

REES BROOME ATTORNEYS WORK TO FIND A POSSIBLE REMEDY TO THIRD WORLD “LAND-GRABBING”

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Cambodia is a beautiful country with beautiful people; the famous Angkor Wat temples draw thousands of tourists every year. At the same time, the people have unquestionably suffered greatly. Following one of the most brutal genocides in history by the Khmer Rouge from 1975 to 1978 — a twisted result of the Vietnam War when the brutal dictator Pol Pot pushed the city population into the countryside and the “killing fields”— the country was not only stripped of its wealth and its laws, but as much as a quarter of its population. Now, early in the 21st century, Cambodia remains a poor and very young country. Perhaps because of their relative youth, the people are optimistic, and appreciate anything others do to help them. They work hard and they are very proud. Unfortunately, they labor under an extremely corrupt government headed by Hun Sen, the current prime minister, who began as a Khmer Rouge soldier, defected to the Vietnamese just before that country invaded to stop the genocide, and then returned as a puppet of the Vietnamese government to lead Cambodian politics. Even as Cambodia struggles to develop, the government is often hand in hand with outsiders intent on looting the country of its raw materials, including the land that supports a largely rural population.

In January I spent three weeks in Cambodia, working with the International Senior Lawyers Project (“ISLP”), an NGO based in Washington, to investigate and possibly represent farmers whose land had been “grabbed” by a foreign company in league with a corrupt highly-placed Cambodian official. The company formed a Cambodian enterprise that intended to grow and sell raw sugar to customers in the European Union (EU). I began in the capital, Phnom Penh, and travelled extensively throughout the country to various provinces. I met with the farmers, with the top officials of various NGO’s, with government officials, with Cambodian attorneys, and with a number of colorful ex-pats who have taken up residence in Cambodia.

The “sugar story” begins about a decade ago, when the EU enacted a no-tariff policy known informally as EBA, or “everything but arms.” EBA was well-intentioned, designed to encourage development in the least developed countries (“LDC’s”) of the world. Products, including agricultural products, originating from the LDC’s and sold to the EU would escape tariffs and theoretically compete favorably against the rest of the world. However, unintended consequences quickly arose. It became apparent that poor and uneducated people rarely form large ventures to take advantage of foreign incentive programs. Instead, in many undeveloped countries EBA policies simply encouraged predatory tactics: exporting companies *were* created, but they usually consisted of the wealthiest, most influential and corrupt individuals in a country, not the workers in the countryside.

Such was the case of a sugar cane company in Cambodia which was the focus of this ISLP project. A big sugar company in neighboring Thailand (which is not an LDC) recognized that creating a Cambodian company, acquiring Cambodian land cheaply for sugar cane development, hiring Cambodian workers for nearly slave wages and then selling sugar to an EU company could be highly profitable. However, the company faced one problem: laws enacted at the insistence of the international community in Cambodia after the fall of the Khmer Rouge ostensibly restricted the easy exploitation of Cambodian land. Because the Khmer Rouge wiped out land titles, much of the country is either owned by the government or is occupied by people best described as squatters — but “squatters” who often have lived on property for twenty years

or more. Under Cambodian land law, similar to the concept of adverse possession in the US, if a farmer lives on an eligible parcel of land longer than five years, he then holds superior title. However, gaining recognition as the proven owner requires that the title be registered with the government.

As in the US, recording land ownership usually clears up disputes. But legally registering land titles has proved nearly impossible in Cambodia when the Khmer Rouge wiped out land records. Various NGO's have attempted to create a land title system, but it's a mammoth undertaking requiring assistance from the international community. Not only does every plot of land demand a "cadastral" survey to describe the land for recording purposes — thereby implying a history of ownership and a value — but each dispute is supposed to be adjudicated by the surveyors, village chiefs or an impartial judge. Even in the highly-advanced US, where I head up Rees Broome's land use group, disputes over land ownership are an active part of a land use practice. In a country like Cambodia, where official corruption is paired with poor and uneducated people, waiting for a survey is like waiting for a winning lottery ticket. The difficulties presented by even simple land title cases can be insurmountable — especially when the legal requirements to prove ownership run into the fact of massive illiteracy.

As a result, much of the land in Cambodia has never been officially registered. In other words, although the Cambodian "squatters" may have superior right to the land, they bear the burden of proof in a title dispute. They have virtually no ability to fight a court battle against anyone with the resources to jump to the head of the line and obtain the registration that supposedly "proves" ownership. In order to prevail, a dispossessed farmer not only must prove his right to the land, he must prove that the line-jumper's registration was illegal. Rampant corruption enables wealthy companies to bribe or simply partner with officials to push their land registrations through the system. Companies also take advantage of "concessions," where the Cambodian government grants large tracts of its own land for development. Supposedly the company seeking a concession has to submit an extensive application, pursue the development plan diligently and "promote the common good." In practice, the government rarely even reviews the applications provided adequate bribes have been paid.

So for the Thai company looking to exploit opportunities in Cambodia, the sugar cane development simply required a government official to play the role of partner in a new company created under Cambodian law, along with a good piece of land. The Thai entrepreneurs found a wealthy senator who, among other ventures, owns a gambling casino and keeps himself close to the head of the government. I will fictitiously refer to him as Senator Kong. The new company, which I fictitiously call CSC, then rapidly acquired from the government a concession of 20,000 hectares of land (77 square miles or a chunk of land slightly larger than the District of Columbia). Unfortunately for the farmers living on or near the new sugar cane plantation, the government threw their unregistered land into the concession. With the stroke of a pen, the government "grabbed" land that their own citizens had been working for years.

In short order, Senator Kong sent out units of the local army — yes, a private individual who hires the army to enforce his private interests — to bulldoze the houses and farms of the roughly 500 families who rightfully owned 5000 hectares given away without their consent and with little or no compensation. CSC built a refinery on site and entered into a contract with a huge EU sugar manufacturer, which I will refer to as EUS. (This same company produces one of the sugar substitutes we all use every day in our cooking and tea.) CSC could afford to offer a price well below the world market while still enjoying a substantial profit. The farmers, now left without a livelihood, had little choice except to work for CSC, planting and cutting cane at \$2.50

per day. At harvest time, working in teams of five or six, they were required to harvest eight tons of sugar cane per day.

Humanitarian NGO's quickly learned of this and many similar land-grabbing instances in Cambodia. They began to ponder some sort of solution. The UN, the World Bank, the IMF and countless others have complained for years that demand for food at rock-bottom prices from developed countries is turning "third world" countries into neo-colonies. The demand for cheap products encourages not only "land-grabbing," but sweat shops and even forms of literal slavery. Fair and honest development needs to encourage labor competition (to a point), but without institutions and the rule of law, exploitation of the weak by the powerful becomes the rule.

In September, 2010, I sent an application to ISLP, a non-profit developed a decade ago "to create a vehicle through which senior lawyers could use their skills and expertise to promote the rule of law and human rights." According to ISLP's corporate biography, the founders were "a group of public-spirited senior partners of global law firms" convinced "there is a widespread need throughout the developing world for legal assistance." ISLP has grown to include numerous projects in the former Soviet Union, Africa and Asia. I received a call from Andra Moss, a recruiter for ISLP, who said that an NGO in Cambodia had requested specialized help. The head of the Cambodian team was a famous woman doctor who had played a significant role in ending the reign of the Khmer Rouge and had been nominated for the Nobel Prize. As we discussed the issue, I focused less on the humanitarian violations (which were obvious), but more on the land use violations. As we discussed the issues, we both agreed that I could help.

After much research and discussion assisted by Mariam Tadros, a Rees Broome associate, along with many others, I proposed a solution: under Cambodian land law, the sugar cane grown on the "grabbed" portion of the CSC concession still belonged to the farmers who held (or should have held) superior title to the land. Consequently, the sugar cane continued to belong to them as it travelled in international commerce. The company, EUS, owed the farmers the world market price for their product.

The next step was to assess the Cambodian legal system, which I discovered on my trip can be as corrupt as the sugar concessions. I witnessed three trials and assisted Cambodian attorneys in one, where a foreign company had taken a Cambodian farmer's land and had bulldozed the farmers' houses before title to the land was decided in court. In another, a company which should have been a defendant against legitimate claims that it dispossessed farmers joined forces with the local prosecutor and filed criminal libel charges against the farmers' legal representative. The "libel" consisted of the representative telling Radio Free Asia that the company had prematurely usurped his clients' property.

By relying on Cambodian land law and the theory of international commerce, we believe we can avoid having to litigate the matter in Cambodia. We can turn to the EU courts, since the compensation claim is directed toward EUS, an EU company. In the EU forum, the issues are considerably simplified because the primary question is "Who owns the sugar cane transported to the EU?" The farmers have standing under most EU law to claim that they rightfully own their share of it: under both Cambodian and international law they owned all land illegally "grabbed" from them.

At Rees Broome, we are now heading up the legal analysis and direction of the probable litigation, actively structuring the strategy in the EU against EUS. While I have made contact with EUS to discuss possible settlement, at this point it appears that litigation is likely. If we do in fact go to trial, we would hope that it will not only resolve the immediate EUS case in Cambodia,

but also provide a model for resolving other similar “land grabbing” cases in other “least developed countries.”