement:

- To make freedom of association an explicit part of enterprise policy, including the production or supply chain. The following may be part of the policy:
 - . to encourage permanent and flexible workers to establish employee representation;

¹⁸ The OECD Guidelines for Multinational Enterprises, version 2011, Chapter V.

- . to promote the local, independent representation of workers (focusing additional attention on underrepresented groups such as women and young employees);
- . to promote the safety of these representatives as much as possible;
- . to enter into a consultation that is perceived to be timely, constructive and meaningful.
- To communicate enterprise policy at all stages of the production or supply chain, including in local languages and to flexible workers.
- To include a clause in contracts with suppliers to the effect that they must encourage participation in workshops about trade union freedom, e.g. by granting a paid day off or by providing an opportunity to attend an on-site training course.
- To investigate by random sampling or by consulting local civil-society organisations and/or trade unions whether trade union freedom has been established at all stages of the enterprises' production or supply chain. If this is not the case in a particular enterprise, that enterprise must draw up a time-bound plan for improvement. If this plan fails to produce a result, the enterprise participating in the Agreement will impose sanctions, in the worst case resulting in termination of the contract with the supplier concerned.

The Agreement defines trade union freedom as follows:

- Trade union freedom means that employees have the right to organise themselves into trade unions and negotiate their terms of employment collectively. Employee representatives are not subject to discrimination and have access to all the necessary workplaces so that they can exercise their representative function. Employers are positive about trade union activities and maintain an open-minded attitude towards the organisational activities of these unions.
- Trade union freedom involves at least:
 - . freedom of association;
 - . the right of employees to organise themselves into trade unions;
 - . the right to collective bargaining;
 - . the right to strike.

Application to the present case

- 5.39 As indicated above under *C. Nature of the involvement*, C&A's involvement can be qualified as a *directly linked* relationship. This means that if it runs the risk of being linked to a lack of freedom of association at Production Site through its activities, products or services, it should use its influence (leverage) on other responsible parties – in any event Production Site in this case – to try to limit or prevent the impact and, if necessary, increase its leverage, also by involving Supplier, for example, in this case.
- 5.40 The OECD Due Diligence Guidance for RBC summarises the following measures that can be taken to try to prevent or mitigate adverse impacts related to a business relationship¹⁹:
- Modifying business operations or activities to prevent and mitigate adverse impacts linked to the enterprise's business relationships.
 - Using leverage to affect change in the practices of the entity that is causing the adverse impact(s) to the extent possible.
 - Supporting business relationships in the prevention or mitigation of adverse impact(s).

¹⁹ See Q34 up to and including Q40 (p.77 to p.81)

- Disengaging from the business relationship.
- Addressing systemic issues.

5.41 From the documents exchanged and what was said between the parties during the hearing, testimony from an expert and testimony from witnesses, the following ensues. The parties consider freedom of association an important value. Respect for freedom of association and collective bargaining is one of the important requirements in the C&A CoC.

A factory trade union was started at Production Site in the summer of 2018 with the support of Z. The employment of some of the then union leaders and activists was terminated by dismissal in the autumn of 2018. There has been no resumption of a factory trade union at Production Site. Witnesses have indicated that since then, staff have feared being active in a trade union at Production Site and that fear still exists.

5.42 C&A has indicated that Production Site needs help in setting up the right processes and in better understanding the requirements that C&A places on a supplier. For this reason, the local C&A team pays special attention to Production Site and works together with the management team to implement the necessary improvements and provide the required support to improve the policy and behaviour with respect to the key elements of the CoC.

5.43 C&A has promoted a number of activities to get social dialogue under way at Production Site and to get the principles of freedom of association respected. C&A strives to have a functioning employee committee in every factory; this is a basic requirement for C&A. For example, it encouraged Production Site to receive support in organising elections for the WCC and in substantiating the activities of the WCC. In the 2018 elections, several things were unsatisfactory and Production Site held the elections again after comments from C&A and with support from its SSC team. In the elections at the end of 2020, MXX provided support and things went better than in 2018. According to a witness statement, it was still not flawless.

C&A also encouraged Production Site to take part in MXX's Workplace Dialogue Programme in order to reduce the risk of violating trade union freedom and collective bargaining. The programme started on 12 March 2020. The aim is to help suppliers and production units to build a platform for consultation between management and workers where requests and complaints can be discussed and resolved with mutual respect. The implementation of this programme was still ongoing in August 2020. C&A is bearing the costs.

Furthermore, C&A, together with other brands, local trade unions and IndustriALL Global Union, has developed and implemented binding guidelines (under the name ACT) on freedom of association for suppliers and a corresponding grievance mechanism. It is trying to encourage Production site to sign this ACT Myanmar Guideline on Freedom of Association (FFOA guideline).

5.44 C&A has had several investigations carried out into the situation reported by the complainants, i.e. that there was union busting by the Production Site management in the summer of 2018, that there is an anti-union climate at Production Site and that the four ex-employees mentioned were forced to resign due to union activities and their dismissal is against the law. C&A has not been able to confirm the complainants' assertions as a result of the investigations.

- 5.45 C&A did not exert any pressure on Production Site to try to encourage it to create a more positive climate for trade union freedom or to take reinstatement action with respect to the four former employees mentioned. Given the results of the investigations, C&A saw no reason to do so. Nor did it contact Supplier about the points raised by the complainants, because C&A felt that it first had to get the case transparent for itself and it was not able to confirm the complainants' points by means of an investigation.
- 5.46 Although C&A felt that it could do little more, it could have taken another step in the CDC's view. In view of the parties' submissions, it would have been logical for C&A to have involved Supplier earlier in the investigation and resolution of the issue, as it has a contractual relationship with Supplier that not only stipulates that Supplier must fulfil the requirements set out in the C&A CoC, but also that Supplier must ensure that the suppliers it engages (such as Production Site in this case) fulfil the requirements set out in the C&A CoC. Incidentally, the CDC has learned from information on the Internet that a merger took place in 2017 between Supplier and Production Site. This may explain why Supplier was not involved in the discussions, but as the parties have not provided information about this, the CDC cannot express an opinion.
- 5.47 In addition, the CDC believes that it would have been logical for C&A to have had more contact with and made use of the knowledge of other stakeholders, for example in connection with Production Site drawing up improvement plans, partly as a result of the audits conducted on behalf of C&A and the investigation carried out by MXX. Particularly as the results of the investigations that C&A commissioned were so different from the complainants' findings, it would have been beneficial to examine together with the stakeholders where the differences in findings came from, how they could be reconciled and to discuss what risks of adverse impact they saw.
This applies all the more in view of the situation in Myanmar, where freedom of association was in its infancy, intimidation and dismissal of trade union members were common and there was a high risk that freedom of association was not yet properly embedded at a production site.
- 5.48 It would therefore have been an obvious step to organise a dialogue between the employees or their representatives, C&A and Production Site, possibly with input from MXX. This dialogue could have dealt with what has happened at Production Site since 2018 regarding freedom of association and how more information can be obtained about it if needed, what problems are being encountered and what can possibly be done to improve the situation. In this dialogue, the option of a (responsible) termination of the relationship should have been explicitly put on the table in case of an insufficiently cooperative attitude by Production Site with regard to this dialogue or agreements made during such.
- 5.49 The CDC is of the opinion that C&A should have increased its leverage in the deadlock that arose between the complainants and C&A by means of an outreach to all stakeholders involved. In a joint dialogue, C&A could have urged the various stakeholders to arrive at an agreement in order to improve the situation at Production Site regarding freedom of association. The CDC is of the opinion that this step can still be taken and that, also in view of the significantly changed current situation in Myanmar, it makes sense to first allow this dialogue to take place before continuing with the handling of this complaint.

F. Other points

- 5.50 At the hearing, the complainants indicated that, for them, the three most important points in these proceedings are union busting and freedom of association, the recognition of Z as a legitimate stakeholder and the fact that C&A's involvement shifted from 'linked' to 'contribution' between the summer of 2018 and the end of 2021. The hearing focused on these points.
- 5.51 Given the interlocutory ruling that the CDC is now making, it is not yet currently addressing the remaining points in the complaint that relate to the WCC, the complaints in the letter of June 2018 and the new 2018 bonus scheme. In this context, the CDC does comment as follows. C&A argues that the bonus scheme is above the minimum wage and therefore it has not identified a problem with the bonus system and no measures have been taken in this regard. In production countries, the minimum wage set by the authorities is often much lower than a living wage. The AGT has identified a living wage as one of the nine specific themes to be prioritised. The ILO describes a living wage as "a wage that is sufficient to provide for the basic needs of a family of average size in a particular economy." In Myanmar, the minimum wage is 54% of the living wage²⁰. The mere fact that the wages paid are above the legally guaranteed minimum wage does not therefore mean that a (new) bonus system cannot result in exploitation of workers in breach of the Agreement. After all, as long as the minimum wage is still far below the living wage, employees will be more inclined to give in to bonus systems that facilitate excessive demands on the part of the employer with regard to, for example, overtime. The fact that pay was in excess of the minimum wage does not necessarily mean that C&A no longer had to pay attention to the new 2018 bonus system.

G. Current situation in Myanmar

- 5.52 A complex political reality has existed in Myanmar for some time²¹. A democratic transition had started in 2011, leading to the election of a civilian government in 2015. It was clear from the beginning that a transition would not only provide opportunities for growth, development and freedom for the people of Myanmar, but would also bring great challenges and tensions. The military rulers stepped down only to some extent. Myanmar is still struggling with many internal (violent) conflicts, such as the conflict regarding the position of the Rohingya that escalated in 2017. The human rights situation is still a cause for concern.
- 5.53 On 1 February 2021, the Myanmar army carried out a coup d'état. Political unrest exists and protests are taking place regularly throughout the country. These often end in violence, which has also resulted in deaths.
- 5.54 Within this context, the issue is whether the risks of the adverse impact on freedom of association can be limited or prevented.
- 5.55 In general, according to the OECD, (responsible) disengagement from a business relationship may be appropriate as a last resort after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them.

A decision to disengage should take into account potential social and economic

²⁰ Benchmark 2021 <https://www.imvoconvenanten.nl/en/garments-textile/news/leefbaar-loon-loonkloof>

²¹ Source: Dutch Ministry of Economic Affairs

adverse impacts. These plans should detail the actions the enterprise will take, as well as its expectations of its suppliers, buyers and other business relationships²².

- 5.56 Following the coup in Myanmar, a Guidance based on the Agreement was sent in mid-February. It calls on AGT-affiliated brands sourcing from Myanmar to take steps to ensure worker safety, including protecting union members and ensuring full and timely payment of workers in this time of uncertainty. They are being asked to consult not only with their suppliers but also with local and international civil-society organisations, if possible. They are being told not to source their products from factories in the three Special Economic Zones. And all AGT participants and their suppliers in Myanmar are being urged not to purchase goods and services from enterprises known to have links with – or to be owned by – the military regime in Myanmar.

The Guidance does not make any statement about staying or leaving. Enterprises will have to make their own assessment and communicate it.

H. Recommendation

- 5.57 The CDC notes that the parties have reached a deadlock and the dialogue has ceased as a result. The three main elements leading to the deadlock are the respondent's attitude towards Z, the complainants' attitude towards MXX and the discrepancy in the complainants' and the respondent's findings with regard to what happened at Production Site in 2018 and thereafter with regard to freedom of association (whether or not union busting, whether or not four workers were fired for union activities, whether or not workers who were keen to do union work were intimidated, whether or not C&A took sufficient action). Under these circumstances, the CDC is of the opinion that a dialogue between the relevant stakeholders, taking into account the frameworks it has indicated, may contribute to resolving the issues raised in the complaint.
- 5.58 In addition, the CDC notes that the situation in Myanmar since the army coup in February 2021 has changed substantially from the situation in the period 2020 to January 2021 during which the written submissions were exchanged and the hearings took place in these proceedings. This also raises other issues and priorities for the parties involved in the proceedings.
- 5.59 The CDC therefore recommends the following:
1. Within the possibilities under the current circumstances in Myanmar, the parties will jointly search for a solution to the deadlock and for possibilities to improve the situation regarding freedom of association at Production Site.
 2. To this end, C&A will organise a dialogue between the parties (complainants and C&A), the employees of Production Site or their representatives, Production Site's management and possibly – this is at the discretion of C&A – Supplier with possible input from MXX. The issue of who can act as workers' representative under the current conditions in Myanmar will also be examined. In so far as Z and MXX are able to take part in the dialogue under the present circumstances, C&A must recognise Z as an interlocutor and the complainants must recognise MXX as an interlocutor. If the dialogue leads to agreements, the means of embedding these agreements must also be discussed. For example, when concluding an agreement for which a party participating in the consultation is not authorised to sign, it can be agreed that an authorised signatory will then be sought.

²² OECD Due Diligence Guidance for RBC Q39.

To enhance the likelihood of a successful dialogue, the CDC recommends that the parties focus in advance on the process of the dialogue and its organisation, including the identification of the participants.

3. The above considerations in this ruling can serve as a framework for dialogue.
4. It is recommended that the points made in the case documents and the hearing be reflected in the dialogue. Points to consider in the dialogue may include:
 - the points that led to the deadlock between the parties, i.e. the discrepancy in the complainants' and the respondent's findings with respect to what happened and is happening at Production Site regarding freedom of association; why the complainants dispute the MXX report; Z's position;
 - exploring how to reconcile the above points;
 - exploring how to progress in bringing about a positive climate for freedom of association at Production Site; which parties can be involved, how can agreements be reached, what kind of underlying conditions must be met in order to achieve a trade union-friendly climate at Production Site, what kind of agreements are necessary for that purpose;
 - what is still possible in the current situation in Myanmar for workers to join or form trade unions or workers' organisations of their own choosing;
 - what the current situation in Myanmar means for the possibilities of reaching agreements on the promotion of a positive climate for freedom of association at Production Site;
 - what the current situation in Myanmar means for the possibilities of continuing production for C&A;
 - the option of (responsibly) terminating Production Site's engagement on behalf of C&A if Production Site fails to adopt a sufficiently cooperative stance in respect of this dialogue or the agreements reached during that dialogue or if there is no reasonable prospect of change.
5. The CDC suggests that the parties consider having the dialogue facilitated by an external moderator.
6. The parties will report back to the CDC on the results of the dialogue no later than six months after the date of this interlocutory ruling. If no results can be reported at that time because the dialogue is still ongoing, they will at least indicate the status of the dialogue.
7. If the parties do not accept this recommendation and do not engage in dialogue, or if they accept this recommendation but the dialogue does not lead to the withdrawal of the complaint, either party may submit the matter to the CDC again. The CDC will then proceed with the complaint, taking into account the results of the dialogue and form an opinion.

Interlocutory ruling

The Complaints and Disputes Committee for the Agreement on Sustainable Garments and Textile:

Is authorised to handle the complaint.

Declares SOMO, SKC and Z, each in its capacity as a Stakeholder, Z also in its capacity as a Mandatory and the four ex-employees of Production Site represented by it, admissible in their request.

Recommends: that the parties first conduct a dialogue as outlined in section *H. Recommendation* and that C&A reports the results of the dialogue to the CDC no later than six months after the date of this interlocutory ruling.

Defers judgment.

This interlocutory ruling was handed down by M. Scheltema, N. Mutsaerts, and H. van der Kolk, assisted by S. Geelkerken and H. Arpaci.

The Hague, 17 May 2021

M.W. Scheltema
Chair

S.W. Geelkerken
Secretary