

# **FINAL STATEMENT FOR U.S. NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

## **Community Legal Education Center of Cambodia (CLEC)/EarthRights International (ERI) and American Sugar Refining Inc. (ASR)**

**June 20, 2013**

### **Background**

The OECD Guidelines for Multinational Enterprises (MNEs) are voluntary, non-binding recommendations for responsible business conduct in a global context. The Guidelines are addressed to MNEs operating in or from the territories of governments adhering to the OECD's Declaration on International Investment and Multinational Enterprises, of which the Guidelines form one part. Adhering governments have committed to encourage their MNEs to follow the Guidelines in their global operations and to appoint a national contact point (NCP) to assist parties in seeking a consensual resolution to issues that may arise under the Guidelines.

As a part of its function, the U.S. NCP receives concerns raised, in the form of a specific instance, about the business conduct of a MNE operating in or from the United States. It handles such issues in accordance with procedures it has adopted for this purpose. In such circumstances, the NCP's primary function is to assist affected parties, when appropriate, in their efforts to reach a satisfactory and consensual resolution to matters raised under the Guidelines. The NCP's role is to take up issues that are amenable to a consensual resolution under the Guidelines and, where appropriate, make recommendations as to how the enterprise might make its business practices more consistent with the Guidelines. Consistent with the voluntary nature of the Guidelines, the NCP does not make a determination whether a "violation" of the Guidelines has occurred, nor does the NCP have legal authority to adjudicate disputes submitted under this process.

### **The Specific Instance**

On October 31, 2012, The Community Legal Education Center of Cambodia (CLEC) and EarthRights International (ERI) jointly filed a specific instance with the U.S. NCP raising concerns over alleged human rights violations related to operations of the Koh Kong sugar plantation and refinery in Sre Ambel District, Koh Kong Province, Cambodia. CLEC and ERI stated that American Sugar Refiners Inc. (ASR), through UK-based T & L Sugars, Ltd. (T&L), purchased sugar produced at the Koh Kong plantation. ASR and T&L share a common corporate parent, American Sugar Holdings, Inc. The NGOs contended that ASR,



by virtue of its supply chain relationship with the Koh Kong plantation, had an obligation to avoid contributing to conduct inconsistent with the Guidelines and, given it was the sole purchaser of sugar from the Koh Kong plantation, had the opportunity and responsibility to use its leverage to mitigate such conduct by the operators of the plantation. The NGOs stated that ASR's actions were inconsistent with the principles in Chapter II (general policies), specifically paragraphs A.1, A.2., A. 10., A.11, A.12 and B.2., and in Chapter IV (human rights), specifically paragraphs 3, 5 and 6.

Due to T&L's UK-incorporation, the U.S. NCP informed the UK NCP of the submission, and shared with it all related documents and information. The two NCPs agreed the U.S. NCP should take the lead on this specific instance because ASR and T&L shared a common U.S.-based corporate parent.

In their submission, CLEC and ERI stated that in 2006 Cambodian authorities granted contracts for two economic land concessions of nearly 10,000 hectares each to Koh Kong Plantation Co. Ltd. (KKPT) and Koh Kong Sugar Industry Co. Ltd. (KCSI), to develop sugar plantations and refinery operations. The NGOs stated that villagers occupying those lands at that time had well-documented possession rights to the land pursuant to relevant Cambodian law. The NGOs claimed that beginning in 2006, the companies forcibly evicted villagers with no public consultation, social or environmental impact assessment or settlement plan as required by Cambodian law, displacing 456 families. In their specific instance filing, the NGOs stated that the evictions had lasting and severe impacts on the lives of displaced community members, including food insecurity, health impacts, and loss of land, housing, livelihood and educational opportunities for children, and that as of October 2012, 207 families were still either under-compensated or uncompensated for their eviction.

Regarding ASR's Guidelines-related responsibilities, CLEC and ERI identified actions and omissions by T&L and ASR. In January 2010, T&L (then unaffiliated with ASR) and Thai sugar company Khon Kaen Sugar Industry Public Company Ltd. (KSL), which held 70 percent ownership stakes in both KKPT and KCSI, signed a five-year contract under which KSL would supply T&L all of its sugar output from Cambodia (including from KKPT and KCSI) and Laos. Cambodian civil society groups, including CLEC, wrote a number of joint letters to KSL and the T&L Board of Directors, raising concerns regarding the establishment and operation of the plantation, including the human rights impacts on the affected communities. In a September 2010 email response, T&L stated it had conducted



due diligence and was satisfied its Cambodian supplier had met the firm's ethical standards. It also stated that ASR had recently acquired T&L and the latter would inform ASR of the groups' concerns. CLEC later sent two separate letters to ASR raising the concerns raised to T&L as well as questions about ASR's own due diligence and any actions by ASR to address the concerns, but received no reply.

CLEC and ERI contended that Cambodian civil society groups had alerted T&L and later ASR to the allegations of human rights violations against the villagers by the plantation operators. The NGOs also stated that neither ASR nor T&L had acted to avoid contributing to the problems or used their leverage with their suppliers to mitigate or remediate the conduct. Further, the NGOs stated that ASR had a responsibility to exercise due diligence prior to its acquisition of T&L, which had been receiving imports of Cambodian sugar, a sector that had been the subject of public criticism for illegal land concessions and forced eviction.

CLEC and ERI's specific instance filing requested that the NCP offer to mediate between ASR and the NGOs, acting on behalf of local communities, with the goals that ASR: (1) create a grievance mechanism to address disputes in its sugar supply chain; (2) investigate the Koh Kong plantation's impacts on local communities; (3) develop options for using its leverage with its Cambodia-based suppliers to ensure ASR's and the suppliers' actions are consistent with the Guidelines; (4) institute a process to mitigate the plantation's human rights impacts, including, where possible, relief to the affected communities; and (5) establish corporate-level human rights-related policies pertaining to its supply chain.

On November 6, the NCP contacted an official at Florida Crystals, a corporate affiliate of ASR, to inform the firm of the filing and to explain the specific instance process. On December 12, ASR's outside counsels met the NCP to inform him that ASR had asked them to represent the firm in the specific instance process. On February 7, 2013, ASR's attorneys informed the NCP that ASR was inclined to participate in mediation to try to arrive at a mutually-agreed solution, but that ASR wished to inform the NCP of some concerns about the conduct of the mediation and expectations on the conduct of the participants. The ASR attorneys and the NCP agreed these concerns would be subject to CLEC and ERI's review. Finally, notwithstanding its inclination to participate in mediation, ASR stated that it disputed the allegations in the specific instance.

Based on its review of information provided by the parties, the NCP determined on March 18 that the issues raised by CLEC and ERI merited further consideration



under the Guidelines and offered its good offices to assist the parties to undertake a dialogue to seek a positive resolution. Consistent with the criteria in the Guidelines and the U.S. NCP procedures for specific instances, the NCP concluded the matters raised were bona fide and relevant to the implementation of the Guidelines.

- **Identity of the party:** CLEC, as a Cambodia-registered legal resource NGO specializing in land and natural resources, and ERI, as a U.S.-registered NGO specializing in protecting human rights and the environment, had legitimate interests in the matter.
- **Issue is material and substantiated:** The specific instance cited allegations of the forced eviction without public consultation of previous land-holders at the Koh Kong plantation – allegations which would relate to implementation of the Guidelines’ human rights-related provisions. The UN Special Representative of the Secretary General for Human Rights in Cambodia stated in a 2007 report that KKPT and KCSI received their concessions without public consultation. The Thai National Human Rights Commission (TNHRC) issued a 2012 preliminary finding of “a reasonable belief that human rights principles and instruments were breached [at the Koh Kong plantation].”
- **Link between ASR’s activities and issues raised:** The specific instance described a supply chain relationship between ASR, through T&L, and the Koh Kong plantation.
- **Relevance of applicable law and procedures, including court rulings, and status of other domestic/international proceedings<sup>1</sup>:** CLEC, on behalf of community members, filed criminal and civil cases in the Koh Kong Provincial Court against KKPT and KCSI seeking cancellation of the concession contracts. The criminal case was dismissed and the civil case has been pending since 2007. The TNHRC was continuing its above investigation. No other NCPs were addressing this matter. The NCP believed an offer of good offices would not create prejudice for either of the parties in any of the parallel proceedings.
- **Contribution to the effectiveness of the Guidelines:** Given the parties’ mutual openness to pursue mediation, with certain assurances regarding its conduct, the NCP considered that its good offices could play a positive role in assisting the parties in reaching a mutually-acceptable solution.

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<sup>1</sup> CLEC and local communities filed civil suit against T&L in the UK High Court on March 28, a development which arose after the NCP had issued its March 18 Initial Assessment. Further information on these proceedings are on page 5.



Under NCP procedures, acceptance of the specific instance – including a finding that the issues raised by the NGOs were bona fide – did not indicate the NCP concluded ASR to have acted inconsistently with the Guidelines, but rather that the NCP considered it appropriate to facilitate a discussion between the parties of the issues raised. For ASR's part, its decision to participate in this process would not imply any prima facie admission of conduct inconsistent with the Guidelines.

After issuing the initial assessment, the NCP conducted active parallel consultations with each side. ASR restated its commitment to participate in the specific instance process with the understanding that CLEC and ERI address certain of ASR's concerns about the parties' conduct once mediation would begin. CLEC and ERI affirmed their commitment to participate in the specific instance process and stated their openness to discuss ASR's mediation-related concerns in a pre-mediation consultation. All parties agreed to the NCP's proposal that the U.S. Federal Mediation and Conciliation Service (FMCS) lead any facilitated dialogue between the two sides, including a pre-mediation consultation.<sup>2</sup>

Before a pre-mediation meeting could be arranged, the NCP learned on April 11 that CLEC on behalf of affected local communities had filed on March 28 a civil suit against T&L Sugars in the UK Commercial Court, alleging T&L had wrongly deprived the affected communities of the ownership, use and possession of the sugar cane processed on the disputed land, causing the communities to suffer loss and damage. ASR informed the NCP that it remained interested in pursuing a mediated dialogue with CLEC and ERI through the specific instance process, but that it would not participate in that process unless and until CLEC withdrew its UK civil suit. ASR stated that it recognized that if CLEC withdrew its suit it would retain the prerogative to resubmit it to the UK courts if CLEC were not satisfied with the results of the specific instance mediation process.

CLEC and the local communities considered but did not accept ASR's condition, and stated in a May 17 letter to the NCP that they were seeking different remedies for different issues in each forum. The communities viewed the UK civil process as relating to the alleged unlawful possession and use of sugar cane on land they allege was lawfully held by the claimants, and were seeking compensation for alleged losses and damage sustained over the conversion and sale of the sugar cane. On the NCP process, the communities saw the specific instance mechanism

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<sup>2</sup> FMCS, an independent U.S. federal agency, and the Department of State have a cooperative agreement in which FMCS makes available its mediators to the NCP, in support of the latter's efforts to help parties resolve issues through the specific instance process.



as a way to address ASR's internal policies and procedures relating to human rights and land acquisition.

In their May 17 letter, CLEC and ERI said the communities would be willing to consider a stay of the UK civil proceedings during the mediation process, with the option for either side to resume the litigation with 14 days notice. The communities also stated their openness to addressing the issues in the UK civil litigation in the NCP process.

On June 3, ASR reiterated that it was unwilling to engage in a mediation of the specific instance in the United States while a private claim seeking money damages based on the same or similar claims was pending in the High Court in London. The parties to the UK proceeding agreed to participate in mediation, supervised by the UK court, currently scheduled to occur on July 5, 2013.

### **Conclusion and Recommendation**

The NCP closed the specific instance on June 4 when it became clear the parties could not reach an agreement to proceed. The NCP observed that all parties came to the process in good faith. The specific instance process – and mediation more generally – is a voluntary process, providing an opportunity for a neutral third-party to assist parties to reach their own resolution of concerns only if and when all parties come to the process freely and committed to cooperative problem-solving. The NCP concluded the conditions did not exist for the parties to advance to mediation.

The NCP observed that the parties honored its expectations on confidentiality in the specific instance process. The confidentiality of the process contributed to the parties' mutual and growing confidence in the process, including candid exchanges between the sides that deepened their understanding of each other's positions. The NCP believed the parties' approach on confidentiality would have created the conditions necessary for meaningful exchange if the parties had gone to mediation.

The issues raised by CLEC and ERI pertain to matters addressed in the human rights chapter of the Guidelines and in the UN Guiding Principles on Business and Human Rights, which both establish the expectation that businesses have a responsibility to respect human rights.

The NCP recommends ASR evaluate the issues raised by the NGOs and consider how to address them, even if the conditions may not exist now to address them

through the NCP process. In particular, the NCP recommends that ASR conduct a corporate human rights policy review process, consistent with the recommendations of the Guidelines and the UN Guiding Principles. Such a policy process could include consultations with external stakeholders.<sup>3</sup>

Finally, the NCP would be prepared to assist the parties in undertaking a facilitated dialogue if in the future they agree to pursue mediation or conciliation.



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<sup>3</sup> This recommendation by the NCP does not constitute a determination of any kind by the NCP that ASR or its affiliates acted in a manner inconsistent with the Guidelines, but rather is consistent with the provision in the OECD Guidelines Procedural Guidance that states that, “The NCP will make recommendations on the implementation of the Guidelines, as appropriate, which should be included in the Statement.” This recommendation is not to be used or cited by any party in any legal or arbitral proceeding of any kind.