



## Evaluation of the Final Statement regarding the Specific Instance Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia versus ING

Date: 13 July 2023

**Evaluation of the Final Statement by the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises further to the Final Statement published on 7 April 2022.**

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### 1. Introduction

On 7 April 2022, the Dutch National Contact Point (NCP) concluded the notification of a specific instance regarding an alleged violation of the OECD Guidelines for Multinational Enterprises (hereinafter: the Guidelines) by ING. This notification was submitted by Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia.

The notification concerned alleged adverse environmental, human rights, and labour rights impacts caused by subsidiaries of three of ING's clients: Noble Group Ltd., Bollore Group/Socfin Group S.A., and Wilmar International Ltd. The notifying parties stated that due to the high degree of foreseeability of the harmful impacts and the failure of ING to take any action that actually mitigated or decreased the risk of impacts, ING – through its continued provision and renewal of loans of a substantial total amount to these clients – has come to be in a position of contributing to the harmful impacts in these three cases.

The notification specifically concerned the alleged non-observance of the OECD Guidelines and furthermore refers to the OECD Due Diligence Guidance for Responsible Business Conduct and the OECD guidance document on Responsible Business Conduct for Institutional Investors.

In its Initial Assessment of 20 January 2020, the NCP concluded that the issues raised merited further consideration and offered its good offices to facilitate a dialogue between the parties.

Both parties accepted the good offices, after which a dialogue between the parties started. Unfortunately, after a fruitful start, the dialogue ended prematurely. Therefore, the objectives of the dialogue facilitated by the NCP could not be attained.

On 7 April 2022 the NCP published its Final Statement, in which it explained why agreement could not be reached and included recommendations to ING on the implementation of the Guidelines. With this, the NCP concluded the procedure of this specific instance.

For further details on the notification and the following NCP procedure, see the Final Statement on the NCP website.

## 2. Evaluation of the Final Statement procedure

The standard procedure for an Evaluation is that the NCP initiates an evaluation one year after the publication of a Final Statement. The purpose of such an evaluation is for the NCP to assess, based on information provided by the parties, what follow-up actions parties have taken in relation to the results of the dialogue and/or the recommendations made by the NCP. Usually, this process is done in writing. However, if parties prefer, the NCP can also organize a meeting. In the case of the specific instance concerned, it was recommended in the Final Statement that both parties would come together for the evaluation.

The NCP initiated the evaluation by contacting both parties with the request to give an account of the follow-up actions they took in relation to the NCP's recommendations and the suggestion of an evaluation meeting. The NCP received responses from Friends of the Earth Netherlands on 21 April 2023 and from ING on 1 May 2023. As the positions of the parties in their respective responses were in line with their previous positions as expressed in the NCP-procedure and there were no indications that a joint meeting would bring further convergence, the NCP decided to continue the procedure in writing.

After receiving written feedback from the parties, the NCP drafted the Evaluation and shared the draft with both parties. Parties provided comments, after which the NCP finalized the Evaluation and posted it on its website.

<b>Date</b>	<b>Actions</b>
8 March 2023	NCP sent mails to both parties requesting information on what follow-up they gave to the NCP's recommendations
21 April 2023	NCP received response from the notifying parties
1 May 2023	NCP received response from the enterprise
10 May 2023	Draft text sent to both parties for comments
13 July 2023	Publication of the Evaluation of the Final Statement

### 3. Outcomes of the Evaluation

In its Final Statement, the NCP recommended that the parties remain in contact about the issues raised in this specific instance regarding:

- 1) the question at what point being “directly linked” to an adverse impact as described in the complaint becomes a contribution to adverse impacts, according to the OECD Guidelines;
- 2) what constitutes proper due diligence to identify, prevent and mitigate adverse impacts in this respect; and, more specifically,
- 3) engagement with (or disengagement from) large-scale palm oil production, in relation to RSPO certification.

The NCP further recommended that the parties, both separately and jointly, take good note of the considerations on the above issues as developed in its conclusions when following up on this specific instance.

Concerning the follow-up on the recommendations in the Final Statement, the parties informed us about the following.

Friends of the Earth Netherlands stated that in the past year, they kept ING up to date by email about the developments on the ground. The notifying parties stated that they did not receive any follow-up questions from ING, nor any request from ING for more information or details.

According to ING, the regular dialogue between Friends of the Earth Netherlands and ING on this topic almost came to a halt following the complaint. ING stated that Friends of the Earth Netherlands asked for information concerning clients active in the palm oil sector and that ING answered these questions as detailed as possible. However, ING also stated that at this moment there is no dialogue going on anymore between the parties and that neither of the parties has taken any initiative for the resumption of such a dialogue.

This means that the parties did not jointly take action on the various recommendations, but took actions in a different context.

Regarding the first recommendation, Friends of the Earth Netherlands, together with OECD Watch, Asser Institute and MVO Platform, organized an expert session in October 2022 as a first step to enhance the understanding of the shift from ‘directly linked’ to ‘contributing to’ by companies and financial institutions. This expert session was joined by several high-level experts (UN, OECD and scientists) and by partner civil society organizations (CSOs). The session helped to further clarify the understanding of Friends of the Earth Netherlands of the shift from directly linked to contributing to and also helped inform strategies of CSOs with regard to their work on international soft law and on hard law (in particular: legislation). Friends of the Earth Netherlands will continue to consider if and when further contact with ING may be appropriate in relation to this specific topic.

Regarding the question what constitutes proper due diligence in the three cases, the notifying parties learned from the mediation process that banks like ING rely on information from CSOs and Sustainalytics for proper due diligence. Sustainalytics in turn also relies on information from CSOs. Friends of the Earth Netherlands stated that they are therefore committed to continue working to fulfil this role. The notifying parties have been, and still are, working on two of the three cases mentioned in this specific instance.

The notifying parties further stated that they sent a letter to ING in which they asked for clarification about ING's palm oil policy. In its public policy, ING states (according to the complainants) that it has "no intention to expand (our) palm oil client base" and that "in total we finance less than ten clients that earn 10% or more from palm-oil-plantation-related activities". The notifying parties hoped to get a better understanding of the practical implementation of ING's policy. ING responded to their letter, but was, according to the notifying parties, not able to answer all their questions, citing client confidentiality.

Although the notifying parties appreciate ING making an effort to respond to their letter, it is in their view still problematic that they – as stakeholders and as representatives of rights holders of the bank – do not have enough information to fully understand ING's due diligence and therefore cannot properly analyze if ING's due diligence is sufficient. According to the notifying parties, this state of affairs is not in line with the OECD Due Diligence Guidance on Responsible Business Conduct regarding transparency.

Regarding RSPO, the notifying parties stated that they have scrutinized RSPO and the RSPO-certification of the cases in the complaint. They feel that this is important as, according to them, it was shown during the mediation sessions that certification systems like RSPO play a major role in due diligence processes. Although this role is too big in the perspective of the notifying parties, they realize that this is the reality they have to deal with and therefore they see it as their job to keep scrutinizing and challenging the RSPO. The notifying parties stated that they found out that companies are allowed to remove plantation areas that are not certification ready from the certification process and obtain certification for the mill and other parts that do comply. This came to their attention when they researched the certifications of one of the cases of the complaint. The notifying parties informed the RSPO about this loophole, and it turned out that the RSPO was not aware of it.

ING informed the NCP that, in reaction to the Final Statement, they wrote an internal guidance on due diligence related to providing general credit facilities to companies with their own palm oil plantations. This guidance describes a step-by-step plan, explicitly giving substance to the OECD Due Diligence Guidance for Responsible Corporate Lending and Securities Underwriting and to the following finding of the NCP in the dialogue (see: Final Statement): "However, participation in such an initiative (note NCP: Roundtable on Sustainable Palm Oil/RSPO) does not shift responsibility from the enterprise to the initiative for adverse impacts that it causes, contributes to or to which it is directly linked; the enterprise remains responsible for ensuring that its due diligence is carried out effectively." This internal guidance is now policy within ING and is being implemented. The enterprise further clarified that when conducting due diligence it takes into account information provided by several parties, amongst which CSOs.

#### 4. Conclusion of the NCP

Based on the information provided by the parties, the NCP concludes the following.

Given the fact that the dialogue ended prematurely, the NCP appreciates that the parties have made attempts to remain in contact about the issues raised in this specific instance.

In relation to the question at what point being “directly linked” to an adverse impact becomes a contribution to adverse impacts, the NCP notes the initiative taken by Friends of the Earth Netherlands, together with other parties, to organize an expert session on this important topic.

On the question what constitutes proper due diligence to identify, prevent and mitigate adverse impacts in the three cases that were central to the notification, the NCP appreciates the fact that the notifying parties still work on two out of the three cases. The NCP also notes the adoption by the ING of an internal guidance on due diligence, which is now being implemented. The NCP encourages the ING to continue monitoring developments and where necessary further develop this guidance in consultation with relevant stakeholders. Regarding RSPO, the NCP notes the continued scrutiny of this initiative by the notifying parties. As explained by the NCP in its Final Statement and as recognized by ING, participation in such an initiative does not shift responsibility from the enterprise to the initiative for adverse impacts that it causes, contributes to or to which it is directly linked; the enterprise itself remains responsible for ensuring that its due diligence is carried out effectively. Therefore, according to the NCP, scrutiny by the notifying parties can help enterprises like ING in continuously assessing the quality of the initiative.

Overall, the NCP has not been able to identify substantive progress made by the parties jointly regarding its recommendations on the issues raised in the specific instance. Still, the NCP would like to thank both parties for their cooperation in this evaluation procedure.

*Glossary:*

CSOs – civil society organizations

FoE - Friends of the Earth

NCP – National Contact Point

RSPO – Roundtable on Sustainable Palm Oil

SDI – Sustainable Development Institute (Liberia)

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP, which is responsible for its own procedures and decisions, in accordance with the Procedural Guidance section of the Guidelines. In line with this, the Dutch NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on the [NCP Website](#)

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