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'Environmental and Conflict Resolution: Case study of Dispute Settlement
Facility (DSF) in the Roundtable on Sustainable Palm Oil (RSPO)',
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Environmental and Conflict Resolution

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Abstract

The Roundtable on Sustainable Palm Oil (RSPO) has Principles and Criteria (P&C) as standards, as well as a Code of Conduct which must be complied by all the members. The RSPO is one of many roundtable initiatives that constantly face challenges, on how it can contribute and deliver significant impact to sustainable development globally.

While maintaining and ensuring its credibility, RSPO provides an avenue for addressing complaints and managing disputes to individuals and communities who are affected by the operations of its members. The dispute resolution mechanism in RSPO contains two parts:

- a) The Complaints System and
- b) The Dispute Resolution Facility.

Complaints can be filed against RSPO members who are allegedly in breach of the P&C through the RSPO Complaints System. The Complaints System can be categorized as a non-judicial, non-state based grievance mechanism that is developed by to address the specific issues that arise in oil palm industry worldwide.

Dispute Settlement Facility (DSF) is part of RSPO Complaints System, an in-house service under the RSPO that support RSPO's members, local communities and related stakeholders in mediation efforts between RSPO members and the affected communities. DSF aims to come up with fair and lasting resolutions that allow members to comply with RSPO policies and standards. Currently, DSF has a cooperation agreement with the National Mediation Centre (PMN) in Indonesia and Malaysian Mediation Centre (MMC). DSF is conducting the following activities:

1. Administers and manages disputes
2. Helps parties communicate and negotiate until a mediator is appointed
3. Provides support and capacity building to concerned parties
4. Recommends mediators and experts who can assist the parties
5. Helps the parties choose a mediator

This paper describes the process, challenges and lessons learned from the RSPO Dispute Settlement Facilities that uses mediation to resolve the disputes in palm oil industry.

Keywords: *palm oil, mediation, dispute*

1. Introduction

Roundtable on Sustainable Palm Oil (RSPO) has two mechanisms to address the complaints: Complaints System and Dispute Settlement Facility (DSF). The mechanism can be categorized as a non-judicial, non-state based grievance mechanism that is developed by palm oil multi-stakeholders initiatives that are based on respect for human rights related standards (Figure 1).¹

The Dispute Settlement Facility (DSF) is RSPO's in-house facilitation service to support RSPO members (notably growers), local communities and other stakeholders to effectively use mediation as a means to resolve palm oil production-related disputes, in cases where at least one party is a RSPO member. Mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.² The concept of "mediation" generally is an extension of the parties' own efforts to manage their conflict; an intervention by an acceptable third party; non-coercive, non-violent, and ultimately non-binding; an attempt to reduce or prevent violence and achieve a peaceful outcome; and a voluntary form of conflict management whereby the conflict parties retain their control over the outcome (if not always over the process), as well as their freedom to accept or reject any aspects of the process or the ultimate agreement.³ DSF is one of the avenues available to disputing parties which the Complaints Panel can recommend. Currently, DSF has cooperation agreement with the National Mediation Centre (PMN) in Indonesia and Malaysian Mediation Centre (MMC).

This paper describes the process, challenges and lessons learned from the RSPO Dispute Settlement Facilities that uses mediation to resolve the disputes in palm oil industry.

1.1 What is RSPO?

The Roundtable on Sustainable Palm Oil (RSPO) is a global, multi-stakeholder initiative on sustainable palm oil.⁴ It was established in 2004 in Zurich in accordance with Article 60 of the Swiss Civil Code. It is a non-profit association that unites stakeholders from seven sectors of the palm oil industry to develop and implement global standards for sustainable palm oil. The seven sectors come from different backgrounds, including plantation companies, processors and traders, consumer goods manufacturers, retailers of palm oil products, financial institutions, environmental NGOs and social NGOs from countries that produce or consume palm oil.

Sustainable palm oil production is comprised of legal, economically viable, environmentally appropriate and socially beneficial management and operations. The RSPO Principles and Criteria (RSPO P&C) is a voluntary standard and in itself gives the impression that member companies willingly commit to make the shift to responsible practices. The commitment is delivered through the application of a set of 8 Principles, 43 Criteria and 139 Indicators and its accompanying Guidance for National Interpretation (RSPO P&C, 2013).

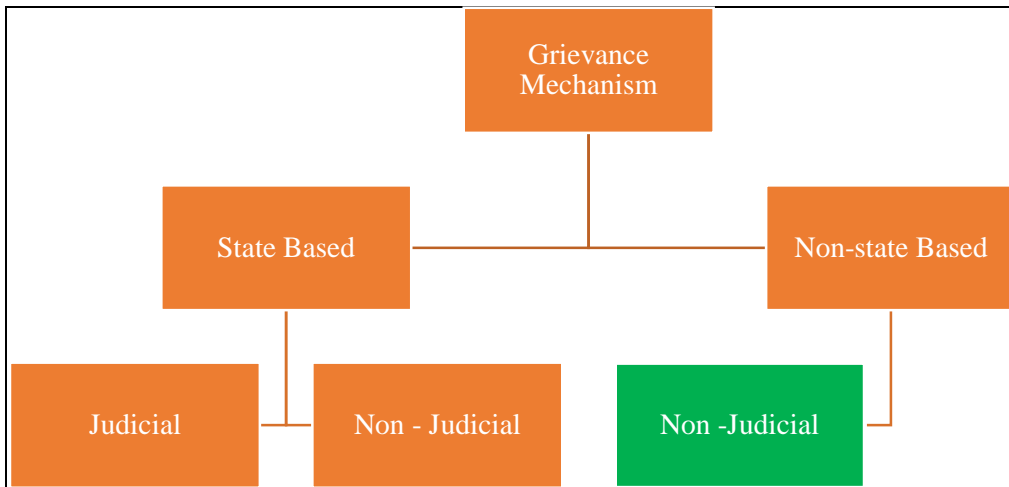
¹ Please see *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations, 2011.

² Matthias Siegfried, *Conflict Prevention: the Use of Mediation and Facilitation in the Post-Agreement Phase*. Mediation Support Project, Swiss Peace Foundation.

³ Matthias Siegfried, *Conflict Prevention: the Use of Mediation and Facilitation in the Post-Agreement Phase*. Mediation Support Project, Swiss Peace Foundation.

⁴ For more information, please surf in to www.rspo.org

Figure 1. The Divisions of Grievance Mechanism



Source: UN Guiding Principles on Business and Human Rights, 2011

Recent data shows that RSPO currently has 2,633 members with 3.46 million hectares of certified palm oil plantation. Approximately 12.84 million tonnes of palm oil is certified by the RSPO or 20% of global palm oil.⁵To support the local communities, RSPO has assisted 165,049 scheme smallholders and 2,391 independent smallholders around the world. The data shows 502,004 hectares plus 11,114 hectares had been certified for the scheme and independent smallholders.⁶

By becoming a member of the RSPO, member organizations acknowledge their membership of the RSPO and its objectives i.e., statutes of the RSPO, the Principles and Criteria (P&C) and its respective national interpretations and implementation process through informed and explicit endorsement.⁷

Apart from that, RSPO has some mechanisms to assure that its members comply with the P&C. Members should submit the time bound plan to obtain certification⁸. The New Planting Procedure (NPP) is applied prior to the land clearing, and also submits the Annual Communication of Progress (ACOP). Audit system conducted by independent parties particularly Certification Body under supervision by Accreditation Services International (ASI). In regards to standard setting, RSPO has National Interpretation to complement the generic P&C. The grievance system in RSPO is called the complaints system which provides for remedies and Dispute Settlement Facilities (DSF) through mediation. For members who carried out land clearing before HCV assessment, RSPO has a corrective mechanism called the Compensation and Remediation Procedure.

⁵ Status 15 January 2016

⁶ <http://www.rspo.org/about/impacts> and <http://www.rspo.org/members/smallholders>

⁷ <http://www.rspo.org/resources/key-documents/membership>

⁸ The time bound plan consist of the indicative schedule for RSPO members and its subsidiaries related to their plan to get their RSPO certification.

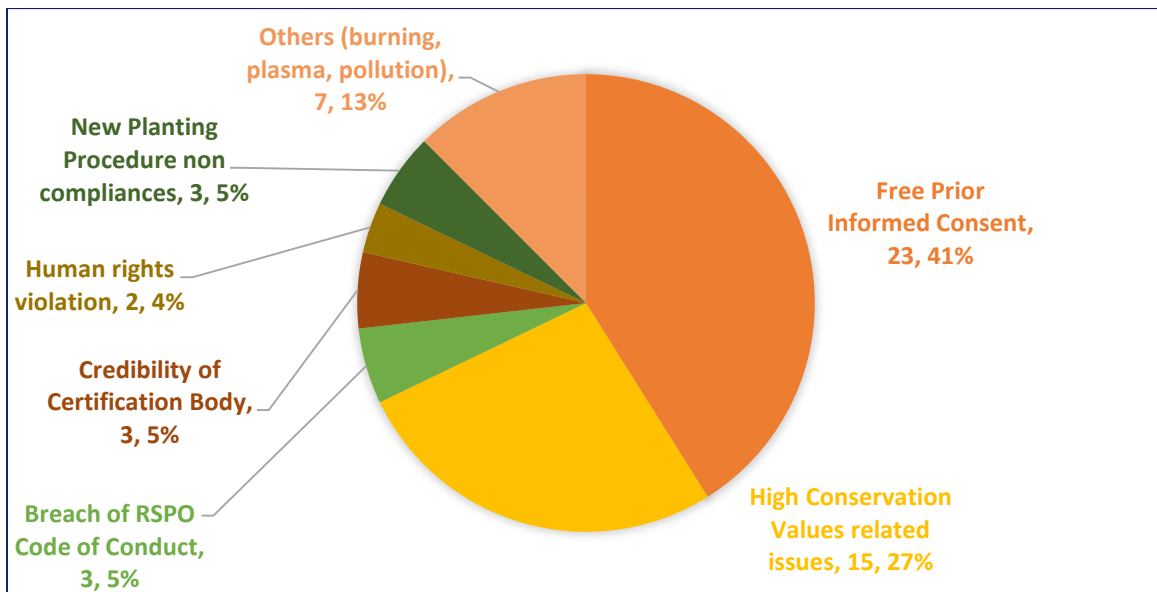
1.2 Complaints System

The system that receives, process, monitor and evaluate the complaints is known as the complaint system. The RSPO Complaints System is a fair, transparent and impartial process to duly handle and address complaints against RSPO members or the RSPO system itself. It addresses grievances in a manner that is reflective of the nature and vision of RSPO. The system allows all stakeholders to lodge complaints. The system is not intended to replace the legal system or the judicial system of a country but as an alternative or as a complement to the judicial and other non-judicial grievance mechanisms.

All the complaints is lodged through the Complaints Coordinator (RSPO Secretariat). The RSPO Secretariat is responsible as a focal point to receive, identify, facilitate, mediate, communicate and manage the flow of the Complaints System from the moment a formal complaint has been received until it is closed. The process seeks to address the complaints in a fair, transparent and impartial manner, while also focusing on engagement and dialogue as the means to resolve the complaints. RSPO Secretariat provide the recommendations to the Complaints Panel.

Complaints Panel deliberates and decided on all complaint cases. The Panel has been tasked to decide on the legitimacy of any given complaint made against RSPO members and on any urgent “interim measure” needed during further investigation and handling of the case by the RSPO. The Panel may propose to the RSPO Board of Governors (BoG) any sanction in a situation where a complaint does not get resolved satisfactory. The composition of the Panel represents the seven membership categories. Each group consist of five expert members, in a balance of interests and expertise.

Figure 2. Number of Complaints, by Types, January 2016



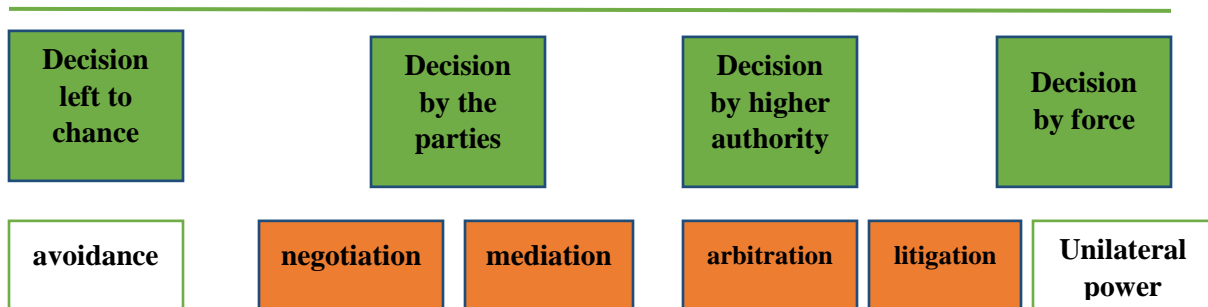
Based on data in January 2016, the majority of complaint cases, 21 (40%) is related to the FPIC. While the second highest complaints are related to HCV, 13 cases (25%). The examples of the cases are: weak High Conservation Value (HCV) assessment, inadequate

HCV management, including endangered species found inside oil palm concession areas e.g Orangutans, burning, and river pollution. The HCV issues are also captured in the complaints cases under New Planting Procedures (NPP). Please see Figure 2 for the details.

2. Dispute Settlement Facility (DSF)

In theory, dispute resolution continuum is divided into four mechanisms, namely negotiation, mediation, arbitration and litigation (Figure 3). This division is based on the decision making process. In negotiation, the process will involve both parties without involvement of the acceptable third party. Under negotiation, the two parties engage in (possibly arbitrarily long) face-to-face cheap talk. Under arbitration, two parties commit to conform to the neutral third party recommendation. Both mediators and arbitrators should optimally filter information, but mediators should also add ‘noise’ to it. It is found that unmediated negotiation performs as well as mediation if and only if the degree of conflict between the parties is low. The mediators may act optimally in dispute resolution by filtering unmediated communication and introducing ‘noise’ to it.⁹ Meanwhile in arbitration, the decision will be made by a higher authority. The RSPO Complaints System can be categorized as arbitration, in which the Complaints Panel as the authority, who can make decisions and shall be implemented by the parties. The RSPO Complaints Panel can be seen as the neutral third party to whom the both parties commit to conform. Mediation improves upon communication when the intensity of conflict is high, or when asymmetric information is large. The mediator improves upon unmediated communication by not precisely reporting information to conflicting parties, and precisely, by not revealing to a player with probability one that the opponent is weak. An arbitrators who can enforce outcomes, is exactly as effective in preventing conflict as a mediators who can only propose self-enforcing agreements.¹⁰ Litigation is the strongest mechanism when the decision is made by force. Researcher is categorized mediation as a middle mechanism between negotiation and arbitration.¹¹

Figure 3. Dispute Resolution Continuum



Source: Slaikeu (1989, 396) in Craig R. Smith, *Mediation: The Process and the Issues*. IRC Press, Industrial Relations Centre, Queen’s University, Canada, 2008

⁹ Maria Goltsman, Johannes Horner, Gregory Pavlov and Francesco Squintani. *Mediation, Arbitration and Negotiation*. 2007

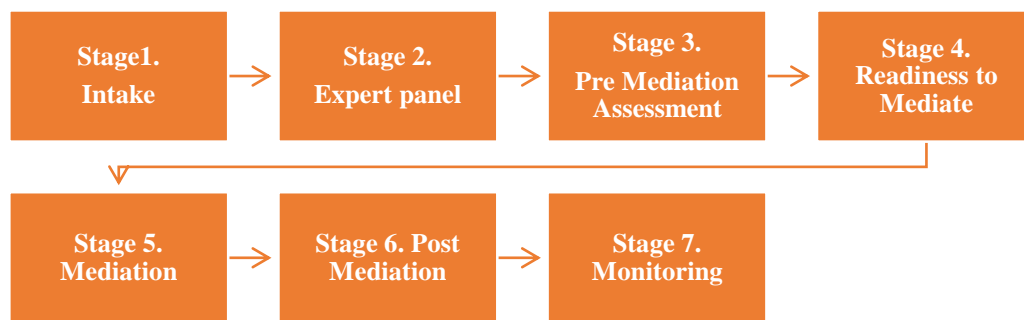
¹⁰ Johannes Horner, Massimo Morelli and Francesco Squintani. *Mediation and Peace*. Cowles Foundation Discussion paper No. 1765. Yale University, USA, 2010.

¹¹ See Slaikeu (1989, 396) in Craig R. Smith, *Mediation: The Process and the Issues*. IRC Press, Industrial Relations Centre, Queen’s University, Canada, 2008.

Parties who shall be of primary standing and therefore recourse under the DSF are those have a direct land-related conflict or other disputes with each other i.e individuals, smallholder groups and/or their communities. The DSF is the way to avoid the similar disputes may flare up again.

The main difference between Complaints System and Dispute Settlement Facility (DSF) is on the process to address the dispute. In Complaints System, the decision will be made by the Complaints Panel, which the RSPO members have an obligation to follow. Meanwhile in DSF, mediation as a tool to develop agreement among the parties. However, this difference is not strictly implemented. Some cases can be forwarded to DSF in the middle or final stage of the process. As an example, land dispute case that needs participatory mapping and land verification. On the other hand, some cases can be forwarded back to the Complaints if the parties refuse to use mediation. However, all cases currently shall be submitted through a single entry, namely through the Complaints Coordinator.

Figure 4. Stages on Dispute Settlement Facilities



DSF conducts the following activities:

- 1) Administers and manages disputes;
- 2) Helps parties communicate and negotiate until a mediator is appointed;
- 3) Provides support and capacity building to concerned parties;
- 4) Recommends mediators and experts who can assist the parties;
- 5) Helps the parties choose a mediator

DSF helps resolve land disputes and to a certain extent, cases based on Free Prior Informed Consent (FPIC), such as issues on the land compensation, land acquisition and plasma scheme.¹² The steps of DSF are as follows:

Stage 1- Intake

To record, categorize and confirm

In stage 1, RSPO Secretariat will gather information and liaise with the Complaints Panel, complainant/disputant and the company. Based on the evidence and discussion with the parties, the Secretariat will check if the criteria is met and categorized as a dispute, also conducts stakeholders mapping. At the same time, this stage is used to inform the parties about the various steps in DSF. The pre-mediation report will be the output of Stage 1.

¹²The FPIC Guideline can be found here: <http://www.rspo.org/news-and-events/announcements/free-prior-and-informed-consent-guide-for-rspo-members-2015-endorsed>

Stage 2- Expert Panel - to advice and support

The DSF Advisory Group (DSF AG) is a voluntary group of experts who support the development of the DSF. An “ad hoc expert panel” that consists of 2-3 experts from DSF AG supports RSPO Secretariat. Composition of the Expert Panel and Terms of Reference, is to be agreed with the parties, based on the needs. A “no conflict of interest’ declaration is to be signed by each expert. The DSF AG has the following roles:

- a) Analyzing the relevance, effectiveness and impact of DSF policies, procedures and operating tools;
- b) Providing strategic guidance, making recommendations and proposing adjustments to DSF policies, procedures and capacity, as appropriate;
- c) Supporting outreach and promotion of DSF as a useful mechanism for RSPO members and affected groups alike to engage with;
- d) Giving advice and guidance to DSF on case management;
- e) Reporting to the RSPO Board of Governors. The DSF Advisory Group in turn, is supported by the RSPO Secretariat.¹³

Stage 3 – pre mediation assessment

In the pre mediation assessment stage, the RSPO Secretariat prepares the Terms of Reference (ToR) for the mediator together with a short list of approved mediators. The ToR describes the disputed issues and perspectives, expectations, roles, responsibilities and capacity needs of the mediators. It is also essential to decide the issues of confidentiality of mediation, time and place, duration, methods of settling disputes arising in contract mediation and persons who may participate in mediation.¹⁴The parties shall sign the contract of mediation, which is a statement that says they are agree to assign a mediator. At this stage, the case should have been published on the RSPO website.

Stage 4 – readiness to mediate

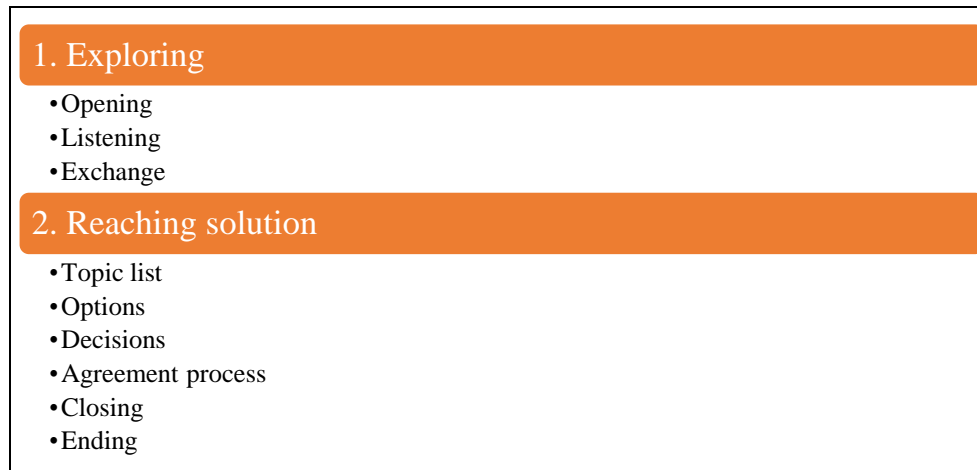
An expert assessment needs to be carried out on whether mediation can help in the situation. It requires *ground-truthing* the situation by ensuring there is a legitimate grievance, getting stakeholder feedback and ascertaining whether the DSF is the appropriate forum to address the said grievance. If it is determined that this is the appropriate forum, there is a need to discuss any concerns that may have about mediation at this stage, clarify to the participants role the mediation, confirm parties' understanding of the scope of mediation their shared goal and the contribution expected of them. Decision makers with pragmatic authority have to be involved and must voluntarily enter mediation in good faith. Decisions can also be taken on confidential, topics i.e., how to withdraw from the process, liability of the mediator, logistics, dates and timeline in general, fees and payments. The ground-truthing is also to conduct stakeholders mapping, to identify the key stakeholders and factions in the community. Identifying credible representation that will be involved in mediation is necessary and this will need to be cross-checked and verified through DSF via an expert panel.

They will also need to determine capacity of parties to mediate. Therefore, DSF has organized mediation training and seminars for invited RSPO members, particularly the parties who want to familiarize themselves with the complaints system and DSF.

¹³<http://www.rspo.org/members/dispute-settlement-facility>

¹⁴ Prof. Veronica Stoica, PhD, *Some Consideration on the Mediation Contract*, University of Targu Jiu, Juridical Sciences Series, Issue 1/2019, Romania

Figure 5. Mediation Process in RSPO DSF



In Stage 3 and Stage 4, RSPO Secretariat starts to open discussion with the candidates for the role of mediators. With the reference of the ground-truthing result, it is possible that the mediator will recommend conducting pre mediation meetings with each or some of the parties. Based on the proposal, DSF provides funding for the local community to pay the mediator. The proposal will then be discussed by the DSF Working Group. However, the local community is still required to bear a portion of the fees to paid to the mediator is still

Stage 5 – mediation

Mediation in Stage 5 refers to the mediation that involves all parties. It is carried out in accordance with the RSPO's Code of Conduct and best practice guidelines for DSF mediation. A mutual agreement is not always concluded at the first mediation.¹⁵ It depends on the complexity of the case and the variety of the parties involved (e.g their interest, variety of organizations, etc). The mediation process is described on Figure 5.

Stage 6 – post mediation

In post mediation, based on the notes from mediator, RSPO Secretariat will consider whether a satisfactory settlement has/has not been reached. The DSF documents the agreements and decisions and reports back to Complaints Panel where relevant.

Stage 7 – monitoring

If a settlement has been reached, the implementation of the agreement should be monitored for one year before the case closed. But if there is no agreement, the process can be moved back to **Step 4**. The Secretariat then, documents the agreements and revisions.

3. Challenges and Lesson Learn

Research reveals that the best way of resolving the conflict seems to be through mediation is via the presence of a mediator, third specialist, impartial and neutral, to try to clarify the underlying causes of conflict to achieve a settlement there of. The work style of mediation depends on the parties' behavior and personality, but also on the mediator's skill to facilitate communication and above all, on how well he knows what actually happened, because by knowing the cause he is likely to facilitate the

¹⁵ Some references wrote mutual agreement as mediation agreement.

proper conduct of both mediation and the positive results which lead to a final peace agreement. In order to solve the conflict, the mediator and the parties must especially understand the motivations and concerns of each of them. The parties must know the methods discussed in mediation, to interact with each other and with the mediator as well.¹⁶ However, the DSF faces some challenges and has also learnt valuable lessons. The details are as follows.

3.1 Challenges

a. The critical points in deciding mediator and/or independent assessors

As the decision making burden in the DSF process is on the disputants and company, the process in appointing the mediator and/or independent assessor may take 2-6 months. The RSPO together with the DSF AG will develop the draft Terms of Reference for each case, which will then be discussed and agreed by both the disputants and company. The difficult part is usually in seeking a mediator and/or independent assessor who does not have a conflict of interest and at the same time, who has good knowledge of the local culture and RSPO policies and procedures. Both parties shall agree upon the as well as the service fee and how it is to be shared among the parties.

b. Complexity and dynamics of the case

The process of finding resolutions takes time. The average time can be 1.5-3 years for each case. The complexity and dynamics (local politics, social, factions in the community, etc) of the case contribute to the time needed to reach a settlement.

c. Resource and Capacity

RSPO has a limited number of staff who manages the complaints and DSF, which may affect the speed of response. Independent consultants can be assigned to support the RSPO Secretariat but the process of procurement may take time, since it should be evaluated and accepted by both parties.

d. Frivolous case

In some instances, it has been found that the RSPO Complaints System has been abused by some communities and civil society organizations to try and obtain pecuniary benefits which are totally disproportionate to the actual or alleged violations by member companies. Therefore, for the system to work effectively spurious claims must be filtered and stakeholder must come with 'clean hands' i.e. in good faith with noble intentions. Recently, the RSPO has sent three warning letters to complainant/disputant who has lodged spurious complaints.

3.2. Lessons Learnt

a. Categorization in receiving cases

After couple of years managing cases, RSPO Secretariat has divided cases into two categories, namely reported cases and complaint cases. The case is put under "reported", if the RSPO Secretariat finds that there is an opportunity for both parties to seek a resolution together, with or without facilitation from the RSPO. The reported cases will be shared with the Complaints Panel but no decision will be made. As the RSPO Secretariat cannot reject any cases, all frivolous complaints are also put as reported cases.

¹⁶Dragos Marian Radulescu. *Mediation – a Method to Resolve Conflicts without Going to Justice*. Dimitrie Cantemir Christian University, 2012

- b. Parties can work together in more equal manner, rather than against each other**

DSF was developed with an intention to seek resolution amicably. The agreed action plan shall be discussed by both parties. The role of the RSPO Secretariat is more as facilitator. There is a process for building, maintaining and restoring relationship between the parties.
- c. Complaints system and DSF as alternative grievance**

RSPO Complaints System can be used as an alternative mechanism by all stakeholders or as a complementary method to address the dispute. DSF not only provides a list of mediators but it also can assist in the pre-mediation, post-mediation, and help enhance the capacity of the parties on their knowledge of mediation.
- d. Accessibility**

In the RSPO Complaints System and DSF, the disputant/complainant can submit a case and its evidence in any form, including in hard copy. It is not bureaucratic the complainant/disputant can send or contact the Complaints Coordinator directly via various media e.g phone, cell phone, email and Skype to get the updates of the case.
- e. Mediation may save time and money**

RSPO does not impose any fees on the complainant/disputant. The RSPO is aware of the impact of the cost factor on the complainant/disputant. Therefore, the venue of physical meetings is undertaken based on agreement from both parties. Research shows that mediation can reduce cost of dispute, produce quicker resolutions than litigation and help to maintain and improve the relationship between the parties.¹⁷
- f. DSF Trust Fund**

The RSPO also provides a DSF Trust Fund that can be used for the capacity building of disputants, realizing the settlement agreed upon by disputants, payment of mediators, technical experts and other specialists. The activities on the capacity building includes education and awareness programmes that aim to deliver an overview of the principles of facilitative mediation, to increase the understanding of the conflict with the use of communication techniques and learn how to approach, manage and resolve the conflicts.
- g. Transparency**

The RSPO Complaints System operates in a transparent manner. The s minutes of meeting of both the Complaints Panel and the DSF are available on the RSPO website.
- h. Confidentiality**

If the parties have decided to use mediation, the mediation process will be treated as confidential. RSPO will respect the decision of both parties and will not publish the information related to the mediation process.

¹⁷ Craig R. Smith, *Mediation: The Process and the Issues*. IRC Press, Industrial Relations Centre, Queen's University, Canada, 2008.

4. Summary

The RSPO is a voluntary multi stakeholder organization which sets standards for the palm oil industry via its Principles and Criteria (RSPO rules). The primary aim of the complaints system and the DSF is to ensure that the RSPO rules are implemented by its members to maintain the integrity of the RSPO.

The complaints system and DSF has created a very positive impact to its members as they are indicators of the effectiveness of the RSPO rules. Frequently, the RSPO Complaints System and DSF has been used as a platform of last resort by individuals and communities to get members companies to address their grievances. The RSPO Complaints System has also been successful in drawing attention to the plight of the affected people by the transparent way; the development and the decision of the complaints are shared through its website.

The lessons learnt from Complaints and DSF has often been the catalyst that triggers a call for changes in the RSPO rules and its implementation, leading to an improvement in the overall sustainability standards. Though at this moment, the RSPO Complaints System and DSF might not fulfill all the ideals of an impartial effective dispute resolution system but it remains as a very viable system, that has resulted in the resolution of a number of complaints leading to fair participation by the communities in the palm oil industry worldwide.***

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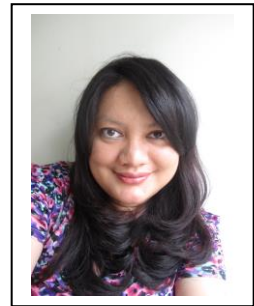
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