

# National Contact Point of Switzerland

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## Initial Assessment

### Specific Instance regarding PT Holcim Indonesia Tbk.

Berne, June 30, 2015

#### 1 Submission

The National Contact Point (NCP) of Switzerland received a written request on 19 March 2015 to consider a specific instance under the OECD Guidelines for Multinational Enterprises (OECD Guidelines) regarding the possible violation of the OECD Guidelines, involving PT Holcim Indonesia Tbk., controlled by Holcim Group (henceforth referred to as "Holcim"), which is headquartered in Switzerland.

The specific instance has been raised by the Institute for Policy Research and Advocacy (ELSAM)<sup>1</sup> together with Solidarity of Blitar Villagers (SITAS-Desa), Aryo Blitar Farmers Association, Consortium of Agrarian Reform (KPA), Transformation for Justice (TuK Indonesia), AURIGA and Fransiscans International (FI Swiss), henceforth referred to as "complainants".

The submission concerns a conflict about land use in the Regency of Blitar, East Java, Indonesia. The complainants state, that in 1991, the Indonesian company PT. Semen Dwima Agung (PT SDA) obtained a license from the Ministry of Forestry to exploit a forest area in Tuban, East Java, for a cement factory project, through a scheme of forest leasing. In its quality of the holder of the lease permit and in compliance with the national law, PT SDA had to give to the Ministry of Forestry a compensation land in return, which was situated in the village of Ringinrejo, District of Wates, Regency of Blitar, East Java. According to the complainants, this land, a former plantation, has been under the control and cultivation of the people of the village of Ringinrejo since 1996.

After PT SDA merged with PT. Holcim Indonesia in 2012, the compensation land in Ringinrejo was designated as a forest area through a Decree of the Ministry of Forestry in 2013<sup>2</sup>. According to the complainants, the designation of the compensation land will affect 826 households, or about 3000 persons, from the village of Ringinrejo.

The complainants refer to the lease guidelines of the Indonesian Law<sup>3</sup>, stating that the holder of a lease is obliged to provide a compensation land that has no problems pertaining to objective conditions (de facto) and the legal status (de jure). In the view of the complainants, the compensation land does have de facto problems since 826 households continue to control and cultivate the compensation land.

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<sup>1</sup> ELSAM is a human rights-focused civil society organization based in Jakarta, Indonesia.

<sup>2</sup> Ministry of Forestry Decision No. SK. 367/Menhut-II/2013

<sup>3</sup> Article 16, paragraph 3, Ministry of Forestry, Regulation P.13 / Menhut-II/2013 Lease Guidelines

Furthermore, the complainants claim, that Holcim did not undertake negotiations with the concerned population of Ringinrejo, but instead with farmers, who do not live on the compensation land but cultivate it.

## **2 OECD Guidelines provisions cited**

In the submission, the complainants claim the breach of the following recommendations of the OECD Guidelines:

### Chapter I: Concepts and Principles

*2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. [...]*

### Chapter II: General Policies

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:*

*A. Enterprises should:*

*[...]*

*2. Respect the internationally recognized human rights of those affected by their activities.*

*[...]*

*14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.*

### Chapter IV: Human Rights

*States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:*

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

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

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

*[...]*

*5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts*

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

## **3 Expectations of complainants of the NCP proceedings**

The submission contains a catalogue of circumstances describing alleged breaches of the OECD Guidelines and requests the NCP to contribute to the process of resolution of the mentioned issues, namely:

- to consider the issue between 826 households of the village of Ringinrejo with PT. Holcim Indonesia Tbk.;
- to encourage PT. Holcim Indonesia Tbk. to ask for the revocation of the respective decision of the Ministry of Forestry<sup>4</sup>, or to find another land as compensation;
- to encourage PT. Holcim Indonesia Tbk. to be responsible in returning the land to the directly impacted farmers who have previously cultivated the land.

#### **4 Statement of the concerned enterprise**

On 16 April 2015, Holcim submitted a written statement to the NCP concerning the issues raised in this specific instance.

In its communication, Holcim stated, that the land swap process went back to 1990, when the predecessor of Holcim Indonesia, PT SDA applied to open forest land in Tuban for industrial use. To compensate for the forest land used and after all the necessary approvals were issued, PT SDA purchased land in Blitar in 1996 and transferred it into state land in 1998. This process was completed in fulfilment of all the regulatory obligations for land swaps. However, the reforestation process led by a state-owned company was opposed by farmers who started cultivating the land, as a consequence of which reforestation eventually halted.

In an effort to mediate the dispute, PT SDA agreed to release 40 hectares of land for distribution to farmers in 2008. An agreement was reached in 2010 with the mediation of the Blitar parliament and officials. The authorization letter was signed by the representative of 978 farmers in front of local members of parliament with Head of Blitar Regent, registered by notarial act, and publicly exposed in front of the Jolosutro mosque in Ringinrejo village.

According to Holcim, some farmers later withdrew from the agreement. Renegotiations started in 2011 in an effort to foster long-term cooperation and a trustful relationship. A scheme in which farmers are involved in the land reforestation process and still able to cultivate crops, accompanied by CSR programs for community empowerment, was developed. In 2013, the land in Blitar was handed over to the Ministry of Forestry of Indonesia and released as forest area. Eight rural communities of Ringinrejo, known as the Farmers Paguyuban Aryo Blitar (PPAB), filed a complaint to the administrative court in Jakarta to cancel the decision of forest land designation from the ministerial decree. The plaintiffs were rejected by the court. An appeal filed in April 2014 was rejected as well.

In its communication, Holcim stated, that they were open for further dialogue on this process and fully committed to respecting human rights. Moreover, Holcim informed that standard processes for meaningful stakeholder engagement were in place in all the Holcim Group companies, including Holcim Indonesia. The company had a Community Engagement Plan covering all sites, which ensured that social needs and concerns were addressed in a systematic manner. Formalized Community Advisory Panels provided for a regular exchange with host communities at the cement plants in Narogong, Cilacap and Tuban, as well as the aggregate quarries in Maloko and Jeladri.

According to Holcim, the company has a group-wide human rights management system in place to implement the UN Guiding Principles on business and human rights. In this context, PT Holcim Indonesia Tbk conducted a human rights impact assessment in 2012, which included consultations with relevant stakeholders, including community members, at five plants, among them Tuban. Land acquisition processes were not mentioned as an issue by the stakeholders consulted at that time. Other identified risk areas were addressed with a follow-up assessment and targeted actions in 2013.

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<sup>4</sup> Ministry of Forestry Decision No. SK. 367/Menhut-II/2013

## 5 The proceedings of the Swiss NCP up to date

Since the receipt of the submission the NCP took the following steps:

- Written confirmation to the complainants to acknowledge receipt of the submission on 23 March 2015.
- Written exchange with the complainants in order to clarify issues about confidential information in the submission on 30 March 2015. In response, the complainants submitted an adapted version of the complaint on 2 April 2015, which was forwarded to Holcim the same day.
- Preliminary discussions by phone with the concerned company in order to explain the NCP proceedings on 30 March 2015.
- On 8 April 2015, the Swiss Embassy in Indonesia was contacted for reasons of information and clarification about the submission. In separate meetings at the premises of the Swiss Embassy in Jakarta, a representative of the Swiss Embassy met with both parties. The meeting with Holcim took place on 24 April 2015 and the meeting with the complainants took place 20 May 2015.
- On 16 April 2015, the NCP received a written statement by the company in response to the submission. The statement was forwarded to the complainants.
- On 14 April 2015, according to the Specific Instances Procedure of the NCP an “ad-hoc” working group was constituted, including representatives from the State Secretariat for Economic Affairs (SECO), the Federal Department of Foreign Affairs and the Federal Office for the Environment. This working group is involved in all steps of the procedure of the specific instance.
- For reasons of clarification of the case, the NCP exchanged with both parties by email or by phone during the phase of the initial assessment a few times. Written answers were shared between both parties.

## 6 Decision of the Swiss NCP

The initial assessment of the NCP results in the conclusion that the issues raised in this specific instance merit further consideration, and the NCP therefore accepts the specific instance. This conclusion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission.

Based on the Procedural Guidance to the OECD Guidelines and the *Information on Specific Instances Procedures* of the Swiss NCP, the NCP has considered the following points in its initial assessment:

- **Identity of the parties concerned and their interest in the matter:** The NCP comes to the conclusion that the complainants have provided sufficient information regarding their interest in the issues raised.
- **Responsibility of the NCP:** A specific instance must be raised in the country in which the alleged breach occurred. If this country is not a signatory state of the OECD Guidelines and therefore does not have its own NCP, the issue should be raised in the country where the multinational company has its headquarters. The Swiss NCP is competent for this specific instance because Indonesia is not a signatory state of the OECD Guidelines and Holcim has its headquarters in Switzerland.
- **Scope of application of the OECD Guidelines and materiality of the specific instance:** The submission is material in the sense that it refers to alleged breaches of specific provisions of Chapters I, II and IV of the OECD Guidelines. The complainants

have substantiated their submission by providing the necessary information for the NCP to consider the issues raised.

- **Legal context and parallel proceedings:** The NCP will take into consideration ongoing parallel proceedings, including court rulings. According to the Specific Instances Procedures of the Swiss NCP, it will not necessarily prevent the NCP from pursuing a specific instance, if parallel proceedings have already been concluded or are ongoing. However, in each individual case the NCP assesses whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised or if it would prejudice either of the parties involved in other proceedings.

According to the information provided by the complainants, the villagers of Ringinrejo have filed a complaint to the Administrative Court in Jakarta regarding the Decree of the Ministry of Forestry of Indonesia<sup>5</sup> on the designation of compensation land as a forest area. Furthermore, the complainants stated that the same court decided in this case that the people did not have the right to file the lawsuit, because they did not have a valid legal tenure of the land and therefore the lawsuit was inadmissible. According to Holcim's written statement submitted to the NCP on 16 April 2015, the plaintiffs were rejected by the court and an appeal filed in April 2014 was rejected as well. According to a further communication by Holcim, the final verdict of the Supreme Court was released in May 2015 stating that the claims of the opposing farmers were rejected.

Despite the parallel legal proceedings the NCP considers that a possible dialogue or mediation could contribute to a common understanding in this matter and, if possible, to an agreement concerning the issues raised in the submission. This seems even more important since the views of both parties involved differ, among others, also in terms of the number of persons concerned by the submission. Holcim mentions a number of twenty concerned farmers whereas ELSAM states that 826 households are concerned. If considered necessary by the parties, the above mentioned court decision could be taken into account during a possible mediation between them.

- **Contribution to the purpose and effectiveness of the OECD Guidelines:** The role of the NCP is to offer a forum for discussion and to assist the parties concerned to deal with the issues raised. The NCP assumes, that in addition to the parties of this specific instance, other stakeholders like e.g. the owner of the land in question (Indonesian state) or the Ministry of Forestry might also play a role in the resolution of the issues raised. The NCP considers that by accepting this specific instance and offering a confidential setting for discussions, it could contribute to a better understanding among parties and help them reach a mutually acceptable outcome concerning the issues raised.

## 7 Further proceedings

The Swiss NCP will contact the parties concerned in order to offer its good offices and ask for confirmation whether they are willing to accept this offer with the aim of reaching a mutually acceptable outcome.

The Swiss NCP will publish its report on the initial assessment on the NCP website.

If the parties reach an agreement and find a solution for the dispute or a further means of resolving the dispute, the NCP will make publicly available a final statement with the results of the proceedings. Information regarding the contents of the discussions and the agreement will only be recorded with the express consent of the parties involved.

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<sup>5</sup> Ministry of Forestry Decision No. SK. 367/Menhut-II/2013

If no agreement is reached or one of the parties is not willing to take part in the proceedings, the NCP will also make this information publicly available in a final statement. The NCP may draw up recommendations for implementation of the OECD Guidelines, which will also be included in the statement. The latter may also set out the reasons why an agreement was not reached.

Final statements are published on the NCP website and in the annual report by the Chair of the OECD Working Party on Responsible Business Conduct. Unless there is good reason not to do so (e.g. protection of individuals), the NCP publishes the names of the parties involved in its written statement. Before the statement is issued, the NCP gives the parties the opportunity to comment on a draft statement. If there is no agreement between the NCP and the parties about the wording of the statement, the NCP makes the final decision.

The Swiss NCP requests parties concerned to agree to maintain confidentiality during the further proceedings. In order to establish an atmosphere of trust, the OECD Guidelines foresee that no information regarding the content of the proceedings may be shared with third parties or supporters of the complaint. If sensitive business information is provided or discussed during the meetings of the NCP, special requirements concerning the treatment of confidential information can be agreed upon by the parties involved in this specific instance. Even after the proceedings have finished, parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other party agrees to their disclosure.