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# **Land-Taking Disputes in East Asia: A Comparative Analysis and Implications for Vietnam**

May 2014

As the case study discussed below suggests, the commission has been unable or unwilling to provide determinations in the sensitive cases involving large-scale ELCs.

## Courts

Inter-Ministry Prakas No. 02 BRKR/03 dated November 26, 2003 states that the courts have the jurisdiction to resolve disputes over registered land, while the Cadastral Commission has jurisdiction over unregistered land. This jurisdictional division effectively deprives the courts of power to resolve disputes where farmers have been dispossessed by ELCs. As previously noted, these are the most widespread and egregious land disputes in Cambodia.

## Sugar Production in Cambodia: A Case Study in Land-taking

This case study concerns a land-taking dispute in Koh Kong province in south western Cambodia. The dispute began in 2006 when approximately 10,000 hectares were taken from farmers to establish two ELCs to grow and refine sugar cane for export markets. The ensuing dispute between the farmers and the sugar producers has been bitter, protracted, and often violent. This case study is instructive in showing that, when all of the domestic avenues for resolving the dispute were exhausted the farmers, with the assistance of NGOs, turned to international legal forums for justice.

### General Information about Koh Kong

Most of the approximately 140,000 people living in Koh Kong depend on agriculture for their livelihoods. This generally involves slash and burn farming on small land holdings of approximately 1 to 3 hectares (WFP 2013). Few farmers have formal land titles and claim ownership through continuous long-term possession of land (APRODEV 2011).

To diversify the economy and increase wealth, Cambodia's National Strategic Development Plan promotes industrialized agriculture in the province (Open Development 2013). A key aspect of the plan is to grant ELCs to agricultural investors. The investors clear the land and plant industrial export crops such as sugar and offer wage labor to the farmers (Open Development 2013).

Industrial agricultural development in the province has been significantly strengthened by Everything But Arms (EBA), a preferential European Union (EU) trade scheme established in 2001 to help farmers in the world's least developed countries (LDCs). Under this scheme, the production of sugar in Cambodia has become highly lucrative as it can be sold to the EU duty free and at a guaranteed minimum price per tonne. Approximately 100,000 hectares in four Cambodian provinces, including Koh Kong, have been granted as ELCs for sugar production (EC&IDI 2013: 8).

### Taking Land for ELCs

In August 2006, the Ministry of Agriculture, Forestry and Fisheries (MAFF) granted two ELCs of nearly 10,000 hectares each in the Sre Ambel and Botumsakor districts in Koh Kong to two Cambodian entities—Koh Kong Plantation Co. Ltd. (KKPT) and Koh Kong Sugar Industry Co. Ltd. (KKSI). Local business entrepreneur and senator Ly Yong Phat's company, the LYP Group, held a 20 percent ownership stake in each company. He later sold his stake to Khon Kaen Sugar Industry Public Company Ltd. (KSL), a Thai sugar company.

KSL currently has a 70 percent stake in the two Cambodian companies that were granted the ELCs. Taiwanese company Ve Wong owns the other 30 percent. KSL hold a five-year contract to supply sugar to UK sugar trader Tate and Lyle Sugar (TLS).

What land was taken to form the ELCs? Local villagers farmed about 5000 hectares of the land granted to KKSI and KKPT (Sokha 2007). They were informed by the LYP Group that their farmland formed part of the newly granted ELCs. Four hundred and fifty-six families were forcibly evicted from the land by guards recruited from local police and the military to make way for a sugar plantation (Sokha 2006).

## **The Farmers' Claim**

The farmers argue that the ELCs granted to KKPT and KKSI were illegal and should be cancelled. They made four main claims:

- Under the Land Law 2001 the maximum size limit for an ELC owned by a single company is 10,000 hectares. The ELCs granted to KKPT and KKSI are twice this legal limit (Land Law 2001, art. 59) because KKPT and KKSI are owned by the same company.
- The farmers had well-documented possession rights under the Land Law 2001 and were eligible for land title certificates. According to the Land Law 2001, ownership titles are granted where farmers can prove continuous occupation for more than five years. In this case, the farmers produced household registration papers or UN identification papers demonstrating long-term occupation (EC&IDI 2013: 25).
- Cambodian land law prohibits interference with land pending the issuing of land titles (Land Law 2001, arts 30–39). The farmers claimed that the ELCs interfered with their rights of possession during the conversion process.
- The ELCs did not follow the procedures stipulated in Sub-decree 146 on Economic Land Concessions 2005. Article 3, Sub-decree 146, requires public consultation for environmental and social impact assessments showing voluntary resettlement plans for landholders. This consultation did not take place before the ELCs were granted by MAFF (ERI 2013). In fact, some farmers were evicted from their land by KKPT and KKSI in May–June 2006, two months before the ELCs were officially granted. They said: "When the company came in May 2006, they bulldozed without consultation or any environmental impact assessment ... They bulldozed the fields and streams. They shot our animals. After about 100 families' land was taken away, we started taking pictures." *Teng Kao, village representative, Koh Kong province who lost nearly 10 hectares to the plantations* (Hodal 2013). "We had no warning—they came one day and began clearing the fields—they cleared my field and I want to know why." *Koh Kong Farmer* (Open Development 2013).

Few farmers (23) received compensation for their losses. Most compensation payments ranged from USD75 to USD750, and small land allotments (0.2 hectares), much less than the market value of the land taken for the ELCs (EC&IDI 2013: 64).

## **Domestic Dispute Resolution Forums**

### ***Consultation and mediation***

The dispossessed farmers staged peaceful protests that were often met with organized suppression from the police and the military (Human Rights Asia 2006). In March 2007, villagers travelled to Phnom Penh and submitted a petition to various government agencies including the National Assembly, the Prime Minister's Cabinet, the Ministry of the Interior, and the Council

of Ministers. They also filed a complaint with the National Authority for Land Dispute Resolution. This is the body responsible under the Land Law 2001 for resolving disputes concerning unregistered land.

Although these government agencies entered into dialogue with the farmers, in five years they have not produced any concrete resolutions binding the sugar companies or government agencies (SRSG 2007: 17). Attempts by the villagers to negotiate solutions directly with the sugar companies have been unsuccessful. In August 2008, a Cambodian NGO, the Community Legal Education Center (CLEC), wrote to KSL about the illegality of the ELCs on which they were growing and processing sugar and the negative impact the sugar industry had on the dispossessed farmers. In September 2008, KSL replied denying any knowledge of the complaints (SRSG 2007: 10). They claimed that villagers had been compensated. At a recent meeting with LYP Group representatives in February 2013, a farmer representative reported:

The company is saying it has reached a resolution with all the families except nine, but this is not true. We have not gotten any compensation for the 1,300 hectares taken from us. (Titthara 2013)

### ***Court action***

In tandem with petitioning central government authorities, the farmers filed criminal and civil cases against KKSI and KKPT in the Koh Kong Provincial Court in February 2007. The CLEC drafted a statement of claim seeking to cancel the two ELC contracts (ERI 2013: 9). The court dismissed the criminal case. The civil case was finally set for a hearing on July 26, 2012, five years after it began (Channyda 2012). However, it was delayed again, as the attorneys for the sugar companies failed to appear.

In addition to delaying the court proceedings, the judges of the Koh Kong Provincial have attempted to push the case back to administrative authorities (e.g. Cadastral Committee), claiming that the court lacks jurisdiction (ERI 2013: 13). In fact the case is about the legality of the ELC contract, not the land claims by the farmers, a matter that is clearly within the court's jurisdiction.

In the six years since the dispute began, the farmers have attempted to push their claims through every dispute resolution forum provided by the law. Although the claims have not been rejected outright, none of the forums has allowed the farmers to discuss liability and compensation with the developers on a relatively equal footing. The developers have not been required to answer in detail the specific details of the farmers' claims.

## **International Dispute Resolution Forums**

In 2010, after exhausting all domestic political and judicial dispute resolution mechanisms, the villagers, with the aid of various NGOs, embarked on a multi-pronged campaign to enlist international dispute resolution forums to resolve the dispute.

### ***Complaints with foreign governmental agencies***

NGOs acting for the villagers have turned to a range of transnational forums to pressure the sugar companies to negotiate with the villagers (ERI 2013: 10). This tactic relies on the extraterritorial jurisdiction in the EU and the USA that holds firms domiciled in these jurisdictions liable for actions carried out anywhere in the world.

In 2010, the CLEC wrote to the European Commission, requesting that it investigate KSL's contract with Tate and Lyle Sugar (TLS) (ERI 2013: 10). It will be recalled that TLS is a UK-registered transnational corporation. In 2012, 97 percent of Cambodia's (Euro) 10 million sugar exports were sent to the EU; TLS bought 99 percent of these exports.

In October 2012, the European Parliament instructed the EU Commission to investigate the rising number of human rights abuses caused by the dispossession of farmers by ELCs in Cambodia (ERI 2013: 10). The European Parliament recommended the temporary suspension of trade preferences on agricultural products where human rights violations had occurred (EC&IDI 2013: 83).

CLEC, together with other NGOs, have filed petitions with other European agencies requesting that they investigate companies and groups that have invested in KSL and that might be in breach of ethical guidelines. For example, in November 2011, CLEC and Earth Rights International (ERI) petitioned the Norwegian Council on Ethics to investigate the activities of KSL (ERI 2013: 11). The Norwegian Global Pension Fund is an investor in KSL. CLEC and ERI argued that the Pension Fund's financial stake in KSL violates the Fund's Ethical Guidelines (SRSG 2007: 10). An outcome is still pending.

Petitions have also been lodged with US agencies. On October 31, 2012, CLEC and ERI filed a complaint on behalf of dispossessed farmers with the US National Contact Point (NCP) about human rights abuses relating to the operations of the sugar companies in Koh Kong province (US Department of State 2013). The complaint alleges that American Sugar Refiners (ASR), through its subsidiary TLS, purchased sugar from KSL that was produced at the Koh Kong Plantations on land that was unlawfully acquired (US Department of State 2013). ASR is bound by the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. Under these guidelines, it "...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" (US Department of State 2013).

ASR initially cooperated with the US NCP and agreed to participate in mediation to find a solution to the land dispute. But ASR withdrew from the mediation when it learned that CLEC had launched litigation against TLS in the UK (discussed below) (US Department of State 2013). The US NCP closed this case on June 4, 2013 because the parties failed to agree about the terms of consultation and mediation, saying:

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. (US Department of State 2013)

### ***Transnational codes of practise***

Cambodian NGOs have also attempted to use transnational codes of practise to pressure transnational corporations involved in the Cambodian sugar industry. Transnational NGOs, such as Bonsucro, formulate codes of practise governing labor and other conditions in the sugar industry (Bonsucro 2013). Firms engaged in the sugar industry, including TLS, require certification from Bonsucro to sell their product into western markets.

In 2011 CLEC and Equitable Cambodia (EC), Cambodian-based NGOs, filed a complaint with Bonsucro about the activities of TLS in Cambodia (ERI 2013: 10). After investigating the complaint about the dispossession of farmers in Koh Kong province, on July 8, 2013, Bonsucro suspended TLS's membership. According to reports, TLS had failed to cooperate resolving the complaint and had ignored a request to review compensation paid to the dispossessed farmers (Bonsucro 2013). The suspension of membership means that TLS is unable to market its sugar as a certified ethical product. This will have price implications in western markets where consumers pay a premium for ethical products (Bonsucro 2013).

### ***Court litigation in third-party countries***

In addition to relying on governmental and transnational codes of practices, NGOs acting for the dispossessed farmers have turned to courts in third-party countries to prosecute their claims. On March 28, 2013, CLEC filed a civil law suit against TLS, a UK registered firm, in the UK High Court (commercial division) (The High Court of Justice Claim 2013 Folio 451: Particulars of claim). The statement of claim alleges that TLS purchased sugar that was produced on land that was wrongfully taken from farmers in Koh Kong province. It claims that TLS "knew that the villagers were the owners of the raw sugar or ought to have known given its position as a leading player in the sugar market" (Davies 2013; Hodal 2013). It further claimed that TLS "wrongfully deprived" the villagers of their property for its own benefit" (Davies 2013). The sugar cane harvested on the contested land was first processed in Cambodia and then in Thailand until it was on-sold to TLS for final processing. The statement of claim argues that "pursuant to Cambodian law, the claimants are the owners of the land" and as such" are entitled to the sugar cane" (The High Court of Justice Claim 2013 Folio 451: Particulars of claim).

The claim is based on property law. It argues as follows: since the farmers owned the land they were entitled to the proceeds of the sugar harvest. If TLS did not have good title to the land, then it was not entitled to sell the sugar harvest to TLS. As a consequence, TLS did not receive good title to the sugar and held the proceeds of the sugar sales on behalf of the farmers.

After the litigation was filed, TLS was sold to American Sugar Refining, which is now the defendant. It has counter-claimed that TLS had no knowledge of any prior ownership of the land in Koh Kong province (The High Court of Justice Claim 2013 Folio 451: Counter claim). Further, it has counter-claimed that the farmers have no claim to the sugar cane grown on the disputed land, even if they did previously own it, because they had not paid for the seed stock or production costs. The farmers are claiming compensation for some of the 48,000 tonnes—or roughly €24m worth—of sugar that TLS's London refinery has allegedly received since 2010 (Hodal 2013). In July 2013, after a preliminary attempt at mediation failed, the case was set for hearing in the High Court later in 2013.

Ou Virak, president of the Cambodian Center for Human Rights, called the case "extremely important" for several reasons (Brinkley 2013). First, it makes the point that Cambodia's own courts are thoroughly corrupt and inept and are incapable of resolving this type of action domestically. As previously mentioned, complaints lodged with the domestic courts in 2007 have still not been heard. Ou concluded that "such companies will be exposed to a greater level of scrutiny in the future. This in itself could potentially have an effect on the level of land grabs that we're currently seeing" (Brinkley 2013).

## Conclusions

The Cambodian case studies show that the best-drafted land laws cannot protect land users without independent and competent state institutions. The Cambodian Land Law 2001 is one of the most comprehensive land laws in East Asia. It provides individual property rights for farmers who can show long-term use of land. However, the law relies on a competent and transparent land administration department to impartially issue land titles in accordance with the ground rules established in the Land Law 2001. The World Bank withdrew support for the land titling program in Cambodia, complaining that local authorities were not issuing titles to farmers in areas that were scheduled for conversion into ELCs. Once land titles are issued to farmers, it is much more difficult for the authorities to clear land for industrial agricultural concessions.

Further compounding the problems for Cambodian farmers, the individualized nature of property rights recognized in the Land Law 2001 does not support collective action by farmers. Instead, farmers relied on NGOs to mobilize resources and take collective action to protest land takings without adequate compensation.

As the Koh Kong case study showed, domestic dispute resolution forums comprehensively failed to give farmers a platform to negotiate an equitable compensation deal with the sugar producers. Since 2007, the Cadastral Commission has failed to organize consultations or mediation between the farmers and the sugar producers. Attempts to challenge the legality of the ELCs in the courts have also been blocked. The Cambodian courts have delayed hearing actions and attempted to push the action back to government agencies for determination.

Frustrated by their lack of success in domestic dispute resolution forums, the farmers have taken their dispute to international forums. EU and US bodies have been petitioned to investigate human rights abuses resulting from the dispossession of Cambodian farmers. Farmers have also attempted to pressure Tate and Lyle, the main international purchaser of sugar produced by the Koh Kong ELCs. Tate and Lyle has lost certification for its products by Bonsucro, a transnational standards organization. So far this pressure has not forced the sugar producers to negotiate compensation agreements with the dispossessed farmers.

In another development, farmers have taken Tate and Lyle to court in the UK. This strategy relies on the extra-territorial jurisdiction of UK courts to hold firms registered in the UK liable for activities conducted around the globe. If successful, this action will give the dispossessed farmers access to the profits generated from the sugar grown on their land. In effect UK courts will be enforcing the private rights granted under the Cambodian Land Law 2001, a function that Cambodian state institutions have consistently failed to perform.

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