

DEVELOPMENTS IN THE FIELD

In the Wake of Bonsucro: Multi-Stakeholder Initiatives and Third-Party Certifiers at the Test Bench of OECD National Contact Points

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Abstract

In January 2022, the UK National Contact Point (UK NCP) issued a final statement in a specific instance claim brought against Bonsucro, a multi-stakeholder initiative (MSI) that aims to promote sustainable production of sugarcane. The claim alleged that Bonsucro had failed to comply with the OECD Guidelines because it had not carried out appropriate due diligence towards one of its members, accused of human rights abuses. While NCP complaints had been brought against MSIs and certifiers before, the UK NCP's final statement is the first to recognize the leverage MSIs have over members due to their ability to deny membership and related reputational benefits to companies wishing to show sustainability logos, and to affirm their responsibility to use this leverage to avoid abuses. The statement sheds light on the accountability of actors involved in private voluntary sustainability standard systems, with possible impacts on other actors such as third-party certifiers.

Keywords: Ethical labels; multi-stakeholder initiatives; OECD National Contact Points; third-party certifiers; voluntary sustainability standards

1. Introduction

In the last decade, the global production of sugarcane has been marked by an unprecedented expansion and has registered one of the highest growth rates of certified products.¹ Human rights violations linked to this industry have emerged in parallel, particularly in areas devoted to plantations. Cambodia in particular witnessed a stream of indiscriminated land concessions granted by the government to multi-national enterprises for cultivation of sugarcane, resulting in large-scale human rights abuses of local communities.²

Against this background, on 11 March 2019, several Non-Governmental Organizations (NGOs) brought a case before the UK National Contact Point (UK NCP) to denounce alleged non-compliance with the Guidelines for Multinational Enterprises of the Organization for

¹ UNFSS, *Voluntary Sustainability Standards: Sustainability Agenda and Developing Countries: Opportunities and Challenges*, 5th Flagship Report (October 2022), UNFSS/5/2022, 6, referring to years 2014–2018; International Institute for Sustainable Development, *Global Market Report: Sugar* (2019), <https://www.iisd.org/system/files/publications/ssi-global-market-report-sugar.pdf> (accessed 5 April 2023).

² HRC, 'Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P Subedi, Addendum, A human rights analysis of economic and other land concessions in Cambodia' A/HRC/21/63/Add. 1 (24 September 2012).

Economic Co-operation and Development (OECD Guidelines) by Bonsucro Ltd, a multi-stakeholder initiative (MSI) operating in the sustainable sugarcane market (from now on, the *Bonsucro* case).³ The UK NCP recognized that MSIs should comply with the OECD Guidelines and use their leverage to influence the behaviour of companies wishing to join their network and maintain reputational benefits related to the membership.

Questions around the nature and scope of human rights responsibilities of actors involved in voluntary sustainability standards (VSS) systems deserve greater attention. So far, several attempts to bring MSIs and third-party certifiers (TPCs) before NCPs have been made,⁴ but the final statement in *Bonsucro* is the first to acknowledge their responsibility for a breach of the OECD Guidelines, and to shed light on the potential accountability of other VSS actors, such as TPCs.

II. Key VSS Actors and Processes

VSS are private regulatory schemes setting specific requirements to address sustainability challenges in global value chains, including human rights and environmental concerns.⁵ VSS schemes typically include the following key processes: (i) the development of standards; (ii) the identification of indicators to assess compliance with and continuous monitoring of standards; and (iii) the certification of compliance carried out by independent certifiers, communicated through labels.⁶ Although VSS are non-mandatory, enforcement may be achieved through refusal or loss of the certification.⁷

VSS systems involve two main actors to carry out the above-mentioned processes: MSIs and TPCs. The first and the second processes are usually undertaken by MSIs, while the third is carried out by TPCs.⁸

As the name suggests, MSIs consist of different stakeholders, such as corporations, NGOs and governments, cooperating to achieve a common aim.⁹ Although MSIs classify themselves with different labels, such as ‘global non-governmental organizations’ or

³ NCP UK, *IDI, EC and LICADHO v Bonsucro Ltd.* (11 January 2022), <https://www.gov.uk/government/publications/idi-ec-and-licadho-complaint-to-uk-ncp-about-bonsucro-ltd/final-statement-idi-ec-and-licadho-complaint-to-uk-ncp-about-bonsucro-ltd> (accessed 9 June 2022). Specific instance (11 March 2019), <https://www.includedevelopment.net/wp-content/uploads/2020/12/UK-NCP-Specific-Instance-Bonsucro-FINAL.pdf> (accessed 31 January 2023).

⁴ NCP Switzerland, *TuK Indonesia v RSPO* (5 June 2019), [https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_Faelle/Sustainable_Palm_Oil_\(2018\)/RSPO_2019_Final_Statement.pdf.download.pdf/Final_Statement_Swiss_NCP_RSPO_TuK_for_publicationNCP_website.pdf](https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_Faelle/Sustainable_Palm_Oil_(2018)/RSPO_2019_Final_Statement.pdf.download.pdf/Final_Statement_Swiss_NCP_RSPO_TuK_for_publicationNCP_website.pdf) (accessed 5 October 2022); NCP Italy, *AEFFAA et al v RINA Services S.p.A.* (9 December 2020), https://pcnitalia.mise.gov.it/attachments/article/2035928/Final%20Statement%20RINA_DEF.pdf (accessed 5 October 2022); NCP Germany, *ECCHR et al v TÜV Rheinland and TÜV India* (26 June 2018), https://www.bmwk.de/Redaktion/EN/Beschwerdefaelle-NKS/Abschliessende-Erklaerung/ecchr-against-tuev-rheinland.pdf?__blob=publicationFile&v=8 (accessed 5 October 2022). On the role and potential of NCPs, see Kari Otteburn and Axel Marx, ‘Seeking remedies for corporate human rights abuses: what is the contribution of OECD National Contact Points?’ in Axel Marx, Jan Wouters and Geert Van Calster (eds.), *Research Handbook on Global Governance, Business and Human Rights* (Cheltenham: Edward Elgar, 2022) 229.

⁵ On VSS *ex multis* Elizabeth A Bennett, ‘The efficacy of voluntary standards, sustainability certifications and ethical labels’ in Marx, Wouters and Van Calster (eds.), *ibid.*, 177; Axel Marx et al, ‘Voluntary Sustainability Standards: State of the Art and Future Research’ (2022) 2 *Standards* 14.

⁶ Axel Marx and Jan Wouters, ‘Competition and cooperation in the market of voluntary sustainability standards’ in Panagiotis Delimatsis (ed.), *The Law, Economics and Politics of International Standardisation* (Cambridge: Cambridge University Press, 2015) 215, 219–220.

⁷ Daniel Brinks et al, ‘Private regulatory initiatives, human rights and supply chain capitalism’ in Daniel Brinks et al (eds.), *Power, Participation and Private Regulatory Initiatives: Human Rights Under Supply Chain Capitalism* (Philadelphia: University of Pennsylvania Press, 2021) 3, 18–19.

⁸ Marx and Wouters, *note* 6, 228–229.

⁹ On MSIs *ex multis* Justine Nolan, ‘Closing Gaps in the Chain: Regulating Respect for Human Rights in Global Supply Chains and the Role of Multi-stakeholder Initiatives’ in Brinks et al (eds.), *note* 7, 35.

‘international non-profit organization’, they are usually constituted in the form of private-law associations or companies. TPCs are mainly set up as corporations.

VSS schemes have *de facto* become necessary mechanisms for companies to gain better positions on the market and even to enter global supply chains.¹⁰ For this reason, it is particularly important to address the responsibility of MSIs and TPCs for human rights abuses committed by members or certified companies.

III. The Bonsucro Case

Bonsucro (formerly, the Better Sugar Cane Initiative Ltd), is a non-profit company limited by guarantee incorporated in the UK. It presents itself as a MSI wishing to ‘accelerate the sustainable production and uses of sugarcane’¹¹ by setting and promoting sustainability standards for sugarcane production. Bonsucro profits from the fees paid by the companies joining the network, the admittance to which is granted against companies’ adherence to its Code of Conduct.¹² If they so wish, members can be certified against Bonsucro sustainability standards through the assessment of TPCs.

In 2008, the Cambodian government granted a 70-year land concession for sugarcane production to three subsidiaries of Mitr Phol Co. Ltd (MP), a Thai company. Most of the areas covered by the land concessions overlapped with private lands and no or inadequate compensation was provided to the affected rights-holders.¹³ Between 2008 and 2009, MP’s subsidiaries carried out violent displacements of the villagers to clear the areas for plantations, leading to further multiple human rights violations such as arbitrary arrests and loss of food security. In 2013, such violations were brought to the attention of the Thai National Human Rights Commission (TNHRC) and confirmed by the Subcommittee for Community Rights of the TNHRC.¹⁴ In 2018, a class action against MP was brought before Thai civil courts.¹⁵

MP was first admitted as a member of Bonsucro in 2010. In 2011, the Cambodian League for the Promotion and Defense of Human Rights and other NGOs submitted a complaint to Bonsucro’s internal grievance mechanism denouncing MP subsidiaries’ human rights violations in Cambodia. After the complaint, MP voluntarily withdrew from Bonsucro. In 2015, MP was re-admitted as a member, with no re-engagement with, or resolution of the claim raised in 2011.¹⁶

In 2019, a group of NGOs filed a specific instance before the UK NCP, arguing that Bonsucro had failed to: (i) conduct an adequate human rights due diligence (HRDD) before admitting MP as a member; (ii) exercise leverage upon MP when re-admitting it in 2015;

¹⁰ Allison Loconto and Cora Dankers, *Impact of International Voluntary Standards on Smallholder Market Participation in Developing Countries: A Review of the Literature* (FAO, 2014), 15.

¹¹ Bonsucro official website: <https://bonsucro.com/what-is-bonsucro/>.

¹² The Code of Conduct contains a generic commitment to human rights respect in sugarcane supply chain (art 1.2). Members have reporting commitment to Bonsucro and a grievance mechanism is provided in case of breaches (art 4–5).

¹³ Details of the business relationship between MP and its subsidiaries and the rights of the villagers under Cambodian law can be found in the case brief provided by Inclusive Development: <https://www.inclusivedevelopment.net/wp-content/uploads/2020/12/Mitr-Phol-Class-Action-Case-Brief.pdf> (accessed 23 January 2023).

¹⁴ TNHRC, complaint no. 259/2013, investigation report no. 1003/2015 (12 October 2015), unofficial English translation, <https://www.inclusivedevelopment.net/wp-content/uploads/2021/04/thai-human-rights-commission-report-mitr-phol-unofficial-translation-1.pdf> (accessed 23 January 2023).

¹⁵ Bangkok South Civil Court, *Hoy Mai et al v Mitr Phol Co. Ltd.* (28 March 2018). See case brief, note 13.

¹⁶ See the amended complaint at: <https://www.inclusivedevelopment.net/wp-content/uploads/2020/12/Amended-Complaint-to-Bonsucro-re-Mitr-Phol-Group-05-February-2016.pdf> (accessed 4 April 2023).

(iii) put in place a human rights policy commitment in accordance with internationally recognized human rights; and (iv) provide an effective grievance mechanism.¹⁷

In its final statement, the UK NCP reached a number of important conclusions. First, it held that Bonsucro, as a London-based non-profit company operating worldwide, should comply with the OECD Guidelines, despite its not-for-profit character. Second, it concluded that there was a link between the harm and Bonsucro by virtue of its business relationship with MP and, by extension, with MP's subsidiaries. The existence of a business relationship between Bonsucro and MP was substantiated by the membership fees paid by MP, which provided the latter with the use of Bonsucro's brand and access to other related benefits.

Third, it agreed with the complainants that MSIs have a 'special leverage' towards their members, as companies gain reputational benefits from membership. As a consequence, MSIs should make sure they provide the reputational benefits entailed by membership to responsibly-acting businesses only, and found that Bonsucro provided no evidence that it exercised the appropriate leverage towards MP before re-admitting it back in 2015.

Finally, the UK NCP concluded that Bonsucro did not undertake an adequate HRDD, as it failed to provide sufficient information on the minimum benchmark on human rights compliance it required in its admission procedure.

IV. NCP Precedents on VSS Actors

Prior to the *Bonsucro* case, NCPs already had the chance to deal with the accountability of MSIs and TPCs.

In the case *TuK v Roundtable on Sustainable Palm Oil* (RSPO), brought before the Swiss NCP in 2018, RSPO was accused of non-compliance with the OECD Guidelines as it had certified a company as compliant with RSPO principles, while it was still involved in unresolved land disputes. The Swiss NCP admitted the complaint notwithstanding the not-for-profit character of RSPO, holding that the OECD Guidelines apply to entities involved in commercial activities, regardless of their legal form, sector or purpose.¹⁸ As for the alleged human rights violations, the NCP observed that they were directly linked to RSPO,¹⁹ but it did not get to assess the merits of the case because the parties reached an agreement based on the elaboration of an action plan to solve the ongoing claim.

TPCs were accused of breaching the OECD Guidelines in relation to human rights abuses committed by companies they certified in both *ECCHR v TÜV* and *AEFFAA v RINA*, brought before the German and the Italian NCPs in 2016 and 2018, respectively.

In both cases, complainants argued that the TPCs failed to exercise leverage to prevent or mitigate corporate abuses, by issuing deficient audit reports and by failing to ensure appropriate auditing standards by their subsidiaries.²⁰ While the NCPs admitted the complaints,²¹ they did not examine the substantive question on TPCs' responsibility. This is because no agreement was reached between the parties in *ECCHR v TÜV*,²² and the issue was set aside in the conciliation process in *AEFFAA v RINA*.²³

¹⁷ Specific instance, note 3, para 7.

¹⁸ NCP Switzerland, Initial assessment, [https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_Fälle/Sustainable_Palm_Oil_\(2018\)/Initial_Assessment_Sustainable_Palm_Oil_2018.pdf.download.pdf/SwissNCP_InitialAssessment_TuK_RSPO_for_publication.pdf](https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_Fälle/Sustainable_Palm_Oil_(2018)/Initial_Assessment_Sustainable_Palm_Oil_2018.pdf.download.pdf/SwissNCP_InitialAssessment_TuK_RSPO_for_publication.pdf) (accessed 31 January 2023), para 6c.

¹⁹ *Ibid*, para 6d.

²⁰ *ECCHR et al v TÜV Rheinland and TÜV India*, Specific instance, 26, 32.

²¹ *AEFFAA et al v RINA Services S.p.A.*, Specific instance, 16, 21.

²² *ECCHR et al v TÜV Rheinland and TÜV India*, note 4, section C.

²³ *AEFFAA et al v RINA Services S.p.A.*, note 4, para 35.

This account shows that, despite previous attempts to hold MSIs and TPCs accountable for due diligence failures, the final statement in the *Bonsucro* case can be seen as the first explicit acknowledgement of responsibility for breach of the OECD Guidelines by a VSS actor.

V. The Applicability of *Bonsucro* Rationale to TPCs

Companies are involved in human rights harms when they cause or contribute to adverse impacts or when such impacts are directly linked to their operations, products or services by a business relationship.²⁴ Under the OECD Due Diligence Guidance for Responsible Business Conduct, contribution exists when a company causes, incentivizes or facilitates human rights harms by another enterprise.²⁵ To avoid contributing to human rights impacts, companies must take action to cease or prevent such contribution and exercise leverage to mitigate any remaining impacts by another enterprise. Leverage should also be exercised when impacts are directly linked to the company's operations, products or services.²⁶

As service providers, MSIs' and TPCs' responsibility will typically arise from instances of contribution or being directly linked to human rights abuses.²⁷ A 'directly linked' scenario was found in the *Bonsucro* case, in view of the business relationship between the MSI and its members, which in turn linked it to the members' subsidiaries and the harm they caused. In these scenarios, companies are expected to use or increase leverage to seek to avoid harm. The UK NCP found that access to the reputational benefits linked to their brands gave MSIs considerable leverage, and *Bonsucro*'s failure to exercise its leverage amounted to a breach of the OECD Guidelines.

It is likely that the same rationale followed by the UK NCP in this case applies to future cases involving TPCs. The ability to grant reputational benefits and commercial advantages through membership in MSIs and certifications are factors that reflect the existence of leverage.²⁸ TPCs are essential for accessing certificates of social and/or environmental compliance and show ethical labels which give companies a competitive advantage and add legitimacy to any claim of sustainability both towards business partners and end-consumers.²⁹ By analogy with MSIs, TPCs can equally be found to: (i) have leverage towards companies wishing to obtain or retain their certificates, and; (ii) have breached the OECD Guidelines by failing to exercise such leverage, releasing certificates to harmful companies without previously demanding and verifying the implementation of corrective action plans. Therefore, to the extent that TPCs fail to exercise their leverage to effect changes on the harmful practices of entities wishing to obtain or retain a sustainability certificate, they may easily fall under one of the two grounds of responsibility under the OECD Guidelines. TPCs will likely be found, at a minimum, to be directly linked to the harm and responsible for failing to take steps to prevent or mitigate it. In some cases, they could also be found to have contributed to the harm, for example, if the failure to exercise leverage is found to have incentivized or facilitated the harmful conduct of aspiring companies.

²⁴ OECD Guidelines, II, A.11-12; IV, 3, 5. For an overview on the current interpretation of such conducts under the UNGPs, see Tara Van Ho, 'Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights' (2021) 43 *Human Rights Quarterly* 634.

²⁵ OECD, *Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018), 70.

²⁶ OECD Guidelines, IV, Commentary, 42.

²⁷ Anita Ramasastry, 'Advisors or Enablers? Bringing Professional Service Providers into the Guiding Principles' Fold' (2021) 6 *Business and Human Rights Journal* 293.

²⁸ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), 49.

²⁹ Susan Park and Teresa Kramarz (eds.), *Global and Environmental Governance and the Accountability Trap* (Cambridge: MIT Press, 2019), 70; Enrico Partiti, *Regulating Transnational Sustainability Regimes* (Cambridge: Cambridge University Press, 2022), 28.

VI. Concluding Remarks

Cases involving VSS actors before NCPs show an increasing awareness of the role that such actors can and should play in disincentivizing human rights violations and their potential responsibility for failing to use their leverage to this end. However, their responsibility is far from being clearly established in NCPs' practice at present. The *Bonsucro* case can be the turning point. The UK NCP established that those in charge of releasing sustainability labels are in an extremely powerful position, capable of influencing the behaviour of companies wishing to access the market benefits of ethical labels. This understanding can prove very useful going forward to hold other VSS actors accountable under the OECD Guidelines, to the extent that they hold similar positions of power and influence towards enterprises wishing to access or retain the benefits of membership in MSIs and sustainability certificates.

Competing interest. The author declares none.

Financial support. This publication is part of the project NODES which has received funding from the MUR – M4C2 1.5 of PNRR with grant agreement no. ECS00000036.