

National Contact Point of Switzerland

Final Statement

Specific Instance regarding the Roundtable for Sustainable Palm Oil submitted by TuK Indonesia

Berne, 5 June 2019

1. Context

The OECD Guidelines for Multinational Enterprises (henceforth referred to as “OECD Guidelines”) represent a set of principles and standards for responsible business conduct, addressed as recommendations by the governments of the 36 OECD member and 12 other adhering states to multinational enterprises operating in or from their territories. The National Contact Point of Switzerland (henceforth referred to as “Swiss NCP”) for the OECD Guidelines has the mandate to raise awareness and promote observance of the OECD Guidelines. The Swiss NCP also contributes to the resolution of issues that arise relating to the implementation of the OECD Guidelines in specific instances by offering a forum for mediation, assisting parties concerned to deal with these issues and providing recommendations regarding the implementation of the OECD Guidelines.

On 25 January 2018, the NGO TuK Indonesia (henceforth referred to as “TuK” or “submitting party”) submitted a written request to the Swiss NCP to consider a specific instance under the OECD Guidelines regarding the Roundtable for Sustainable Palm Oil (henceforth referred to as “RSPO or “responding party”).

The submission concerned an unsolved land conflict related to palm oil production in Indonesia between the enterprise PT Mitra Austral Sejahtera, a subsidiary of the Malaysian Enterprise Sime Darby Berhad (henceforth referred to as “Sime Darby”), and the Dayak Hibun communities of Kerunang Hamlet and Entapang Hamlet in West Kalimantan in Indonesia (henceforth referred to as “Communities”).

On 31 December 2012, the Communities filed a complaint within RSPO’s proper complaints system. The actions taken and reports published are listed in the RSPO case tracker.¹ As the complaint has not been resolved completely after several years, TuK filed a submission to the Swiss NCP asking to support the elaboration of an action plan between RSPO and TuK regarding the resolution of the ongoing RSPO complaint. This action plan should identify the various steps, which need to be taken to resolve the Communities’ complaint to the RSPO. The submitting party expects the action plan to include strict time limits for each step.

The submitting party did not expect the Swiss NCP to mediate between the Communities and the enterprise PT Mitra Austral Sejahtera in order not to duplicate the ongoing RSPO complaint procedure. Furthermore, there is no link between Switzerland and the Communities respectively the enterprise concerned. The only link to Switzerland concerns

¹ www.rspo.org/members/complaints/status-of-complaints/view/29

the RSPO, as it is organized in the legal form of an association under the Swiss Civil Code, and is registered in Zurich, Switzerland.

2. Proceedings of the Swiss NCP

According to the Specific Instances Procedures of the Swiss NCP, an ad hoc working group was constituted which included representatives from the State Secretariat for Economic Affairs (SECO)² and the Federal Department of Foreign Affairs³. The ad hoc group was involved in all steps of the Initial Assessment, the decision regarding the acceptance of the specific instance as well in the Final Statement.

In its report on the [Initial Assessment](#) of 31 May 2018, the Swiss NCP concluded that the issues raised in the submission merit further consideration and therefore accepted the specific instance. However, as the issues in question have arisen in Indonesia, a non-adhering country of the OECD Guidelines, and as no operational unit of the RSPO is located in Switzerland, the Swiss NCP came to the conclusion that its degree of influence appears to be merely limited. Subsequently, a classical mediation procedure taking place in Switzerland and led by the Swiss NCP was assessed as unfeasible. Taking into account that no other NCP would be competent to treat this specific instance, the Swiss NCP decided nevertheless to offer its good offices to support direct discussions between TuK and RSPO where deemed appropriate. This offer was accepted by both parties.

Starting in June 2018, the Swiss NCP supported the parties through telephone conferences and written communications regarding the treatment of the RSPO complaint procedure. The following persons represented the parties:

- RSPO: Wathshlah Naidu, Bakhtiar Talhah, Patrick Chia
- TuK Indonesia: Edi Sutrisno, Eva Maria
- Swiss NCP: Alex Kunze, Barbara Maurer (until 31 August 2018), Olivier Bovet (from 1 September 2018)

The submitting party and the responding party agreed on the proceeding, including rules of confidentiality during a telephone conference on 3 July 2018.

Starting in July 2018 regular exchanges between TuK, RSPO and the Swiss NCP took place by written communications and telephone conversations. The Swiss NCP acted as a moderator of this dialogue. The dialogue was constructive and contributed to improve mutual trust, but was delayed, as deadlines were not met.

The parties agreed on a Confidential Joint Outcome of the Dialogue, which was signed by the NCP on 25 April 2019, TuK on 10 May 2019 and RSPO on 21 May 2019. Both parties agreed to disclose all elements of the Confidential Joint Outcome (with the exception of one annexe) in the Final Statement (see para. 3).

3. Joint Outcome of the mediation process

3.1. Objective

The objective of the dialogue was to agree on the elaboration of an action plan between TuK and RSPO regarding the resolution of the ongoing RSPO complaint with strict time limits for each step. The agreed outcome is founded on the parties' shared interest to find a mutually

² Divisions: International Labour Affairs, Economic Cooperation and Development,

³ Divisions: Human Security Division, Sectoral Foreign Policies Division

agreed solution of the issues raised in the near future.

3.2. Legal Review

As multiple offers by RSPO to have the matter resolved via mediation by an independent mediator have not worked, the pending case in the RSPO complaint mechanism was transferred from the RSPO Dispute Settlement Facility⁴ to the RSPO Complaints Panel on 9 June 2017 (see letter by RSPO from 9 June 2017⁵).

In order to support the final decision by the RSPO Complaint Panel, on 21 February 2018 the RSPO Complaint Panel decided to conduct a legal review of the pending issues by an independent reviewer. At the moment of this decision, the submission to the Swiss NCP had already been filed. But the Swiss NCP was not involved in this decision, because the submission had not yet been accepted by the Swiss NCP.

At the start of the dialogue between TuK and RSPO under the NCP proceeding (June 2018), the legal review had not been mandated. The criteria and timing of its elaboration was in consequence a major issue of discussion within the NCP proceeding.

The parties discussed the cost sharing of the financing of the legal review. As neither the communities nor TuK were able to contribute to the cost of the legal review, the parties agreed that the independent consultant would first be paid by RSPO before being reimbursed by Sime Darby.

In order to avoid any influence on the outcome of the legal review by the agreed financing scheme a certain number of criteria to assure an objective output were discussed. TuK and RSPO agreed to respect the following criteria regarding the elaboration of the legal review:

- The proceeding has to be in accordance with the RSPO Complaints and Appeals Procedures (2017).⁶
- Terms of reference (ToR) for the legal review will be shared by RSPO with TuK and Sime Darby for their review and comments. RSPO will then submit an adapted version for non-objection.
- The goals of the legal review have to be described in the ToR.
- The CV of the independent⁷ legal reviewer will be shared with the parties for their non-objection.
- The independent legal reviewer should be supplied with all relevant documents. A preliminary list of documents⁸ should be included in the ToR. Subject to protection under privacy laws, the documents will also be shared with TuK and Sime Darby.
- A draft of the legal review will be submitted to the parties enabling them to correct factual errors.

3.3. Action plan – steps and timelines

With the objective to conclude the ongoing complaint through the RSPO complaint mechanism, the parties agreed on the following steps and timelines:

- The terms of Reference of the legal review are agreed by the parties by 28 February 2019.

⁴ www.rspo.org/members/dispute-settlement-facility

⁵ <https://askrspo.force.com/Complaints/case/50090000028ErzsAAC/detail>

⁶ <https://askrspo.force.com/Complaints/procedures>: RSPO Complaints & Appeal Procedures (w.e.f. 1st August 2017)

⁷ Independent means that the reviewer wasn't engaged in any contractual relations with the parties (Sime Darby Group, TuK on behalf of the communities).

⁸ Including already documented witness statements and responses from Parties to the Complaint.

- The choice of the independent legal reviewer is agreed on by the parties by 31 March 2019.
- Subject to the comments received on the draft, the legal review is finalized by 31 Mai 2019.
- Subject to any further investigation to be conducted by the Complaints Panel, submissions by TuK and Sime Darby may be possible on the basis of the scope and timeline established by the RSPO Complaint Panel in order not to delay the procedure.
- TUK and Sime Darby are to be kept informed on the status of the Complaints Panel's investigation and the continued resolution process on a regular basis. Relatedly, and pending delivery of the final decision, the timeline for the different phases in the resolution process is to be communicated to TUK and Sime Darby.

3.4. Follow-Up

The parties concluded that there is a need for a continuing regular dialogue between them. They agreed on a series of follow-up activities:

- The parties agreed to continue their regular exchange by telephone and email until the pending case at the RSPO complaint mechanism is concluded.
- The parties agreed to meet mutually agreed deadlines. If deadlines cannot be met, the concerned party explains the reason and a new deadline is agreed on.
- The parties agreed to a follow-up by the Swiss NCP. They will send a report about the progress made regarding the agreed steps in the Confidential Joint Outcome to the Swiss NCP six months after the publication of the Final Statement. After reception of the reports, the NCP will organize a telephone conference with both parties. Based on the reports and the discussion with the parties, the NCP will decide about additional follow-up periods and/or meetings if needed.

4. Conclusions and follow-up

The NCP concludes that both Parties engaged constructively throughout the dialogue, which contributed to improve mutual trust. Challenges remained with time management (e.g. meeting deadlines for provision of feedbacks).

The Swiss NCP welcomes:

- the parties' agreement on a transparent and fair process of conducting the legal review by the RSPO Complaint Panel;
- the parties' agreement on an action plan with clear deadlines;
- the parties' commitment to continue their regular exchange until the pending case at the RSPO complaint mechanism will be concluded.

The Swiss NCP will follow-up on this specific instance as agreed by the Parties (see para. 3):

- The parties agreed to a follow-up by the Swiss NCP. They will send a report about the progress made regarding the agreed steps in the Joint Outcome to the Swiss NCP six months after the publication of the Final Statement. After reception of the reports, the NCP will organize a telephone conference with both parties. Based on the reports and the discussion with the parties, the NCP will decide about additional follow-up periods and/or telephone conferences if needed.

With this Final Statement, the Swiss NCP closes the specific instance.