

National Contact Point of Switzerland

Initial Assessment

Specific Instance regarding Credit Suisse submitted by the Society for Threatened Peoples Switzerland

Berne, October 19, 2017

1 Conclusion

This report on the initial assessment produced 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 and offers its good offices to the parties. 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 for Multinational Enterprises (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 28 April 2017 to consider a specific instance under the OECD Guidelines regarding Credit Suisse (henceforth referred to as “CS” or “responding party”), which is headquartered in Zurich, Switzerland. The specific instance has been raised by the Society for Threatened Peoples (STP) Switzerland henceforth referred to as “STP” or “submitting party”.

The submission concerns CS’s business relation with companies involved in the construction of the Dakota Access Pipeline (henceforth referred to as “DAPL”) in the United States (henceforth referred to as “US”). The submitting party acknowledges the existing good internal policies of CS regarding corporate responsibility, but asks that they are fully coherent with international standards and principles such as the OECD Guidelines, the UN Guiding Principles for Business and Human Rights (henceforth referred to as “UNGP”), the UN Declaration on the Rights of Indigenous Peoples (henceforth referred to as “UNDRIP”) and the UN Global Compact (henceforth referred to as “UNGC”). In its submission, the submitting party therefore requests to discuss with the responding party internal corporate responsibility procedures of CS regarding their coherence with international standards and implementation in practice.

According to the submitting party, the DAPL project has generated major protests over several months because it may threaten the local indigenous communities’ main drinking water source and a leak of the pipeline could affect 17 million people downstream. According to the submitting party, there were concerns that the project would destroy important cultural sites. The submitting party further claims, that allegedly the indigenous communities have not adequately been involved in the project and a more comprehensive environmental impact assessment than the one carried out in view of the re-routing of the pipeline, was cancelled.

The submitting party claims, that despite international critics about the project, CS has increased its business relation with enterprises involved in the construction of the DAPL. The allegations include that CS failed to actively encourage its business partners involved in the construction of the DAPL to prevent or mitigate adverse impacts on affected communities or the environment. According to the submitting party, the responding party failed to carry out proper ongoing due diligence, to encourage its business partners to act compatibly with the OECD Guidelines, to prevent or mitigate adverse human rights impact and to protect the environment, public health and to contribute to a wider goal of sustainable development. Furthermore, according to the submitting party, the responding party did not act in compliance with its own internal oil and gas policy.

3 Alleged Violations of the OECD Guidelines

In the submission, STP claims the violation of the following recommendations of the OECD Guidelines:

3.1 Failure to Conduct Due Diligence

The submitting party considers that the responding party has violated the OECD Guidelines by failing to conduct ongoing due diligence regarding their business relationship with enterprises involved in the construction of the DAPL.

Chapter II, General Policies, Paragraph 10:

A. Enterprises should:

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11¹ and 12², and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Chapter IV, Human Rights, Paragraphs 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:

5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

3.2 Failure to encourage business partners to act compatibly with the OECD Guidelines

The submitting party considers that the responding party has violated the OECD Guidelines by failing to influence their business partners involved in the construction of the DAPL to prevent potential or mitigate real adverse impacts of the project on the affected communities and the environment.

Chapter II, General Policies, Paragraph 13:

A. Enterprises should:

¹ *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities and address such impacts when they occur.*

² *Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*

13. *In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.*

3.3 Failure to prevent or mitigate adverse human rights impacts

According to the submitting party, the responding party has violated the OECD Guidelines by neither conducting preventive and continuous due diligence nor encouraging actively its business partners involved in the construction of the DAPL to prevent or mitigate adverse human rights impacts.

Chapter IV, Human Rights, Paragraphs 3:

[...] 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.

3.4 Failure to protect the environment, public health and to contribute to a wider goal of sustainable development

According to the submitting party, the construction of the DAPL fosters the exploitation of crude oil by fracking, which is not contributing to the development of environmental friendly technologies. Moreover the use of the pipeline bears the risk of environmental damage due to oil spills. Subsequently, according to the submitting party, the responding party has violated the OECD Guidelines by failure to protect the environment, public health and to contribute to a wider goal of sustainable development.

Chapter VI, Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

4 Expectations of the submitting party regarding the Swiss NCP proceedings

Since 2016, the submitting party has engaged with the responding party regarding its involvement in the DAPL and alleged human rights violations. However, in the view of the submitting party, CS has not responded to their requests. Therefore the submitting party requests, that the Swiss NCP offers its good offices for mediation between the responding and the submitting party. STP acknowledges the already existing good internal policies of CS regarding the issues of human rights, sustainability and corporate responsibility. STP further welcomes the responding party's willingness to further develop these policies, but asks that

they fully comply with international standards and principles. Therefore STP makes the following requests:

- Internal policies of CS regarding corporate responsibility should be coherent with international human rights standards such as the OECD Guidelines, the UNGP and the UNDRIP.
- The responding party should, in line with the UNDRIP, issue a public statement adhering to the principle of Free Prior and Informed Consent (henceforth referred to as “FPIC”) if indigenous people might be affected by a certain project and avoid business relation with partners that violate the FPIC.
- CS should comply with existing internal policies about human rights, sustainability and corporate responsibility and disclose them fully.
- CS should ensure to use its leverage to actively influence investee companies on issues of human rights, the environment as well as the compliance with its own respective policies.
- In cases where direct engagement with investee companies does not lead to prevention or mitigation of the adverse impacts on human rights and the environment caused by these investees, CS should establish ongoing monitoring mechanisms that allow the responding party to dissolve contracts or take other appropriate measures.
- In addition to the above mentioned requests related to policy issues, the submitting party asks the responding party to stop business relations with the enterprises Energy Transfer Equity, Energy Transfer Partners, Sunoco Logistics and other companies involved in adverse human rights impacts or damages to the environment.

In particular, STP would wish to address the following points in a NCP dialogue facilitated by a mediator:

- “Examination of how to improve ongoing risk assessments and establish exit clauses in financial contracts and other measures that allow the bank to dissolve contracts if business partners are involved in human rights violations and environmental damages or if they don’t follow the banks policies”.
- “Assessment of how to include a genuine FPIC in internal policies and how to implement it in cases indigenous peoples might be affected by a certain project”.
- Clarification of the role and responsibility of CS as a manager of shares of third parties.

5 Statement of the responding party

On 27 June 2017, the responding party submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. On 2 October 2017, as response to the Draft Initial Assessment, it provided additional written comments.

In its communications, the responding party noted, that the issues as presented in the submission have exclusively occurred in the US and not in Switzerland and that they are exclusively governed by US laws and regulations. As the US is an adhering member of the OECD Guidelines and has its own NCP, CS requested the Swiss NCP not to further proceed on the submission and refer it to the US NCP. CS explained its position by stating, that:

- The DAPL is an infrastructure project developed in the US that is subject to US federal- and state-level approval procedures and US regulatory oversight. The transactions referred to in the submission were executed under US laws and were subject to regulatory oversight by the US Securities and Exchange Commission. Furthermore, the

operating entities (Energy Transfer Equity, Energy Transfer Partners, Sunoco Logistics) referred to in the submission, are domiciled in the US. These entities operate infrastructure assets in the US and provide energy to recipients in the US. The submission does not assert any activities of these companies in Switzerland.

- Furthermore the responding party stated, that the issues as set out in the submission touch upon historical and contemporary policy issues of the US which are governed by certain historical treaties between the Government of the US and various Native American Nations. According to the statement, these treaties grant Native Americans certain rights to be consulted in governmental decisions concerning infrastructure projects potentially affecting their territories.
- The responding party clarified, that the concerns related to actions or omissions as specified in the submission refer to the group's organization located in the US (and to some extent in the Cayman Islands).

Due to the high level of public attention and criticism that the DAPL has attracted, the responding party also publically informed about its respective involvement.³ In its communication, CS states that it is not involved in project finance for the DAPL. The responding party states that like numerous other banks it has business relations with companies that are involved in the DAPL project, including Energy Transfer Equity and its subsidiaries Energy Transfer Partners and Sunoco Logistics. According to CS, transactions with these companies include the provision of loans, the issuing of securities (notes) and advisory mandates for their broad range of business purposes. The responding party further explains that Energy Transfer Equity and its subsidiaries operate important infrastructure assets in the US that supply energy to the whole of the country, including more than 100'000 kilometers of oil and gas pipelines, and a network of gas stations in several states.

According to the responding party's public statement, the transactions with Energy Transfer Equity had undergone a reputational risk review process. Additionally, during direct talks between CS and representatives of Energy Transfer Equity, issues such as pipeline security, accident responses, the protection of biodiversity and habitats as well as the consultation with local communities, including the indigenous population, were discussed in detail. According to the responding party, approval was granted for a business relationship with the company based on the satisfactory assessment of these aspects.

The responding party states that its representatives have met repeatedly with representatives of STP, whereas one meeting was cancelled by the NGOs, and that CS continues to be open for a meeting.

Furthermore, the responding party is of the firm view that the transactions with Energy Transfer Equity and its subsidiaries satisfy the provisions of Chapters II, IV and VI of the OECD Guidelines.

The responding party acknowledges the value of an NCP, as provided for in the OECD Guidelines, as a mediation and conciliation platform to support the resolution of disagreements arising from the implementation of the OECD Guidelines. At the same time, it emphasizes that the scope of the present procedure is defined by the OECD Guidelines, but not by the UNGC or the UNDRIP. Therefore, in its view, these and other initiatives or recommendations (such as FPIC) should not form part of the consideration whether or not to accept a specific instance under the OECD Guideline, nor be part of any specific instance procedure.

³www.credit-suisse.com/ch/en/about-us/responsibility/current-topics/dakota-access-pipeline.html

The responding party also emphasizes that for the purposes of this specific instance procedure, the factual and legal issues regarding the DAPL project form preliminary questions, which are key to all subsequent discussions and procedures. Furthermore, CS recalls that issues raised in the submission form part of judicial proceedings in the US and that the outcome of such proceedings will have to be considered. According to CS, it is indispensable that any discussion about the policies of CS regarding corporate responsibility, which has been raised in the submission in connection with the DAPL project, will have to be preceded by a discussion on issues such as constitutional rights of minorities in the US, Native American Treaty rights, US laws related to the regulatory approval procedures for infrastructure projects, US environmental law and other applicable legislation regarding the DAPL project and the companies involved in the project. Accordingly, CS states that as long as the factual and legal issues pertaining to the DAPL project have not been judged by the competent US courts, the procedures would lack a sound basis for a meaningful discussion facilitated by the Swiss NCP.

6 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 28 April 2017 the Swiss NCP took the following steps:

- Written confirmation to the submitting party to acknowledge receipt of the submission on 28 April 2017.
- Preliminary discussion by phone with the responding party in order to inform it about the submission and explain the Swiss NCP proceedings on 3 May 2017. The submission was forwarded to the responding party on 4 May 2017.
- On 11 May 2017, according to the Specific Instances Procedure of the Swiss NCP⁴ an ad hoc working group was constituted, including representatives from the State Secretariat for Economic Affairs, the Federal Department of Foreign Affairs and the Federal Office of Environment. This working group is involved in all steps of the procedure of the specific instance.
- On 15 May 2017, the US NCP was informed by the Swiss NCP regarding the submission.
- On 16 May 2017, the ad hoc working group of the Swiss NCP held separate meetings with the responding party and the submitting party respectively to inform them about the procedure of the specific instance.
- On 29 June 2017, the Swiss NCP received a written statement by the responding party in response to the submission. The statement was forwarded to the submitting party on 30 June 2017.
- On 22 August 2017, the NCP sent its draft report on the initial assessment to both parties for comments on possible misrepresentations of factual information.
- On 28 August 2017, the NCP received written comments by the submitting party. The responding party asked the NCP for an extension of the deadline and submitted its written comments on 2 October 2017.

7 Considerations and decision of the Swiss NCP

The Swiss NCP's mandate relates to the OECD Guidelines. Any other instruments mentioned by the submitting party can only be considered to the extent that they are mirrored in or referenced by the OECD Guidelines. Based on the Procedural Guidance for the OECD Guidelines and the Specific Instances Procedures of the Swiss NCP, the Swiss NCP has considered the following points in its initial assessment:

⁴www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/organisation-und-kontaktaufnahme.html

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 its interest in the issues raised. The submitting party is an international human rights organisation working for the protection of persecuted minorities and indigenous people. The submitting party has been engaging with the responding party since 2016 regarding the issues raised in the submission.

b) Responsibility of the Swiss NCP

The OECD Guidelines say that a specific instance should be raised in the country in which the alleged issues arise. 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.

According to the expectations of the submitting party (see above, paragraph 4), the main issues to be discussed concern the coherence between internal policies of CS regarding corporate responsibility (e.g. code of conducts and sector policies) and international standards such as the OECD Guidelines and their implementation in practice. The policies of the responding party regarding corporate responsibility are based on the “Credit Suisse Group Code of Conduct”⁵. They include e.g. the “Global Policy on Oil and Gas”⁶, the “Credit Suisse Statement on Human Rights”⁷ or the “Credit Suisse Statement on Sustainability”⁸. These policies are published and implemented under the responsibility of the “Credit Suisse Group AG”, which is headquartered in Zürich, Switzerland (see register of commerce of the canton of Zürich)⁹. For the discussion on such policies, the Swiss NCP is therefore competent.

The submission also refers to activities of enterprises which are registered and domiciled in the US such as Energy Transfer Equity and its subsidiaries Energy Transfer Partners and Sunoco Logistics. These entities operate infrastructure assets in the US and are involved in the DAPL project. Possible discussions regarding their activities would not fall within the mandate of the Swiss NCP. Per the OECD Guidelines, issues should primarily be dealt with by the NCP of the country in which the issues have arisen.

According to the Procedural Guidance for the OECD Guidelines, when a specific instance relates to business activities that take place in several adhering countries, the NCPs involved consult each other and agree on which NCP will take the lead in assisting the parties.¹⁰ In the present case, the issues to be discussed concern the development and implementation of internal policies of CS regarding corporate responsibility. As explained above, they are within the competence of the Swiss NCP. For this reason, the Swiss and US NCP have consulted and agreed that the Swiss NCP will take the lead in assisting the parties. The US NCP will support the Swiss NCP, as appropriate. The US related matters fall within the competence of the US NCP and will have to be dealt with by the US NCP. As

⁵ www.credit-suisse.com/media/assets/corporate/docs/about-us/governance/standard-and-policies/code-of-conduct-en.pdf

⁶ www.credit-suisse.com/media/assets/corporate/docs/about-us/responsibility/banking/policy-summaries-en.pdf

⁷ www.credit-suisse.com/media/assets/corporate/docs/about-us/responsibility/banking/human-rights-statement-en.pdf

⁸ www.credit-suisse.com/media/assets/corporate/docs/about-us/investor-relations/financial-disclosures/financial-reports/sustainability-statement-en.pdf

⁹ <https://zh.chregister.ch/cr-portal/auszug/auszug.xhtml?uid=CHE-105.884.494>

¹⁰ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 24

such, the US NCP will be leading on any statement or decision regarding US legal entities and US-related facts.

c) Scope of application of the OECD Guidelines and materiality of the specific instance

The OECD Guidelines apply to all sectors¹¹, including the financial sector and commercial investment enterprises¹². They distinguish between impacts on matters covered by the OECD Guidelines, including human rights, through own activities¹³ of the concerned enterprise and adverse impacts directly linked to the operations of the enterprise by a business relationship¹⁴.

According to its public statement¹⁵, the responding party is not involved in project finance for the DAPL. However, it seems to have business relations with companies involved in the DAPL project such as Energy Transfer Equity and its subsidiaries Energy Transfer Partners and Sunoco Logistics. Transactions with these companies include the provision of loans, the issuing of securities (notes) and advisory mandates. Therefore, the Swiss NCP concludes that the issues raised fall within the scope of OECD Guidelines. The role of different actors according to the specific provisions of the OECD Guidelines will have to be further explored during the proceedings.

The submission is material in the sense that it refers to alleged breaches of specific provisions of Chapters II, IV and VI of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the NCP to consider the issues raised.

d) 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 NCP is aware of legal procedures in relation with the DAPL. E.g. a complaint was filed in 2016 by the Standing Rock Sioux Tribe against the US Army Corps of Engineers, the authority in charge of the land administration.¹⁶ While the Court already issued several opinions (the most recent on October 11, 2017¹⁷), the process is still pending. As those proceedings are not related to the parties of the present submission, they do not prevent the Swiss NCP to pursue this specific instance.

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

The role of the NCP is to offer a forum for discussion and to assist the parties concerned to address the issues raised. The submitting party has engaged in an exchange with the responding party since 2016. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation, it could help the parties reach a mutually acceptable outcome concerning the issues raised. The Swiss NCP also believes that this

¹¹ OECD Guidelines, I. Concepts and Principles, Paragraph 4

¹² Responsible business conduct for institutional investors, Key considerations for due diligence under OECD Guidelines for Multinational Enterprises, OECD 2017, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>: p.7

¹³ OECD Guidelines, Chapter II, Paragraph 11 and Chapter IV, Paragraph 2.

¹⁴ OECD Guidelines, Chapter II, Paragraph 12 and Chapter IV, Paragraph 3.

¹⁵ www.credit-suisse.com/ch/en/about-us/responsibility/current-topics/dakota-access-pipeline.html

¹⁶ www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_16-cv-01534

¹⁷ www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_16-cv-01534/pdf/USCOURTS-dcd-1_16-cv-01534-4.pdf

offer of mediation could foster the continuation of this previous exchange between the responding and the submitting party and contribute to a better mutual understanding.

8 Further proceedings

The Swiss NCP will contact the parties to offer its good offices 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 no agreement was reached.

The Swiss NCP may draw up recommendations for implementation of the OECD Guidelines, which will also be included in the final statement. In addition, in consultation with the parties, the 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. 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 that the parties concerned 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 submission. 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 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 been concluded, parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other party agrees to their disclosure.