

National Contact Point of Switzerland

Initial Assessment

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

Berne, 31 May 2018

1 Summary

This report on the initial assessment elaborated by the Swiss National Contact Point (henceforth referred to as “Swiss NCP”) concludes that the issues raised in this submission merit further consideration. The Swiss NCP therefore accepts the specific instance. As the issues in question have arisen in Indonesia, a non-adhering country of the OECD Guidelines for Multinational Enterprises (henceforth referred to as “OECD Guidelines”), and no operational unit of the Roundtable for Sustainable Palm Oil (henceforth referred to as “RSPO or “responding party”) is located in Switzerland, the degree of influence of the Swiss NCP appears to be merely limited. Subsequently a classical mediation procedure taking place in Switzerland and led by the Swiss NCP seems unfeasible. But taking in account, that no other NCP would be competent to treat this specific instance, the Swiss NCP decides to offer its good offices to support direct discussions between the parties where deemed appropriate. This conclusion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission.

2 Submission

The Swiss NCP received a written submission on 25 January 2018 to consider a specific instance under the OECD Guidelines regarding the RSPO. The specific instance has been raised by the NGO TuK Indonesia (henceforth referred to as “TuK” or “submitting party”) on behalf of the Dayak Hibun communities of Kerunang and Entapang in West Kalimantan in Indonesia (henceforth referred to as “the Communities”)

The submission concerns an unsolved land conflict in Indonesia. According to the submitting party, the enterprise PT Mitra Austral Sejahtera (henceforth referred to as “PT MAS”), a subsidiary of the Malaysian Enterprise Sime Darby Berhad (henceforth referred to as “Sime Darby”) have unlawfully excluded the Communities of their traditional lands, in order to be used for the production of palm oil. According to the submitting party, there are many sacred sites within the disputed land where prayers are offered and rituals take place. The loss of access to any of those sites would have an unsettling effect for the Communities. Furthermore, the Communities claim, that PT MAS’ operations already disrupt cultural festivals.

According to the submitting party, the Communities have tried to engage with Sime Darby since 2006. On 31 December 2012, the Communities filed a complaint within RSPO’s proper complaint mechanism. The actions taken and reports published are listed in the RSPO complaint tracker.¹ Although the complaint has been accepted as legitimate by RSPO, the issues could not be resolved entirely until the date of submission to the Swiss NCP.

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

According to the submitting party, RSPO has failed to take any or any effective steps to ensure that the complaint made by the Communities under the RSPO complaints procedure are determined within a reasonable period. In the view of the submitting party, RSPO has certified Sime Darby as compliant with RSPO principles and criteria even though land issues in relation with Sime Darby's activities remain unsolved. According to the submitting party, RSPO has failed to comply with its own rules and procedures by certifying Sime Darby.

According to the submission, TuK claims the violation of the following recommendations of the OECD Guidelines:

2011 OECD Guidelines, Chapter IV, Human Rights, Paragraphs 3 and 5:

[...] 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:

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 of their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

3 Expectations of the submitting party regarding the Swiss NCP proceedings

The submitting party asks the Swiss NCP to support the elaboration of an action plan with RSPO 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 does not expect the Swiss NCP to involve itself directly in the merits of their complaint to RSPO. Consequently, the Swiss NCP is not asked to offer mediation between the Communities and PT MAS.

4 Statement of the responding party

On 26 February 2018, the responding party submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In its communication, the responding party emphasizes its commitment for engaging in proceedings of the Swiss NCP to ensure a constructive resolution to the complaint raised by TuK on behalf of the Communities.

RSPO states, that it is organized in the legal form of an association under the Swiss Civil Code registered in Zurich, Switzerland. The Secretariat of RSPO is based in Kuala Lumpur, Malaysia. RSPO is a non-profit multi-stakeholder initiative and its objectives are to promote the growth and use of sustainable palm oil through cooperation within the supply chain and open dialogue with its stakeholders. The non-profit status is recognised through the tax exemption decree granted to RSPO under the Zurich Cantonal Tax Law and the Swiss Federal Law on Direct Federal Taxes. As a non-profit organization, RSPO states, that any income generated by RSPO is for the sole reason of servicing the membership and not for any profit making purposes.

In its communication, the responding party provided an update on the ongoing RSPO certification and complaint process. An official complaint was lodged with the RSPO complaints system in 2012, by the Communities against PT MAS, a subsidiary of Sime Darby. According to the responding party, the particular concession unit of PT MAS, a subsidiary of Sime Darby, is yet to undergo the RSPO certification process. The ongoing complaint had proceeded

through multiple mechanisms within the RSPO complaints system. It had initially proceeded through the dispute settlement facility, when both parties agreed to enter into mediation. According to the responding party, the parties to the complaint were able to settle several of their demands through bilateral negotiation. When the process failed to reach a resolution on the remaining demands, the complaint was transferred to the RSPO complaints panel in June 2017, as requested by the Communities. At current state, the complaint is under the purview of the RSPO complaints panel and shall proceed in accordance to the revised RSPO complaints and appeals procedures of June 2017, as well as related key procedural documents. Upon transfer of the complaint, the complaints panel had undertaken an immediate process of seeking a clarification and plan of action from Sime Darby on its plans to divest its ownership of PT MAS. Sime Darby was also required to submit monthly updates on its plans to divest its property and its other actions aimed at resolving the Communities' demands. These updates have subsequently been shared with TUK for their response.

On 7 March 2018, a representative of the law firm "Holenstein Rechtsanwälte AG" (henceforth referred to as "law firm") in Zurich (Switzerland), where RSPO has its domicile, submitted a written statement regarding the submission. In its communication, the representative of the law firm confirmed, that RSPO is an association according to Art. 60 ff. of the Swiss Civil Code, has its domicile at the law firm and is listed in the register of commerce of the Canton of Zurich. According to the communication by the law firm, no operational activities are executed at the domicile of RSPO. The law firm advises RSPO in a limited way regarding legal issues especially on issues of the register of commerce and the articles of associations of RSPO.

5 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 25 January 2018 the Swiss NCP took the following steps:

- Written confirmation to the submitting party to acknowledge receipt of the submission on 25 January 2018.
- The submission was forwarded to the responding party on 31 January 2018. Preliminary discussion by phone with the responding party took place in order to explain the Swiss NCP proceedings on 30 and 31 January 2018.
- On 7 February 2018, according to the Specific Instances Procedure of the Swiss NCP² an ad hoc working group was constituted, including representatives from the State Secretariat for Economic Affairs (SECO) and the Federal Department of Foreign Affairs (FDFA). This working group is involved in all steps of the procedure of the specific instance.
- On 26 February 2018, the responding party submitted a written statement to the Swiss NCP regarding the submission.
- On 1 March 2018 a meeting between the ad hoc working group and representatives of RSPO took place at the premises of the Swiss NCP in Berne (one person present in Berne, two persons participating by telephone) in order to exchange about the proceedings of the Swiss NCP, the governance structure of RSPO and the submission by TuK to the Swiss NCP.
- On 7 March 2018, a representative of the law firm, where RSPO has its domicile, submitted a written statement regarding the submission.
- During March 2018 several communications between the Swiss NCP and the parties and the parties themselves took place with the goal to move forward the elaboration of

²www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/organisation-und-kontaktaufnahme.html

the action plan as suggested in the submission prior to the publication of the report on the initial assessment.

- On 26 March 2018, the Advisory Board of the Swiss NCP³ discussed general considerations regarding the applicability of the OECD Guidelines to multistakeholder initiatives as well to organizations without operational activities in Switzerland but with domicile in Switzerland.
- On 24 April 2018 the Swiss NCP sent its draft report on the Initial Assessment to both parties for comments on possible misrepresentations of factual information.

6 Considerations and decision of the Swiss NCP

Based on the Procedural Guidance to the OECD Guidelines and the Specific Instances Procedures of the Swiss NCP, the Swiss NCP 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-governmental organisation with its secretariat in Jakarta (Indonesia) working on environmental, natural resource and human rights impacts of development in Indonesia. The Communities represented by TuK belong to the Dayak Hibun tribe situated in Kerunang and Entapang in West Kalimantan, Indonesia and had filed the complaint to the RSPO complaint mechanism in 2012. Information about the ongoing complaint is available on the website of RSPO.⁴

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.

RSPO is organized in the legal form of an association under the Swiss Civil Code, and is registered in Zurich, Switzerland. The Swiss organisations Federation of Migros Cooperatives and WWF Switzerland were among the founding members of RSPO.

The Secretariat of RSPO is based in Kuala Lumpur, Malaysia. RSPO works with a regional office in Jakarta Indonesia as well as several technical offices e.g. in Europa (UK and Belgium), Africa, Latin America and Asia (e.g. in India). RSPO does not undertake any operational activities in Switzerland.

As the issues in question have arisen in Indonesia and no operational unit of RSPO is located in Switzerland, the degree of influence of the Swiss NCP appears to be merely limited. E.g. it may not be practicable to obtain access to all pertinent information or to bring all the parties involved together in Switzerland. Subsequently a classical mediation procedure taking place in Switzerland and led by the Swiss NCP seems unfeasible. But taking in account, that no other NCP would be competent to treat this specific instance, the Swiss NCP will deal with this submission.

c) Applicability of the OECD Guidelines to the responding party

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

³ www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Sitzungsberichte_NKP-Beirat.html

⁴ www.rspo.org/members/complaints/status-of-complaints/view/29

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 ways⁵.

The OECD Guidelines expressly establish legally non-binding principles and standards for responsible business conduct, which is generally understood as the responsibility of entities involved in business or commercial activities. The key question should therefore be whether an entity is involved in commercial activities, independently of its legal form, its sector of activity or its purpose (profit or non-profit). Whether an entity can be considered to have commercial activities, should be decided by the competent NCP through a case-by-case analysis based on the concrete circumstances.

RSPO is organized in the legal form of an association under the Swiss Civil Code registered in Zurich, Switzerland.⁶ RSPO is active in several countries with its secretariat in Kuala Lumpur (Malaysia), a regional office in Jakarta (Indonesia) and several technical offices in Europe, Latin America and Asia.

RSPO is financed mainly by income generated through contributions from sustainable palm oil trade⁷ produced at certified plantations and membership fees. The membership fees are defined in the statutes of RSPO⁸ and the RSPO Membership Rules⁹.

According to the RSPO Annual Financial Report 2017 (financial year 2016/2017, ended 30 June 2017)¹⁰, income generated through contributions from sustainable palm oil trade (25.8 million RM¹¹) amounted approx. 64% of total income of the RSPO Group (40.5 million RM). Membership fees from 3422¹² members amounted around 35% (14.1 million RM) of total income of the RSPO Group. According to the approved minutes of the RSPO 13th General Assembly¹³, “the current income model which combines subscription from members and contribution from trading is working very well for RSPO”.

In the case at question the Swiss NCP makes the following considerations based on the OECD Guidelines:

- With its secretariat in Kuala Lumpur (Malaysia), its regional office in Jakarta (Indonesia) as well as technical offices in several continents, the organization has international operations and a multinational scope.
- Unlike other enterprises, RSPO’s international operations may not *per se* be qualified as being of commercial nature. Its status as a multinational enterprise under the OECD Guidelines must therefore be established in a case-by-case analysis based on the concrete circumstances.
- RSPO’s income is generated by a prominent part (64% in 2017) by income generated through contributions from sustainable palm oil trade. Furthermore, the RSPO Trademark, a globally recognized ecolabel, that signals the use of RSPO certified palm

⁵ OECD Guidelines, Chapter I, Paragraph 4.

⁶ [www.zefix.ch/en/search/entity/list/firm/760425?name=Roundtable%2520on%2520Sustainable%2520Palm%2520Oil%2520\(RSPO\)&searchType=exact](http://www.zefix.ch/en/search/entity/list/firm/760425?name=Roundtable%2520on%2520Sustainable%2520Palm%2520Oil%2520(RSPO)&searchType=exact)

⁷ See note No 5 (p.28) to the financial statements for the financial year which ended 30 June 2017 (<https://rspo.org/about/who-we-are/standing-committees/finance>): Income RSPO group through “Certificate Trading” (8.4 Million RM) and “Segregated and mass balance trading” (17.4 Million RM). Explanations: “The RSPO receives a contribution of USD 1 per tonne from credit trades, charged to buyer of certificates.” (...) “In addition, the RSPO receives a contribution of USD 1 per tonne from first transactions under the segregated and mass balance supply claims. The USD 1 per tonne levy is charged to the first buyer in the supply chain (...)”

⁸ www.rspo.org/key-documents/supplementary-materials/minutes-reports-of-rspo-ga-ega (last version indorsed by the RSPO General Assembly on 19 November 2015)

⁹ www.rspo.org/key-documents/membership (last version endorsed by the Board of Governors on 6 March 2017)

¹⁰ RSPO, Financial Statements for the financial year ended 30 June 2017:

<https://rspo.org/about/who-we-are/standing-committees/finance>

¹¹ Malaysian Ringgit

¹² Number of members end of June 2017, see p.6.: https://rspo.org/toc/RSPO-Impact-Update-Report-2017_221117.pdf

¹³ Para. 5; www.rspo.org/key-documents/supplementary-materials/minutes-reports-of-rspo-ga-ega

oil, is contributing to the value of sales products on a global level. Subsequently RSPO's activities (e.g. elaborating a system for certification of plantation, granting of licenses for products) contribute to the generation of income for the responding party. RSPO's activities can therefore be considered as activities of commercial nature, to which the OECD Guidelines are applicable.

Based on these considerations, the Swiss NCP concludes that in the particular case of the present submission the OECD Guidelines apply to the responding party.

d) Scope 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 IV of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the NCP to consider the issues raised. This includes information provided by the submitting party about the situation of the Communities. Furthermore, information disclosed by RSPO regarding the ongoing complaint¹⁴ allows the Swiss NCP to conclude, that the submission falls in the scope of the OECD Guidelines.

The OECD Guidelines distinguish between impacts on matters covered by the OECD Guidelines including human rights through own activities¹⁵ of the concerned enterprise and adverse impacts directly linked¹⁶ to the operations of the enterprise. In the present case, the Swiss NCP concludes that the alleged breaches are directly linked to RSPO activities.

e) Legal context and parallel proceedings

The Swiss NCP will take into consideration ongoing parallel proceedings, including court rulings. According to the Specific Instances Procedures of the Swiss NCP, already concluded or ongoing parallel proceedings will 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.

The submission is based on an ongoing complaint treated by the RSPO complaint mechanism. The complainant are the Communities of Kerunang Entapang, Sanggau, West Kalimantan and the concerned enterprise is Sime Darby.

The submitting party does not expect the Swiss NCP to mediate between the Communities and the enterprise PT MAS. TuK expects the Swiss NCP to mediate between RSPO and TuK. The treatment of the submission aims therefore to make a positive contribution to the resolution of the issues raised.

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

The role of the Swiss NCP is to offer a forum for discussion and to assist the parties concerned to deal with the issues raised. The submitting party has been engaged at least since 2014 with the responding party to foster solutions regarding the raised questions. The Swiss NCP considers that by accepting this specific instance, it could foster the continuation of this previous exchange between the responding and the submitting party. Thereby, the Swiss NCP could contribute to a better understanding among parties and help them reach a mutually acceptable outcome concerning the issues raised.

g) Conclusions

This report on the initial assessment concludes that the issues raised in this submission merit further consideration. The Swiss NCP therefore accepts the specific instance. As the issues in

¹⁴ <http://www.rspo.org/members/complaints/status-of-complaints/view/29>

¹⁵ OECD Guidelines, Chapter II, Paragraph 11 and Chapter IV, Paragraph 2.

¹⁶ OECD Guidelines, Chapter II, Paragraph 12 and Chapter IV, Paragraph 3.

question have risen in Indonesia and no operational unit of the RSPO is located in Switzerland, the degree of influence of the Swiss NCP appears to be merely limited. E.g. it may not be practicable to obtain access to all pertinent information, or to bring all the parties involved together in Switzerland. Subsequently a classical mediation procedure taking place in Switzerland and led by the NCP seems to be unfeasible. But taking in account, that no other NCP would be competent to treat the specific instance, the Swiss NCP decides to offer its good offices to support direct discussions between the parties where deemed appropriate.

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.

7 Further proceedings

The Swiss NCP will contact the parties in order to offer its good offices to support direct talks between the submitting and responding party 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 Swiss NCP website.

If the parties reach an agreement and find a solution for the dispute or a further means of resolving the dispute, the Swiss 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.

If no agreement is reached or one of the parties is not willing to take part in the proceedings, the Swiss NCP will also make this information publicly available in a final statement. The latter will include a summary of the reasons why an agreement was not reached.

The Swiss NCP may draw up recommendations for implementation of the OECD Guidelines, which will also be included in the statement. In addition, in consultation with the parties, the Swiss NCP can envisage specific follow-up activities, for which the NCP will provide support following completion of the specific instance procedure.

Final statements are published on the Swiss 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 Swiss NCP publishes the names of the parties involved in its written statement. Before the statement is issued, the Swiss NCP gives the parties the opportunity to comment on a draft statement. If there is no agreement between the Swiss NCP and the parties about the wording of the statement, the Swiss 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 Swiss NCP, special requirements concerning the treatment of confidential information can be agreed upon by the parties involved in this specific instance. The Swiss NCP informs the parties that it reserves the right to stop the proceedings if one or other of the parties does not respect this confidentiality. 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.