

National Contact Point for the OECD Guidelines

Specific instance submitted to the Italian NCP on 11 March 2016 by Survival International Italia against Salini Impregilo S.p.A.

INITIAL ASSESSMENT¹

Presentation of the specific instance and topic

1. On 11th March 2016, the Italian NGO Survival International (hereinafter also "Survival" or complainant) submitted a specific instance to the Italian NCP against the Italian enterprise Salini Impregilo SpA (hereinafter also "Salini Impregilo" or the enterprise) "on behalf" of the indigenous peoples of the Lower Omo Valley, in Southwestern Ethiopia, and Lake Turkana in Kenya.

Violations of the Guidelines alleged in the specific instance

2. Survival ascribes to Salini Impregilo, at the time of the start the construction of the Gibe III dam (2006), the violation of the following recommendations of the 2000 Guidelines:
 - Chapter II (2) and Chapter V (2) (b).
3. Being the works for the construction of Gibe III still ongoing at the time of the entry into force of the 2011 Guidelines, Survival also charges the enterprise with the violation of the recommendations of this last edition of the Guidelines:
 - Chapter IV (1); (2); (3); (4); (5) and Chapter VI (2) (b).

The OECD Guidelines for Multinational Enterprises

4. As part of the specific instances procedure, the initial assessment is intended to determine whether the issue merits further examination.

¹ The official language of the Final Statement and of the Initial Assessment is Italian. The official language of the OECD Guidelines for Multinational Enterprises is English.

5. If the need for further examination arises from the initial assessment, this does not mean in any way that there has been a violation of the Guidelines.
6. Namely, the NCP must determine whether the issue raised is *bona fide* and relevant to the implementation of the Guidelines, on the basis of the following criteria, set forth in the Guidelines²:
 - the identity of the party concerned and its interest in the matter;
 - whether the issue is material and substantiated;
 - whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
 - the relevance of applicable law and procedures, including court rulings;
 - how similar issues have been, or are being, treated in other domestic or international proceedings;
 - whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.
7. In consideration of the complexity of the case - happened in a country non adhering to the Guidelines such as Ethiopia, related to an infrastructural project developed over a long period of time and in a changing territorial context on the receiving end of economic development programmes - in the initial assessment phase the Italian NCP decided to make specific enquires and to proceed with an exchange of written defences between the parties, according to a process agreed with the parties and briefly reported below.
8. At first, the NCP met separately with both parties, Salini Impregilo (April 4, 2016) and Survival International (April 5, 2016), in order to collect their positions directly, face-to-face.
9. Thereafter, there was a first exchange of defences and replies between the parties for the deepening of the issues raised and in compliance with the adversarial principle in the proceedings. All the defences and documents received by the NCP by one of the parties were brought to the attention of the other party. The extensions of the deadlines established by the NCP upon requests by both parties for the submission of defences and replies were granted in order to allow a better understanding of the case³.

Applicability of the 2011 Guidelines or of the 2000 Guidelines

10. Concerning the applicability of the 2011 or of the 2000 edition of the Guidelines to the present case, the activities necessary for the realisation of a work must be considered in the light of the provisions and principles of the Guidelines in force when these activities take place.

The identity of the party concerned and its interest in the matter

11. The indigenous peoples in whose name the instance was submitted are those of the Lower Omo valley in Southwestern Ethiopia (Mursi, Bodi Kwegu, Kara, and Nyangatom Dassanac) and Lake Turkana in Kenya (Elmolo, Gabbra, Rendille and Samburu).

² 2011 GL, Part II, Commentary on the Implementation Procedures, §§ 25-27.

³ On May 4, 2016 Survival presented, spontaneously, a Note with attachments, integrating the initial submission. On May 17 2016, within the agreed time of eight weeks, Salini sent to the PCN its reply to the instance, with attachments. On July 4, 2016 Survival, having obtained a further time extension - additional to that already obtained from 15 to 22 June - delivered its response to Salini's reply, with attachments. On September 23, 2016 Salini ó having obtained a further time extension (after previous extension from July 26 to September 10) ó submitted to the PCN its additional reply, with attachments.

12. The instance was submitted by the Italian branch of Survival International Charitable Trust, which advocates for the rights of indigenous peoples. Survival International's interest in the issue is also clear from several campaigns in favour of indigenous peoples, from the complaints submitted to other NCPs to protect their rights⁴ and from the grievances raised in international organisations⁵.
13. Specifically, the interest of Survival International for the protection of the rights of the indigenous peoples of the Lower Omo Valley is demonstrated by various elements in practice, including the presentation by Survival International of a communication to the African Commission on Human and Peoples' Rights against Ethiopia concerning the violation of human rights of the peoples of the Lower Omo Valley⁶.
14. With regard to the mandate of Survival International Italy as part of the international organisation Survival International, the former provided the needed corroborative documents⁷.
15. Therefore, the identity of the complainant is clear and it is demonstrated the interest of Survival International Charitable Trust to represent the Lower Omo Valley peoples.

Whether the issue is material and substantiated.

16. The complainant assumes that some behaviours of the enterprise are in contrast with the 2000 and 2011 Guidelines because of some alleged violations of human rights and of the provisions of the Environment and Human Rights Chapters:
 - A. Regarding the issue raised by the complainant about the respect of the **right of self-determination** of the indigenous peoples of the Lower Omo Valley, **the NCP considers that it is not relevant nor appropriate, and that, therefore, it does not merit further examination.** On the basis of the international law and practice, indeed, respecting the right to self-determination is an obligation that rests on the State and cannot be ascribed to an enterprise acting with its consent.
 - B. As to the issue of the **right to development** of indigenous peoples, it should be pointed out, firstly, that the lack of practices and the contrary positions of the majority of the doctrine lead us to strongly doubt the existence of a right of peoples to their economic development, understood as an autonomous right different from the sum of other rights given to these peoples under international law. Secondly, it should be noted that the content of whatever rule providing for the right to development of peoples would be so abstract and undefined not to be fully identifiable. Finally, it is self-evident that any corresponding obligation to ensure the people a proper development could not be attributed to a foreign commercial enterprise, since this is a kind of obligation that relates to the exercise of typical sovereign state powers. **Therefore, the issue doesn't merit further examination.**

⁴See *Survival International v. Vedanta Resources*, a specific instance submitted to the UK NCP in 2008; *Survival International v. WWF*, a specific instance submitted to the Swiss CP in 2008 on February 10, 2016 (still pending).

⁵ See petition submitted by Survival International to the Inter-American Commission on Human Rights against Brazil, *Comunidad Yanomami*, Caso n. 7615, Resolución N° 12/85.

⁶ Survival International Charitable Trust, in its quality of international NGO enjoys observer status at the African Commission on Human and Peoples' Rights (ACHPR) since 2001, <http://www.achpr.org/network/ngo/> There it presented the Communication 419/12 - *The Indigenous Peoples of the Lower Omo, Represented by Survival International Charitable Trust, v Ethiopia*, that has been held admissible during the 14th extraordinary session of the Commission, (July 20-24, 2013. See http://www.ahrlj.up.ac.za/images/ahrlj/2014/Chapter%20Killander_2014.pdf, p. 287).

⁷ Constitutive Act of the Italian Office of Survival International; notarial act filing of the constitution of the Italian Office and appointment of Survival International representative for Italy.

- C. Moreover, the complainant points out the violation of the right of the communities concerned to the **free disposal of wealth and natural resources**, since "they have lost or are likely to lose the vital means of subsistence previously guaranteed by the annual floods of the River Omo". Specifically, **the complainant argues that this right would be denied because of the lack of consultation with the communities**. The requesting party also argues that **the company has not engaged in a timely and appropriate process of communication and consultation of the communities concerned as part of the due Environmental and Social Impact Assessment** linked to the construction of the Gibe III dam. This would not even be in line with the duties of the enterprises, as set out in the Guidelines, to undertake an adequate and timely communication and consultation process with the communities directly affected by the company's policies on **environment, health and safety** and by their implementation⁸.

The available elements lead the NCP to believe that the issue merits further examination.

- D. The complainant argues that the company was aware of the potential impact of the dam on the affected communities, **but it did not start a due diligence process**. The duty of enterprises to respect human rights of those affected by their activities is expressly provided for since the 2000 Guidelines (Part I, par. II, General Policies, n. 2). In the related commentary it is underlined the need for a conduct of multinational enterprises respectful of human rights, consistently and in compliance with the international obligations and commitments of the host country. This implies that the human rights applicable at the time of realisation of the activity and the content of international standards must be checked from case by case. Only since the 2011 Guidelines - applicable to the activities undertaken after 2011 - a real businesses duty to adopt a specific policy on respect for human rights, even outside the country, is provided for, in compliance with the due diligence detailed indications contained therein⁹. Therefore, it is believed that **at the start of the construction activities of Gibe III (2006), no business duty to adopt in advance a due diligence process existed yet. This issue doesn't merit further examination.**

Whether there seems to be a link between the enterprises activities and the issue raised in the specific instance

17. The company argues that the role of the EPC contractor (i.e., in this case, its role) is limited to the infrastructure construction, while the consultation of the affected communities and the environmental and social impact assessments are up to the governments and to other bodies responsible for the management and exploitation of the infrastructure (in this case EPPCo).
18. According to international law and practice and to the Guidelines, the involvement of the communities potentially affected by investment and development projects should be secured primarily by the government of the state to which the population belongs.

⁸ See 2000 and 2011 GL, Part I, Chapter on "Environment" §2(b).

⁹ 2011 GL, Part I, Commentary on General Policies, § 14: "For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems".

19. However, the Guidelines attribute certain responsibilities directly to the enterprises, regardless of the behaviour of state authorities and business partners. This is confirmed in the practice of some NCPs¹⁰.
20. Moreover, the Guidelines establish principles and standards for responsible business conduct, as generally understood also in the context of trade relations. The key question is therefore whether the enterprise is involved in commercial activities, irrespective of the legal form of the contract or the role played in the execution.
21. **Therefore, in this preliminary assessment phase of the case, it is not possible to rule out the existence of a plausible link between the enterprise's activities and the issue raised in the specific instance.**

The relevance of applicable law and procedures, including court rulings

22. As of the relevant international standards reference is made to other parts of this initial assessment.
23. The issue of the construction of the Gibe III dam and its impact on the rights of the indigenous peoples and on the environment has been addressed by some international and regional organisations in the framework of the monitoring procedures related to violations of international obligations assumed by the states¹¹.
24. However there does not seem to be parallel proceedings in progress having the same object and the same parties involved, neither before national judicial and non-judicial bodies, nor in other international fora.

How similar issues have been, or are being, treated in other domestic or international proceedings

25. The practice of NCPs reveals a general trend toward admission of specific instances concerning the consultation of indigenous peoples in relation to the availability and use of their resources¹² as well as the chapter on the environment, especially in conjunction with human rights issues¹³.

Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

26. During the initial assessment phase, the NCP has observed a clear divergence between the positions of the parties on the specific instance, but also their active participation to the procedure. Both of them submitted a number of findings that proved useful to understand the matter.

¹⁰ See 2010 Final statement of the case *Pobal Chill Chomain Community et al. vs. Shell*, before the Ireland and Netherland NCPs, *CSDT at al v. Andritz AGH*, before Austrian NCP (April 2014); *FIVAS v. Norconsult*, before Norway NCP (August 2014).

¹¹ Among others, the African Commission on Human and Peoples' Rights (see above).. The Gibe III project was also addressed by the three Communications posted by the Special Rapporteur of the United Nations on the Rights of Indigenous Peoples, on February 18, 2011, respectively on China, Ethiopia and Kenya (CHN 4/2011, 1/2011 ETH; KEN 2/2011). The Committee on the Elimination of Racial Discrimination (CERD) in 2011 initiated its early warning and urgent action procedure on the impact of the Gibe III dam on local communities. Since 2011, the UNESCO World Heritage Committee has considered the impact of Gibe III on Turkana Lake (Decision 35 COM 7B.3).

¹² See cases *FIVAS v. Norconsult*, cit., and *Survival Int. v. Vedanta*, cit.

¹³ See for instance: *FIVAS v. Norconsult*, cit., *Survival Int. v. Vedanta*, cit., *Future in Our Hands (FIOH) v. Intex Resources ASA (Intex)*(2009), *Friends of the Earth Norway e Forum for Environment and Development v. Cermaq ASA* (2009), *FREDEMI Coalition v. Goldcorp* (2009)

27. Moreover, the NCP welcomes the information provided by the enterprise about the recent artificial release completed in October and about its active collaboration with EEPCo (Ethiopian Electric Power Corporation), through technical and logistical support in connection with the Artificial Flow Releases programme of the Gibe III dam.
28. In the context of all of the above, the NCP believes that the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines and that it is able to offer its good offices to facilitate the dialogue between the parties in view of an agreed solution of the issue.

Conclusions

1. **The NCP, within the limits specified above, believes that the issue raised merits further examination. This decision concludes the initial assessment based on the criteria set forth for this stage and not on an assessment of the merits of the case.**
2. **The NCP has decided not to publish and not to spread this initial assessment to facilitate a positive outcome of the case.**
3. **The parties are invited to maintain confidentiality in relation to this document, its contents, and all stages previous to and following the present one.**
4. **The NCP intends to offer its good offices to the parties so that they attain a consensual resolution of the dispute.**
5. **The parties are invited to deal with the next phase of the procedure with a constructive, prudent and discreet attitude, in the respect of good faith as required by the Guidelines, avoiding the disclosure of information, communications and acts shared during the procedure.**

The Director General
Chair of the OECD NCP
Stefano FIRPO

(Signed)