

National Contact Point of Switzerland

Initial Assessment

Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by Americans for Democracy and Human Rights in Bahrain (ADHRB)

Berne, 17 August 2016

1 Submission

The National Contact Point of Switzerland (henceforth referred to as “Swiss NCP”) received a written submission on 11 February 2016 to consider a specific instance under the revised OECD Guidelines for Multinational Enterprises¹ (OECD Guidelines) regarding the Fédération Internationale de Football Association (henceforth referred to as “FIFA” or “responding party”), which is headquartered in Zurich, Switzerland. The specific instance has been raised by Americans for Democracy and Human Rights in Bahrain (ADHRB), henceforth referred to as “submitting party”.

The submitting party states that the responding party has violated the OECD Guidelines by allowing Sheikh Salman bin Ibrahim Al Khalifa (henceforth referred to as “Sheikh Salman”) to stand for candidacy in the FIFA presidential election without first carrying out adequate human rights due diligence, and in failing to previously investigate the below elaborated allegations.

According to the submitting party, there is evidence to suggest that Sheikh Salman was responsible for punitive measures of a political character against football clubs and players in respect of their support for pro-democracy protests in Bahrain in 2011. He was the President of the Bahrain Football Association and chaired an ad-hoc committee (Investigative Committee) which identified players believed to have participated in pro-democracy protests so that sporting sanctions and state security measures could be taken against them. Furthermore, he allegedly failed to take any steps to investigate the unlawful detention and torture of leading Bahraini footballers by the Bahraini security forces at the time. Those security forces were under the control of the Bahraini ruling family, of which he is a member.

Sheikh Salman was chairman of a FIFA member association, the Bahrain Football Association which is subject to FIFA’s disciplinary and ethics processes. Therefore, the submitting party states that FIFA should have followed human rights due diligence obligations as laid down in the OECD Guidelines², in particular in connection with its ‘integrity check’ vis-à-vis Sheikh Salman before authorizing his candidacy in the 2016 elections. In the view of the submitting party the responding party additionally should have conducted an investigation into the evidence regarding Sheikh Salman’s and the Bahrain Football Association’s actions and omissions since 2011 by rigorous gathering and testing of evidence and by allowing stakeholder participation in that process. After the non-election of Sheikh Salman as President of FIFA, the submitting party confirmed in a written letter (see paragraph 5) its interest to maintain the submission.

¹ The updated OECD Guidelines came into effect on 25 May 2011

² OECD Guidelines, Chapter II, Paragraphs 2, 7, and 10; Chapter IV, Paragraphs 4 - 6

2 Alleged Violations of the OECD Guidelines

According to the submitting party, FIFA should have carried out adequate due diligence before allowing Sheik Salman to stand for candidacy in the 2016 FIFA presidential election. Furthermore, FIFA should have investigated his role in the 2011 Bahraini national emergency period. Subsequently the submitting party claims the violation of the following recommendations of the OECD Guidelines:

Chapter II, General Policies, Paragraph 2, 7 and 10:

A. Enterprises should [...]:

- 2. Respect the internationally recognized human rights of those affected by their activities.*
- 7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.*
- 10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11³ and 12⁴, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.*

Chapter IV, Human Rights, Paragraphs 4, 5 and 6:

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

- 4. Have a policy commitment to respect human rights.*
- 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 the submitting party regarding the Swiss NCP proceedings

Since April 2013 the submitting party has been engaged, together with other human rights organizations, with the responding party in an exchange of letters regarding events during the 2011 Bahraini national emergency period. However, according to the submitting party the responding party has refused to open an investigation regarding his role in the said period and failed to conduct an appropriate 'integrity check' via its Ad-Hoc Electoral Committee.

Therefore, the submitting party requests that the Swiss NCP offers its good offices for the resolution of this conflict through the facilitation of effective due diligence and human rights policy improvements.

4 Statement of the responding party

On 16 February 2016, the responding party submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance.

³ *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

⁴ *"Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing and adverse impact of the enterprise with which it has a business relationship."*

In its communication, the responding party emphasizes its commitment to adhere to the OECD Guidelines, to the extent that these are relevant for FIFA and its activities, and, as part thereof, to ensure respect of human rights.

However, the responding party repudiates any attempt to interfere with its mere internal affairs for political reasons. In its view, there is an evident connection between this submission and the 2016 FIFA presidential elections. It gained the impression that the submission was an attempt to take influence on the elections for political reasons. It noted that despite the fact that Sheikh Salman has been a FIFA official for a considerable period of time (President of the Asian Football Confederation and member of the FIFA Executive Committee), no submission related to an alleged involvement of Sheikh Salman in human rights violations that are purported to have occurred in Bahrain in 2011 has ever been made to the Swiss NCP before.

Furthermore, the responding party refers to the fact that it is an association under Swiss law and, as such, enjoys a considerable freedom of association and, as a sport's governing body, has a significant amount of autonomy. It mentions that in addition it is strictly neutral in terms of political matters and categorically rejects any attempts to interfere with its affairs for political reasons or to interfere or disrupt the work of its bodies.

Finally, the responding party believes that the subject matter of the submission does not fall within the scope of the OECD Guidelines, which according to it, primarily provide guidance for responsible business relationships.

5 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 11 February 2016 the Swiss NCP has taken the following steps:

- On 12 February 2016, the NCP acknowledged the receipt of the submission to the submitting party in written form.
- The submission was forwarded to the responding party on 12 February 2016.
- On 16 February 2016, the Swiss NCP received a written statement by the responding party in response to the submission, which was forwarded to the submitting party.
- On 17 February 2016, according to the Specific Instances Procedure of the Swiss NCP⁵ an ad hoc working group was constituted, including representatives from the State Secretariat for Economic Affairs (SECO) and the Federal Department of Foreign Affairs. This working group is involved in all steps of the procedure of the specific instance.
- On 16 March 2016, the submitting party sent a letter of clarification to the NCP after the non-election of Sheikh Salman as President of FIFA. This letter was forwarded to the responding party.

6 Considerations and decision of the Swiss NCP

Based on the Commentary on the Implementation Procedures of the OECD Guidelines and according to the Specific Instances Procedures of the Swiss NCP, the Swiss NCP has considered the following points in its Initial Assessment:

a) Identity of the parties concerned and their interest in the matter

The Swiss NCP comes to the conclusion that the submitting party has provided sufficient information regarding their interest in the issues raised. The submitting party is a non-profit

⁵www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/organisation-und-kontaktaufnahme.html

organization headquartered in Washington D.C., United States of America. It primarily advocates for democratic and human rights reform in Bahrain by lobbying actors in the United States and the international community. The organization is directed by Husain Abdulla, a Bahraini national and naturalized United States citizen. Since April 2013 the submitting party together with other human rights organizations has been engaged with the responding party in an exchange of letters regarding the concerns relating to events in Bahrain during the Bahraini national emergency period in 2011.

b) Responsibility of the Swiss 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 enterprise has its headquarters. The Swiss NCP is competent for this specific instance because Bahrain is not a signatory state of the OECD Guidelines and the responding party has its headquarters in Zurich, Switzerland.

c) Applicability of the OECD Guidelines to the responding party

The OECD Guidelines establish legally non-binding principles and standards of responsible business conduct for “*multinational enterprises*”. The OECD Guidelines do not provide a precise definition of the term “*multinational enterprises*”. However, they state that these include enterprises in all sectors of the economy and that ownership may be private, State or mixed. In addition, they usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.⁶ Whereas the OECD Guidelines do not explicitly refer to the “*commercial nature*” of multinational enterprises’ operations, responsible business conduct is generally understood as the responsibility of entities involved in business or commercial activities. The key question should therefore be whether the activities in question are of commercial nature, independently of the legal form of the entity.

FIFA, the world football’s governing body, is an association registered in the Commercial Register of the Canton of Zurich.⁷ According to its Statutes, FIFA has two main objectives: The first one is “to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural, and humanitarian values, in particular through youth and development programmes”.⁸ This is primarily done through financial and logistic support of member associations across the globe which in turn are engaging in football development projects.⁹ The second one is “to organise its own international competitions”, amongst others the FIFA World Cup generating revenue for FIFA (which are subsequently reinvested in, *inter alia*, aforementioned football development programmes). In doing so, FIFA is to some extent acting through wholly or partially owned domestic and foreign subsidiaries.¹⁰

Against this background, the Swiss NCP makes the following considerations in the case at question:

- It is fully acknowledged that FIFA is, directly or indirectly through its various subsidiaries, involved in commercial activities. This holds especially true for its operations in connection with the FIFA World Cup. However, and unlike other enterprises, FIFA’s operations may not *per se* be qualified as being of commercial nature. On the contrary, large parts of FIFA’s interactions strive towards fostering football as a global game without pursuing any business or profit motives whatsoever.

⁶ OECD Guidelines, Chapter I, Paragraph 4

⁷ <http://zh.powernet.ch/webservices/net/HRG/HRG.aspx/getHRGPDF?chnr=CH-020.6.000.262-1&amt=020&toBeModified=0&validOnly=0&lang=1&sort=>

⁸ http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf p. 6

⁹ www.fifa.com/about-fifa/who-we-are/explore-fifa.html

¹⁰ http://resources.fifa.com/mm/document/affederation/administration/02/77/08/71/qb15_fifa_web_en_neutral.pdf p. 61

In particular, the relationship between FIFA and its member associations is, regardless of the substantial financial flows involved, generally not governed by business interests but by the goal of promoting the cause of football. FIFA's status as a multinational enterprise under the OECD Guidelines must therefore be established in a case-by-case analysis based on the concrete circumstances.

- Alleged human rights violations brought forward by the submitting party against Sheikh Salman refer to the latter's role as the chairman of the Bahrain Football Association and his actions or omissions during pro-democracy protests in Bahrain in 2011. Nothing has come to the attention of the Swiss NCP that leads it to believe that Sheikh Salman's purported actions or omissions are in any way related to a commercial relationship between FIFA and the Bahrain Football Association.
- FIFA is an association under Swiss law. As such, it enjoys considerable freedom in setting up its governance regime. The selection procedure of candidates for the presidential election is an issue of internal organization. This process is not directly linked to specific commercial activities of FIFA. Therefore, the selection process cannot be considered as part of the commercial activities of the responding party.

Based on these considerations, the Swiss NCP concludes that in the particular case of the present submission the OECD Guidelines do not apply to the responding party.

d) Scope of the OECD Guidelines and materiality of the specific instance

The submission refers to alleged breaches of specific provisions of chapter II and IV of the OECD Guidelines. The submitting party is requesting to integrate human rights due diligence in the selection of candidates for the presidential election. The Swiss NCP states that specificities of election processes of executives and board members are an issue of corporate governance. Regarding this matter, the OECD Guidelines refer in its commentary to chapter II to the OECD Principles of Corporate Governance.¹¹ While the OECD Principles of Corporate Governance stipulate diversity and competencies as criteria for board members, they do not foresee human rights due diligence for the election processes.

Moreover, there is no evidence that Sheikh Salman's purported human rights violations have their basis in a commercial relationship between FIFA and the Bahrain Football Association. Accordingly, they are not covered by the business oriented provisions of chapter II and IV of the OECD Guidelines.

Based on these considerations, the Swiss NCP concludes that the issues raised in the present submission are not within the scope of the OECD Guidelines.

e) Legal context and parallel proceedings

The Swiss NCP takes into consideration concluded or ongoing parallel proceedings, including court rulings, if any. At the same time, and according to the Specific Instances Procedures of the Swiss NCP, already concluded or ongoing parallel proceedings would not necessarily prevent the Swiss NCP from pursuing a specific instance. However, in each individual case the Swiss 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. At this time, the Swiss NCP is not aware of any parallel legal proceedings covering the topics of the submission.

¹¹ OECD Guidelines, Chapter II, Commentary on General Policies, Paragraph 7

f) Contribution to the purpose and effectiveness of the OECD Guidelines

The role of the Swiss NCP is to contribute to the purpose and effectiveness of the OECD Guidelines by offering a forum for discussion and assisting the parties concerned to deal with the issues raised in order to find future orientated solutions.

As the OECD Guidelines are not applicable to FIFA in the present submission (cf. 6.c) and the issues raised do not fall within the scope of the OECD Guidelines (cf. 6.d), the Swiss NCP is not in a position to offer its mediation services.

Furthermore, the submission requested the responding party to investigate the role of Sheikh Salman and the Bahrain Football Association in alleged human rights violations in Bahrain in 2011. The role of the Swiss NCP is to contribute to future orientated solutions by offering a forum for discussion and mediation. It would however be beyond its role to exercise any investigative powers and conduct an investigation about alleged human rights violations in Bahrain.

7 Conclusion

The initial assessment of the Swiss NCP results in the conclusion that the issues raised in this submission do not fulfil the requirements according to the Specific Instances Procedures of the Swiss NCP. Therefore, the Swiss NCP will not give further consideration to the issues raised.

The Swiss NCP recommends to FIFA to address the topic of human rights with its member associations on a general basis in the relevant FIFA bodies.

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