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equitable cambodia



idi inclusive
development
international



The Complaints Manager
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February 5, 2016

Dear Complaints Manager:

Inclusive Development International (IDI), Equitable Cambodia (EC), and the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), by this letter file an amended complaint against Bonsucro member Mitr Pohl Group (MPG). This submission follows and supplements a complaint filed in 2011 (Attachment 1). Both of these submissions concern the activities in Cambodia between approximately 2008-2015 of three sugar companies owned or otherwise controlled by MPG.

The original complaint and this amended complaint are on behalf of persons who were living in Bos, O’Bat Moan, Taman, Trapaing Veng and Ktum villages in Oddar Meanchey province in Cambodia, who suffered grave harms as a result of MPG’s business activities.

In this amended complaint we refer to “economic land concessions” (ELCs), which in Cambodian law are very long term leases of government land to private persons for industrial scale agriculture. This case concerns ELCs that were issued for 70 years each; the three sugar companies owned or controlled by MPG each received one ELC.

Procedural Issues

1. This amended complaint supplements a complaint dated January 31, 2011 that was filed with the Better Sugar Cane Initiative (BSCI), as Bonsucro was known at the time, against MPG. It was filed by Bridges Across Borders Cambodia (BABC) and LICADHO. BABC has since become EC, and IDI has been established by the former executive director of BABC.
2. The then Chairman of the BSCI Complaints and Grievances Committee (CGC), who is now Bonsucro Vice-President, Kevin Ogorzalek, wrote to BABC on June 28, 2011 that CGC “has agreed that the contents of the complaint are within the CGC’s remit to further investigate and potentially work towards the formation of a Complaints Resolution Mechanism.” (Attachment 2.)

3. At some point after this, MPG resigned its membership in BSCI.
4. Mr. Ogorzalek wrote to BABC on March 9, 2012: "From Bonsucro's position, without Mitr Phol being a member, the organization does not currently have a relationship or leverage to work with them or make them do anything. However, a board member will visit with them soon and will raise their need to re-engage with Bonsucro through membership. **In order for Mitr Phol to become a member again, they must re-engage in the complaints resolution process** (emphasis added)."¹ (Attachment 3.)
5. In 2015 MPG applied for and once again was granted membership in Bonsucro.
6. MPG has to date not re-engaged in the complaints resolution process with the complainants.
7. As a result of MPG's readmission, IDI objected to Bonsucro CEO Simon Usher, who on December 21, 2015 replied that, among other things, the MPG case filed in 2011 was forever closed: "There is a four year clause regarding **past claims** in our membership rules. As such any claim against the suitability of Mitr Phol's membership per our Code of Conduct will have to be brought fresh, based on current facts." (Attachment 4.)
8. The clause that Mr. Usher is referring to appears to be Article A(4)(11) of the Complaint Resolution Process and reads as follows: "**Decisions** reached through the Bonsucro Complaint Resolution Process are valid for a period of 4 (four) years, starting from the date of notification of the parties, unless otherwise stated in the decision."
9. In Mr. Usher's above-mentioned email to IDI, he wrote that "**there was no Board decision** taken against Mitr Phol before they resigned." Based on this fact alone, Article A(4)(11) could not have the application that Mr. Usher claims it has.
10. We do not know Mr. Usher's legal reasoning when he wrote that the article barred further processing of the case. It would seem, though, that he may have thought the article brought into play the British common law principle of *res judicata*, or that the article imposed a kind of statute of limitations (SOL).
11. *Res judicata* is Latin for "a matter already judged." Any further complaint in such a situation must be based on new facts—it must in essence be a new case. In fact in this situation, as Mr. Usher himself wrote, the matter has **not** been already judged.
12. SOLs involve deadlines for filing claims. They are part of civil as well as criminal law. They are keyed to the dates of the acts complained against. So for example if there is a one year SOL in a situation where a person wants to claim a breach of contract, this means he/she has one year from the date of the breach, or perhaps one year from when he/she became aware of the breach, to file a complaint. Article A(4)(11), however, is about the length of life of a decision, not about a deadline for filing a claim.

¹ Unless otherwise noted all bold in this complaint is by the complainants.

13. Moreover, in the law of most nations, the idea would be considered ludicrous that a party complained against could leave the jurisdiction where the proceeding has begun, and therefore make himself unreachable in terms of the proceeding, and then, after a certain amount of time goes by, re-enter the jurisdiction, and it is now declared that the case is forever dead because of the length of his absence. Indeed, SOL laws normally state that if a party makes himself unavailable, that during that time the SOL is suspended.
14. Finally, on the question of when complaints may be filed against Bonsucro members based on the governance documents, the Complaint Resolution Process Table 1 simply reads: "Available timeframe for filing complaints: Duration of membership."
15. The Complaint Resolution Process does not explain how to handle a situation where a complaint has been filed, the CGC then begins to process the case, then the person complained against drops out of Bonsucro before case processing is complete, then later the person is readmitted. Nevertheless as mentioned above, Mr. Ogorzalek wrote that "In order for Mitr Phol to become a member again, they must re-engage in the complaints resolution process." Mr. Ogorzalek's statement is a fair and reasonable interpretation of the Complaints Resolution Process to the circumstances.
16. Concerning MPG's readmission without being required by Bonsucro to re-engage in the case, perhaps Mr. Usher believes this was acceptable because, as he wrote to IDI, following MPG's application for readmission, MPG "passed their 30 day consultation phase with no objections being raised."
17. We note that Membership Application Comments Process document article B(1) states that "Membership Application Comments serve two purposes: • To request a formal review from Bonsucro regarding a membership application from an organization that is allegedly in breach of the Bonsucro Code of Conduct or the Production, Chain of Custody and Claims and Labeling Standards at the time of the membership application; • To submit information regarding previous practices of an applicant that would currently represent a breach of the Bonsucro Code of Conduct or the Production, Chain of Custody and Claims and Labeling Standards, and requesting Bonsucro to further monitor the applicant if it becomes a Bonsucro Member."
18. Surely no one was more likely than the original Complainants to raise such concerns during the MPG application comment period, yet Bonsucro failed to notify us of MPG's application. Had we been notified we would have immediately and strongly commented. We consider it shameful that Bonsucro might now try to shield MPG from engaging with this case based on Bonsucro simply posting on its website the fact of the MPG application, but not directly informing our organizations – obvious interested parties – about the application.
19. Complaints Resolution Process art 4.1 states that "1. Matters that will not be considered include: Allegations of a member's actions that occurred prior to that member joining Bonsucro and that they bear no relevance to the member's current activities." In the case of MPG since rejoining Bonsucro in 2015 there have been prior actions that are directly relevant to current activities. The prior

actions are those discussed below and in attached documents. The current actions that we are complaining about relate to MPG's ongoing failure to engage with and provide an effective remedy to its victims in Cambodia, and its ongoing responsibility to do so, as confirmed by the October 2015 ruling of the Thai National Human Rights Commission (TNHRC) (see below and attached).

20. It would seem that art. 4.1 was adopted for the situation of a company or organization that had never before been a Bonsucro member, then joined. In this case MPG had been a member, during which time it engaged in multiple instances of harmful behavior, which it did not repair; then it resigned and then rejoined. If such a pattern of behavior were to result in MPG having shed responsibility for having to now face the CRP, then every member ever complained against can do the same, rendering the CRP of no purpose at all. Allowing this would be especially unjust given how many countries Bonsucro growers operate in that have judicial systems so stacked against the poor that people harmed in ways as occurred in this case have no recourse except to try to involve organizations like Bonsucro.
21. Based on all of the above procedural points, we believe that the 2011 complaint remains active, that CGC must restart the processing of that case, and that MPG must be required to engage in that process in good faith in order to maintain its membership of Bonsucro.
22. At the same time, because there is crucial new information about the case, we take this opportunity to supplement the original complaint.
23. In particular, we wish to bring to your attention the report of the Final Investigation Report of the Thai National Human Rights Commission (TNHRC), issued on October 12, 2015 (Attachment 5).²
24. We also take this opportunity to provide you with a 2013 report entitled, "Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything But Arms Initiative in Cambodia" by IDI and EC (Attachment 6),³ and a 2015 report by ActionAid Cambodia and Oxfam entitled, "Cambodia: The Bitter Taste of Sugar Displacement and Dispossession in Oddar Meanchey Province"⁴ (Attachment 7).

Human Rights Violations Committed by or with the Complicity of Mitr Phol

25. In the original complaint and the attachments to this amended complaint, we provide extensive documentation of the facts of this case, resulting from multiple investigations, which reveal devastating and widespread human rights violations suffered by households and communities that were physically and/or economically displaced to make way for Mitr Phol's sugarcane plantations.

² An official translation of this document is available upon request.

³ See: http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf

⁴ See: http://www.actionaid.org/sites/files/actionaid/finalized_the_bitter_taste_of_sugar_displacement_and_dispossession_in_oddar_meanchey_2015_1.pdf

26. Police and state security forces have carried out arbitrary arrests and detentions and used physical violence at the behest of sugar companies against local communities attempting to defend their land.
27. Homes and farms in Bos village and O’Bat Moan village were bulldozed or burned to the ground – its residents forcibly evicted without due process of law. Many families suffered the destruction of their crops, livestock and personal possessions. Smallholder farming families and indigenous communities in other villages lost significant amounts of farmland to Mitr Phol’s concessions. There was extensive logging of community-managed forests that affected people had relied upon to gather food and other non-timber forest products, as permitted by law and written agreements with the Cambodian government.
28. Despite significant loss of housing, land, property and resources supporting livelihoods, compensation was generally not provided. When compensation was given, losses were undercounted and undervalued, and the process was characterized by a lack of participation, threats and corruption. None of the families who were illegally evicted from their land were granted their right to return and no efforts were made to rehabilitate the displaced.
29. As a result, after the evictions, affected people suffered a severe retrogression in their enjoyment of economic and social rights, including the human rights to adequate housing, food, work, education and health. Of those who were physically displaced from their homes, over 1000 men, women and children were left homeless and landless. Most affected households have suffered increased food insecurity, deterioration of livelihoods and loss of income-earning opportunities as a result of their de-capitalization and loss of natural resources that previously provided a safety net. In some cases, the forced evictions led to extreme hunger and possibly starvation. Many people resorted to illegal migration to Thailand in search of work - putting themselves at the mercy of people smugglers, after their land was seized for Mitr Phol’s sugarcane concessions.

Relevant Bonsucro Governance Documents

30. The Bonsucro Membership Governance Framework Rules and Regulations (MGFRR) in its Background section (B) states that “Upon its subscription and as a condition of its continuing Membership, each Member undertakes and agrees to comply with the Governance Documents.” These include the MGFRR, the Complaints Resolution Process (CRP) and the Code of Conduct (COC). CRP article A(a) authorizes complaints based on these documents.
31. COC article 1.1 states: "Member organisations shall acknowledge and agree to implement BONSUCRO’s objectives and Standards through informed and explicit endorsement." (See also article 6.6.2[a].) MGFRR article 2(b) states that Bonsucro’s objectives include “to promote measurable improvements in the key economic, environmental and social impacts of sugarcane production ...”
32. Concerning standards, COC article 3.1 states: “All Members shall commit themselves to the principle of continuous improvement of the sugar cane value chain.” Article 3.2 states: “In this regard, Members shall use their best efforts to

support the implementation of the BONSUCRO Standards ...” (See also MGFRR articles 6.6.2 and 7.2).

33. During the first period of MPG’s membership in Bonsucro, the 2011 Bonsucro Production Standard (PS) and Audit Guidance (AG) (both adopted 7 March 2011) were in effect. Certain provisions of the PS and AG listed below, as well as the above-cited provisions concerning Bonsucro’s Objectives, form the basis of this complaint.
34. **PS Principle 1: “Obey the Law.”** This principle includes the expectation that “[r]elevant national laws and international conventions are complied with.” PS Principle 1 clarifies that, “[r]elevant legislation includes laws and international conventions, but is not limited to: regulations governing land tenure and land-use rights, labour, agricultural practices, environment, transportation and processing practices, acting with integrity. PS Principle 1 also states it is necessary for the Bonsucro member to show that “the right to use the land can be demonstrated and is not legitimately contested by local communities with demonstrable rights... Those rights can be related either to legal ownership or lease of the land or to customary rights. Legal ownership shall be the official title in the country.”
35. The AG states that to verify the sugar grower’s right to the land, the following must be verified:
- Evidence of absence of unsettled conflicts where there is no resolution process regarding land ownership and use between local communities and company.*
- In case of contest by communities, verification with independent authority such as government or local agencies, to establish legitimacy of claim and demonstrability of rights through:*
- 1. Provision of evidence of negotiated agreements and stakeholder consultation based on free prior informed and documented (consent) undertaken by company.*
 - 2. Interview with stakeholders: Record of no previous conflicts while acquiring land use of land for sugarcane cultivation does not diminish the customary/usufruct rights of local communities. Local level solution on land ownership, access and use shall be evaluated.*
36. **PS Principal 2: “Respect Human Rights and Labour Standards.”** While Principle 2 requires respect for human rights, we note with regret that the only indicators provided in the PS relate to labour standards and disregard other key human rights impacts that are prevalent in the sugarcane industry, including those relating to forced displacement and violence perpetrated by company and State security forces.
37. **PS Principal 4: “Actively manage biodiversity and ecosystem services.”** Article 4.2 requires sugar growers “to implement measures to mitigate adverse impacts where identified,” and calls for the “existence of a mitigation plan, and verification of the implementation of mitigation measures, **including consultation with affected stakeholders.**”

38. The corresponding AG section 4.2 states that “**Free, Prior and Informed Consent shall be used for the [consultation] process and consensus shall be sought for decision making.**”

MPG Violations of Bonsucro Governance Documents

39. Cambodian Land Law (2001) article 59 states that: “The issuance of land concession titles on several places relating to surface areas that are greater than those authorized by the first paragraph (10,000 ha) in favor of one specific person or several legal entities controlled by the same natural persons is prohibited.” On January 24, 2008 the Ministry of Agriculture, Forests and Fisheries (MAFF) awarded ELCs totaling 19,700 hectares to three companies owned or controlled by Mitr Phol Group: Angkor Sugar Company, Tonle Sugar Cane Company and Cane and Sugar Valley Company. Two of the ELCs abut each other and the third is perhaps three kilometers away. MAFF records indicate that the three companies applied for the ELCs on the same day, received approval from MAFF on the same day, and signed the ELCs contracts on the same day. On August 23, 2012, the Council of Ministers issued three sub-decrees reclassifying the land covered by the three ELCs to state private land.⁵ In 2015 all three were cancelled at once at the request of MPG. A search of the directors of the three companies reveals that at the time they were all senior figures in MPG. The Director of Cane and Sugar Valley was MPG President Krisda Monthienvichienchai, the Director of Tonle Sugar was MPG Managing Director Buntoeng Vongkusolkit, and the Director of Angkor Sugar was Tat Wanakornkul, who was Executive Vice-President of MPG at the time.⁶
40. 2001 Land Law article 58 states that an ELC can only be granted on state private land. The ELCs were awarded in 2008 but the land was not classified as state private land until 2012.
41. Conversely, Land Law article 16 only allows private uses of state public land that are “temporary, precarious and revocable”. This would obviously not include 70-year ELCs.
42. The Council of Ministers issues various types of legal texts including sub-decrees, which are normally signed by the prime minister. A sub-decree on ELCs was issued in 2005. Its article 4 states that “An economic land concession may be granted only on a land ... for which there have been public consultations, with regard to economic land concession projects or proposals, with territorial authorities and residents of the locality.” Such consultations before issuances of these ELCs never took place.
43. This sub-decree also states that an ELC can only be granted where there are “solutions for resettlement issues, in accordance with the existing legal framework and procedures.” The sub-decree indicates that this applies only in the case of people without legal right to occupy the land. Here the legal framework concerning the affected people that fell into this category was not respected.

⁵ Kingdom of Cambodia, Sub-decree No 130-132, 23 August 2012. One of the 3 is available at:

<http://www.opendevdevelopmentcambodia.net/company-profiles/profile/?id=666&cat=0&type=0&map=elc&tier=1>

⁶ According to MPG’s website, Krisda Monthienvichienchai is currently MPG president and CEO and a member of the board of directors, and Buntoeng Vongkusolkit is a member of the board of directors.

44. Moreover the sub-decree states that: “The Contracting Authority shall ensure that there will not be involuntary resettlement by lawful land holders and that access to private land shall be respected.” Under Cambodian law a person who is a legal “possessor” of land would be a lawful land holder. There is strong reason to believe that there were possession rights attaching to most although not all of the cultivated and residential lands of the 31 villages.⁷ Possession rights are legally recognized under Cambodian law, including the Land Law and are the most prevalent type of land tenure right in existence in Cambodia today. According to the AG, in order to respect PS 1, MPG would have had to investigate the land tenure situations of those people occupying the areas covered by the ELCs. An investigation would have had to include interviews with land occupants and other stakeholders among other steps. No such interviews or other form of investigation took place in this case.
45. In addition to the sub-decree provision barring involuntary resettlement of lawful land holders, the civil law of Cambodia prohibits this where, as here, there has been no due process of law.
46. The AG states that there should be “evidence of absence of unsettled conflicts where there is no resolution process regarding land ownership and use between local communities and company.” In fact there was no fair resolution process and there were serious conflicts, as documented by LICADHO in its briefing paper, “Bos/O’Bat Moan Village in Konkriel Commune, Samroang District, Oddur Meanchey Province – Chronology of a Forced Eviction,” published on 12 October 2009.”⁸
47. 2001 Land Law article 58 states: “The land concession may not violate ... waterways, pools, ponds and water reserves to be used by the people in their daily lives.” Affected people have reported that the ELCs extensively disrupted their use of water sources.⁹
48. Article 5 of the sub-decree on ELCs states that “Evaluating Economic Land Concession proposals shall be based on the following criteria: ... - Promotion of living standards of the people; - Perpetual environmental protection and natural resources management; - Avoidance or minimizing of adverse social impacts ...” Based on all materials we have submitted, all of these points have been seriously disregarded.
49. We are unaware of whether MPG prepared the type of environmental plan called for in PS Principle 4. In any case, the “free, prior and informed consent” of affected people to such a plan absolutely did not take place.

⁷ Private occupation of state private land that began before the current Land Law took effect, which was 30 August 2001, which occupation was done peacefully, openly etc., creates a right very similar to an ownership right (2001 Land Law article 39 calls possession a right “in rem”), except that a possession right can be lost by voluntarily ceasing the occupation (2001 Land Law art. 38), whereas an ownership right cannot be lost in this way. Once the possession lasts 5 years the possessor is entitled to an ownership certificate. To be a legal possessor there is no need to have a possession certificate issued by the old Land Titles Department or now by the Land Ministry (2001 Land Law arts. 40, 42). The law allows a possessor to transfer his right, and the transferee becomes the possessor. (2001 Land Law arts. 30, 39) A possessor may go to court to protect the right. (Civil Code art. 243, 2001 Land Law art. 47) If the government wishes to take possession land for a public project, the possessor must be compensated at “market price or replacement price”, in exactly the same way as an owner. (2010 Expropriation Law articles 4, 19 and 22) If the cultivation and residential lands of the 31 villages was state public land, that would only be because it was forest. The Land Law states that forest land is state public land (Art. 15), which means that it cannot be possessed. The term used in the Land Law for “forest” is “prey cheu”, which connotes old, deep forest. The 2002 Law on Forestry uses this same term, and generally describes forests as areas dominated by trees. (Glossary. See also land minister decision 01 [2006] on classifying state land.) Based on the CDA report and other evidence it strongly appears that most of the cultivated and residential land in this case had few or no trees and was legally possessed.

⁸ See: http://www.boycottbloodsugar.net/wp-content/uploads/2012/06/LICADHO_Briefing_Paper_Eviction_in_Konkriel_Commune.pdf

⁹ See Bittersweet Harvest report, p. 71.

50. Article 11.1 of the UN Covenant on Economic, Cultural and Social Rights, which both Cambodia and Thailand have ratified, states that: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The Committee on Economic, Social and Cultural Rights’ General Comment 7, among other international law documents, affirms that forced evictions are a gross violation of the right to adequate housing. Evictions are only permissible in exceptional circumstances (such as for a development project that serves the general welfare), if there are no feasible alternatives, following meaningful consultations and in accordance with due process of law. As explained above and documented extensively in the attachments, the forced evictions, land seizures, destruction of homes, property, forests and crops, and other activities that resulted in a reduction in access to food for subsistence amount to a gross violation of numerous human rights.
51. The TNHRC investigated this case, following a complaint against MPG by the same affected people represented in the present complaint, and found MPG in serious breach of its responsibility to respect human rights under the United Nations Guiding Principles on Business and Human Rights: Implementing in Protect, Respect, Remedy Framework (2011) (See Attachment 4).¹⁰
52. The above is not an exhaustive description of all the violations of Cambodian and international law committed by MPG, and we urge you to review the additional documentation provided. There can be no doubt that MPG has failed to comply and remains in non-compliance with the governance documents of Bonsucro.
53. Importantly, the TNHRC found that, although MPG has since ceased its operations in Cambodia and relinquished its economic land concessions there, the company has an ongoing responsibility to provide compensation and other appropriate remedies for the losses and human rights impacts suffered by people in Bos, O’Bat Moan, Taman, Trapaing Veng and Ktum villages as a direct result of its previous business activities.

Conclusion

54. MPG operated three ELCs that were illegally constituted. Based on these three illegal ELCs, MPG committed numerous, grave violations of Bonsucro’s objectives and principles, Cambodian law and its international human rights responsibilities. In plain terms, MPG seriously deepened the impoverishment and suffering of a large number of already very poor people, and now MPG has a responsibility to do everything within its power to remedy the damage it caused.
55. We ask that Bonsucro enforce its Governance Documents and require MPG to constructively engage in the Complaint Resolution Process.
56. We note that MPG has said that it has hired a consultant to assess damages in this case, possibly as a prelude to discussing compensation, and that the Cambodian government reportedly has not yet allowed the consultant into

¹⁰ See also: <https://www.cambodiadaily.com/news/sugar-firm-ready-to-compensate-evictees-rights-body-says-98641/>

Oddar Meanchey province to make an assessment. We, as yet, have scant information on what the quality of this assessment might be, though we have reason to doubt that it would be credible if it were to take place given previous social assessments undertaken by the proposed consultant.

57. Based on all of the above, we propose that Bonsucro:

- a. Provide the parties with a competent and impartial mediator, who is accepted by both parties, to attempt to bring about a resolution of this complaint. Such a resolution will necessarily entail the provision of adequate compensation by MPG to the affected households. The determination of the precise amount of compensation shall be subject to negotiation between the parties. A period of 3 months shall be provided to try to reach an agreement.
- b. If at the end of these 3 months no agreement has been reached, or if at any time during the 3 months either side believes further negotiations are futile, one or both sides shall so inform Bonsucro. At that time, Bonsucro shall immediately begin to resolve the complaint according to Section D of the Complaint Resolution Process, adhering to the steps and timetable stipulated in that section.

Yours sincerely,



Eang Vuthy
Executive Director
Equitable Cambodia



David Pred
Managing Director
Inclusive Development International



Naly Pilorge
Director
LICADHO

List of attachments:

1. Original complaint to Better Sugar Cane Initiative re Mitr Phol Group (January 31, 2011)
2. Bonsucro letter to Bridges Across Borders Cambodia (June 28, 2011)
3. Email from Kevin Ogorzalek (then Chairman of the BSCI Complaints and Grievances Committee) to Bridges Across Borders Cambodia (March 9, 2012)
4. Email from Simon Usher (CEO of Bonsucro) to Inclusive Development International (December 21, 2015)
5. Final Investigation Report of the Thai National Human Rights Commission (October 12, 2015)
6. "Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything But Arms Initiative in Cambodia," Inclusive Development International and Equitable Cambodia (September 2013)
7. "Cambodia: The Bitter Taste of Sugar Displacement and Dispossession in Oddar Meanchey Province," ActionAid Cambodia and Oxfam (May 2015)