

**Initial Assessment by the UK National Contact Point (NCP) for the OECD  
Guidelines for Multinational Enterprises (the Guidelines)**

**Complaint from the European Centre for Constitutional and Human Rights  
against Cargill Cotton Limited (in Uzbekistan)**

**SUMMARY OF THE UK NCP DECISION**

- The UK NCP declines Cargill Cotton’s request that the complaint should be rejected at the Initial Assessment stage of the complaint process. Cargill Cotton had argued that the complaint should be rejected because of the lack of an “investment nexus” between Cargill Cotton and Uzbekistan, or between Cargill Cotton and companies owned by the Government of Uzbekistan.
- The UK NCP has decided that the issues raised in the complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers Cargill Cotton to have acted inconsistently with the Guidelines. The UK NCP is accepting for further consideration the alleged breach of Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) of the Guidelines.
- The UK NCP will formally contact both parties to ask whether they are willing to engage in conciliation/mediation, through the use of a professional mediator engaged by the UK NCP, with the aim of reaching a settlement. If they are so willing, the UK NCP will then liaise with both parties to arrange the conciliation/mediation meetings.

**BACKGROUND**

1. On 1 December 2010, Leigh Day & Co Solicitors, acting on behalf of the European Centre for Constitutional and Human Rights (ECCHR), wrote to the UK NCP raising a number of concerns which the ECCHR considered constitute a Specific Instance under the Guidelines in respect of the UK registered company Cargill Cotton Limited (Cargill) in relation to Uzbekistan.

**THE COMPLAINT AND RESPONSE**

2. The concerns raised by the ECCHR relate to Cargill’s purchase of Uzbekistan-origin cotton in Uzbekistan and were specifically linked by the ECCHR to Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) of the Guidelines which state that:

*“II. General Policies*

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*

- 1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.*
- 2. Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.*

[...]

*10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.”*

*“IV. Employment and Industrial Relations*

*Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:*

[...]

*1.(b) Contribute to the effective abolition of child labour.*

*1.(c) Contribute to the elimination of all forms of forced or compulsory labour.”*

3. The ECCHR made the following allegations in respect of Cargill:

- a) That Cargill may buy cotton from Uzprommashimpeks, one of three companies controlled by the Government of Uzbekistan which sell to international buyers the cotton produced in Uzbekistan. The ECCHR further submitted that: Cargill has a branch office in Tashkent (Uzbekistan) which specialises in buying cotton; that Cargill lists central Asia as one of its key cotton suppliers; and that Cargill participated at the 5<sup>th</sup> Tashkent Cotton Fair on 14-15 October 2009;
- b) That the cotton bought by Cargill in Uzbekistan is produced through the systematic use of child and forced labour supported by the Government of Uzbekistan, which in turn negatively affects the sustainable development of the region;
- c) That Cargill, in view of its relationship with the Government of Uzbekistan outlined in paragraph 3(a) above, is in a position to influence, either alone or as part of international groups (such as the Bremen Cotton Exchange or the International Cotton Advisory Committee (ICAC)), the Uzbek authorities regarding their use of forced and child labour. The ECCHR further alleged that Cargill chose not to join an international group of cotton (and cotton products) retailers boycotting the use of cotton produced in Uzbekistan;
- d) That Cargill, in view of its relationship with the Government of Uzbekistan outlined in paragraph 3(a) above, breached the Guidelines through:
  - i. Its supply chain. The ECCHR alleged that, if it is confirmed that Cargill entertains significant trade relationships with Uzbek state corporations and as a result it has opportunities to influence the situation but has failed to do so, by continuing to buy cotton from the Government of Uzbekistan, Cargill might have contributed to (and helped to maintain and incentivise) the use of forced and child labour in cotton production. Therefore, Cargill would have arguably been responsible for violations of the Guidelines committed by the Government of Uzbekistan.
  - ii. Complicity with human rights abuses committed by the Government of Uzbekistan. The ECCHR argued that, if the indications of Cargill’s involvement in the trade with Uzbek cotton and its close relations to the State-owned businesses are confirmed,

by aiding and abetting the Uzbekistan authorities in perpetuating the cotton production system based on the use of forced and child labour, Cargill is complicit in these human rights breaches committed by the Government of Uzbekistan. The ECCHR further alleged that Cargill satisfies the following requirements of the concept of “aiding and abetting”: “causation” (Cargill allegedly purchased cotton from the Government of Uzbekistan which was produced in Uzbekistan at very low cost thanks to the use of child labour, thus creating an incentive to perpetuate this exploitative system); “knowledge” (Cargill allegedly knew, or should have known applying a due diligence test, how cotton is produced in Uzbekistan); “proximity” (as outlined in paragraphs 3(a) and 3(c), Cargill was allegedly close to the Government of Uzbekistan and in a position to influence it);

- e) That, in light of the above, Cargill did not respect the following human rights: Articles 23(1) and 26(1) of the United Nations (UN) Universal Declaration of Human Rights; Articles 28(e), 31 and 32 of the UN Convention on the Rights of the Child; Article 24(1) of the UN International Covenant on Civil and Political Rights; Articles 6, 7 and 10(3) of the UN International Covenant on Economic, Social and Cultural Rights; Article 7(1) of the International Labour Organisation (ILO) Convention 138 (on minimum age).
4. Cargill wrote to the UK NCP on 21 January 2011 and on 14 February 2011, denying these allegations and requesting the UK NCP to reject the ECCHR’s complaint. Cargill however also stated that it is open to constructive dialogue, subject to reasonable terms, with the ECCHR. In particular, the company stated:
- a) That Cargill has no direct investments or operations in Uzbekistan and that, although it does buy cotton (on an arm’s length basis at prices which reflect world cotton price levels) from government companies such as O’zmarkazimpeks, it does not have any direct involvement in cotton production in this country. Cargill clarified that its representative office in Tashkent was in fact closed over four years ago. Cargill therefore claimed that the complaint from the ECCHR is outside of the scope of the Guidelines. In particular, Cargill stated that the OECD Investment Committee, which monitors the implementation of the Guidelines by adhering countries, stated in 2003 that *“the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus”*. Therefore, Cargill contended that the complaint from the ECCHR falls outside of the scope of the Guidelines because Cargill has no investments in Uzbekistan;
- b) That Cargill does not condone the use of abusive, enforced or illegal labour wherever this may occur and that it takes its corporate responsibility commitments very seriously.
- c) That Cargill does not have, on its own, the ability directly to influence the Uzbekistan authorities by reducing or boycotting cotton procurement from this country. Cargill explained that, should Cargill cease to buy cotton from Uzbekistan, Uzbekistan would be able to sell its cotton production to other companies and therefore would not be affected by Cargill’s boycott. According to Cargill, the ECCHR’s request for a boycott on Uzbekistan’s cotton is incompatible with the purpose of the Guidelines. Cargill also stressed that, should the ECCHR’s allegation that Uzbekistan is incapable of producing cotton without the systematic use of forced and child labour be confirmed,

the ECCHR cannot expect Cargill to be successful in influencing the Uzbekistan authorities where both the UN and the ILO have failed to influence Uzbekistan's behaviour even after Uzbekistan ratified the ILO Conventions. Cargill stated that, to the extent it has been able to, it has already raised the concerns expressed by the ECCHR in respect of the use of forced and child labour with the relevant Uzbekistan authorities. Cargill also explained that the Association of Cotton Merchants in Europe (ACME), of which Cargill is a member, wrote to the Minister for Foreign Economic Relations, Investments and Trade of Uzbekistan, and met with Mr Nasreddin Nadjimov (Deputy Minister for Foreign Economic Relations, Investments and Trade of Uzbekistan). Cargill explained that ACME urged the Uzbekistan authorities to address the same types of issues raised by the ECCHR, to engage openly with key stakeholders, and emphasised the need for a credible independent assessment of the situation in Uzbekistan;

- d) That Cargill strongly rejects the claims that it has breached the Guidelines through:
- i. Its supply chain. Cargill contended that it cannot be held responsible for violations of the Guidelines committed by the Government of Uzbekistan. Cargill in fact submitted that, according to the Commentary to the Guidelines<sup>1</sup>, a company's supply chain obligation does not arise in a situation where a company is engaged in "*individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships*". Cargill explained that its relationship with Uzbekistan is limited to the purchase of cotton on an arm's-length, transaction-by-transaction basis.
  - ii. Complicity with human rights abuses committed by the Government of Uzbekistan. Cargill submitted that the Guidelines are not intended to place an enterprise in a situation where it faces conflicting requirements. Cargill stated that the ECCHR's application to Cargill of the concepts of complicity with and of "aiding and abetting" the commission of human rights abuses in Uzbekistan, are unsubstantiated and place Cargill in a situation where it faces conflicting requirements. Cargill further contended that, if such arguments were to be seriously considered by the UK NCP, it would set a dangerous precedent that could, ultimately, undermine the future success of the Guidelines.
- e) That Cargill's aim is to work with NGOs and other stakeholders to "*tackle root causes for meaningful solutions*", and that it has a history of engaging relevant stakeholders to encourage responsible supply chains in, for example, the cocoa, palm, soy, and sugar sectors. According to Cargill, cotton can provide an important source of income to the economy and the livelihoods of cotton-growing communities in Uzbekistan. Cargill also stated that it is important that all those involved in the cotton supply chain in Uzbekistan (i.e. governments, international organisations, NGOs and communities) find practical, achievable and sustainable solutions whilst fostering responsible economic development. In this respect, Cargill expressed its willingness to engage in a constructive dialogue with stakeholders, including the ECCHR.

## THE UK NCP PROCESS SO FAR

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<sup>1</sup> OECD, *Commentary on the OECD Guidelines for Multinational Enterprises*, 2008, paragraph 10, p. 41 (downloadable from <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - visited on 4 February 2011).

5. The UK NCP received the ECCHR's complaint against Cargill on 1 December 2010 (and the supporting annexes on 8 December 2010).
6. Uzbekistan is not an OECD member nor does it have an NCP, therefore it falls to the NCP of the country where the company is registered to deal with the complaint. Cargill is a UK registered company but its parent company, Cargill Inc., is based in the United States (US). Having consulted with the US NCP, on 8 December 2010, the UK NCP informed the complainant that the UK NCP would be better placed to deal with the complaint against Cargill and that it would do so on the basis of the UK NCP's published complaint procedure. The reasons for this decision are that Cargill is a UK registered company and that there is some evidence that it is Cargill (rather than Cargill Inc.) that deals with Uzbekistan. The UK NCP is keeping the US NCP updated on the status of the complaint and will seek the US NCP's assistance where appropriate.
7. In its complaint against Cargill, the ECCHR stated that it had filed similar complaints under the Guidelines against other companies (based in Germany, Switzerland, and France). The UK NCP is therefore also liaising with the German, Swiss and French NCPs, and will keep these NCPs updated on the status of the complaint against Cargill. However, it should be pointed out that, although all NCPs operate on the basis of the Guidelines, each NCP is independently established by each adhering country, and may therefore operate within different timelines and reach different conclusions from the conclusions reached by other NCPs on the same issues.
8. On 10 December 2010, the UK NCP forwarded the complaint and the supporting annexes to Cargill. The company submitted a preliminary response to the allegations on 21 January 2011 and further clarified its position on 14 February 2011 (mainly in response to further comments submitted by the ECCHR on 27 January 2011).
9. Cargill held a telephone conference call with the UK NCP on 18 January 2011 to discuss the complaint process under the Guidelines and the matter of providing a preliminary response on the allegations. The ECCHR did not take up the UK NCP's offer to meet but remained in e-mail contact with the UK NCP.

## **UK NCP DECISION**

### *"Investment nexus"*

10. The UK NCP has considered Cargill's contention that the complaint falls outside of the scope of the Guidelines because of the lack of an "investment nexus" between Cargill and Uzbekistan, or between Cargill and companies owned by the Government of Uzbekistan. In reaching its conclusion, the UK NCP took the following considerations into account:
  - a) The concept of "investment nexus" is not referred to (nor is it defined) in the OECD "Declaration on international investment and multinational enterprises", the Guidelines, OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance, or in the Commentaries attached to the Guidelines. The Guidelines and OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance

can only be amended respectively by all the adhering countries and by the OECD Council.

- b) The UK NCP's published complaint procedure does not contemplate the presence (or lack) of an "investment nexus" as a criterion to determine the acceptance for further consideration of a complaint under the Guidelines. The UK NCP's published complaint procedure is based on the Guidelines and on OECD "Council Decision C(2000)96 on the OECD Guidelines for Multinational Enterprises" and its annexed Procedural Guidance. As already indicated, neither of these instruments makes an "investment nexus" a factor for determining the admissibility of complaints under the Guidelines.
- c) As indicated by Cargill in its letters of 21 January 2011 and 14 February 2011, in the course of 2003, the OECD Committee on International Investment and Multinational Enterprises (CIME), now merged into the Investment Committee, issued a statement<sup>2</sup> reflecting the exchange of views held by the CIME (and its Working Party) in the period 2002-2003 on the issue of the "investment nexus". The statement reads:

*"In considering this issue [i.e. the question of the scope of the Guidelines - the definition of activities to which the Guidelines are thought to apply], the CIME has sought to protect and enhance the credibility and effectiveness of the Guidelines and to remain true to the agreement reached among adhering governments at the 2000 Review after extensive consultations with the business, trade union and NGO communities.*

*The Guidelines are a multifaceted instrument and the Committee found it useful to consider this issue with reference to the following, which does not aim to change the balance reached during the 2000 Review*

[...]

*Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances."*

In light of the above, the UK NCP considers that the arguments put forward by Cargill (see paragraph 4(c) above) in respect of the company's capacity to influence the Government of Uzbekistan and the companies controlled by this government, are likely to warrant a closer examination of Cargill's actual capacity to exert such influence, either alone or as part of a group of companies. Such examination is outside the scope of the Initial Assessment but, should conciliation/mediation not be possible, will take place as part of the Examination stage of the complaint process.

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<sup>2</sup> CIME, *Scope of the Guidelines and the investment nexus*, 2003 (available at [http://www.oecd.org/document/42/0,3746,en\\_2649\\_34889\\_37356074\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/42/0,3746,en_2649_34889_37356074_1_1_1_1,00.html) (visited on 4 February 2011)).

The results of the examination would then be reflected in the UK NCP's Final Statement.

11. In light of the above, the UK NCP has concluded:
  - a) That none of the key OECD instruments related to the Guidelines refer to the concept of an "investment nexus";
  - b) That the UK NCP's complaint procedure, which is based on the Guidelines, does not contemplate the presence (or lack) of an "investment nexus" as a relevant criterion to determine whether the issues raised in a complaint under the Guidelines merit further consideration;
  - c) That the company's capacity to influence the Government of Uzbekistan and the companies controlled by this government, is likely to warrant a closer examination by the UK NCP in the context of the examination of the allegations and of the analysis of the results of the examination in the Final Statement, should conciliation/mediation not be possible.
12. Therefore, the UK NCP declines Cargill's request that the complaint should be rejected at the Initial Assessment stage of the complaint process. Cargill had argued that the complaint should be rejected because of the lack of an "investment nexus" between Cargill and Uzbekistan, or between Cargill and companies owned by the Government of Uzbekistan.

#### *Complaint from the ECCHR*

13. The UK NCP has decided that the issues raised in the ECCHR's complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers Cargill to have acted inconsistently with the Guidelines.
14. The UK NCP is accepting for further consideration the alleged breach of Chapters II(1), II(2), II(10), IV(1)(b) and IV(1)(c) of the Guidelines. The reasons for this decision are explained below.
15. As set out in paragraph 14 of the Commentary on the Guidelines on "Implementation in Specific Instances"<sup>3</sup>, the UK NCP took the following points into account when considering whether the ECCHR's complaint merited further consideration:
  - a) Identity of the ECCHR and its interest in the matter:

The complaint was formally submitted to the UK NCP by the London-based law firm "Leigh Day & Co. Solicitors" acting on behalf of the ECCHR. The UK NCP is satisfied that the ECCHR is a legitimate and credible body to make this complaint. The ECCHR is a non-governmental organisation based in Berlin (Germany). According to its

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<sup>3</sup> OECD, *Commentary on the implementation procedures of the OECD Guidelines for Multinational Enterprises*, p. 58 (downloadable from <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - visited on 4 February 2011).

website<sup>4</sup>, the ECCHR is “an independent, non-profit legal and educational organization dedicated to protecting civil and human rights throughout Europe [...] ECCHR engages in innovative strategic litigation, using European, international, and national law to enforce human rights and to hold state and non-state actors accountable for egregious abuses”. The ECCHR primarily takes cases covering four areas: universal justice, business and human rights, counter-terrorism, and human rights, gender and human rights. The ECCHR stated in the complaint against Cargill that its “overarching aim is to assist as far as possible with protecting the Human Rights of children in Uzbekistan”. In light of the above, the UK NCP considers that the ECCHR is directly interested in the issues raised in the complaint and is in a position to supply information about them.

b) Whether the issue is material and substantiated:

Within the scope of the Initial Assessment, the ECCHR has provided sufficient information for the UK NCP to conclude that the issues identified by the ECCHR are material and substantiated. The ECCHR has provided various documents in support of the complaint, including: three reports from the Environmental Justice Foundation (documenting serious human rights violations by the Government of Uzbekistan; the systematic use of forced and, in particular, child labour in cotton production in Uzbekistan; the draining of the Aral Sea partly to support cotton production in Uzbekistan; and statements allegedly made by Cargill in 2004-2005 on cotton production in Uzbekistan); two reports from the School of Oriental and African Studies (SOAS) University of London (documenting the use of forced child labour in cotton production in Uzbekistan and how cotton is then sold to international companies allegedly including Cargill); a collection of news releases (from various sources) confirming the systematic use of forced and child labour in cotton production in Uzbekistan; and the alleged list of attendees (including Cargill) at the Tashkent cotton trade fair in 2009.

c) Relevance of applicable law and procedures:

According to the ECCHR, child labour and forced labour are prohibited by Uzbekistan’s domestic law. In particular, according to one report annexed to the complaint<sup>5</sup>, forced and child labour is regulated under Uzbekistan’s domestic law by: Article 37 of the Constitution; the “Law on the Foundations of State Youth Policy”; the “Law on Guarantees of the Right of Child to Labour”; and the Labour Code.

The Guidelines represent voluntary principles and standards of behaviour of a non-legal character and are not a substitute for (nor should they be considered to override) local law and regulation. If a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will not examine whether there has been any breach of Uzbekistan’s law.

d) How similar issues have been, or are being, treated in other domestic or international proceedings:

<sup>4</sup> <http://www.ecchr.eu/about.html> (visited on 4 February 2011).

<sup>5</sup> SOAS, *Invisible to the world? The dynamics of forced child labour in the cotton sector of Uzbekistan*, London, 2009, pp. 30-31 (downloadable from <http://www.soas.ac.uk/ccac/events/cotton-sector-in-central-asia-2005/file49842.pdf> - visited on 4 February 2011).

The UK NCP understands from the ECCHR that the complaint against Cargill is part of a group of complaints under the Guidelines filed by the ECCHR (and other non-governmental organisations) against other European companies (based in Germany, Switzerland and France) which allegedly buy cotton from Uzbekistan.

The UK NCP will offer conciliation/mediation to Cargill and the ECCHR but if a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will take into account as appropriate (and if available) the outcome of the relevant proceedings in Germany, Switzerland and France, as part of the UK NCP's examination of the allegations.

e) Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:

One of the stated aims of the Guidelines, specifically the role of the NCPs, is for the NCP to “offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law”<sup>6</sup>. To this effect, the UK NCP considers that by accepting this Specific Instance, it could help both parties in reaching a conciliated/mediated solution to the complaint in relation to the issues of: Cargill's policy of buying cotton from Uzbekistan; Cargill's capacity to influence the Government of Uzbekistan in relation to the use of forced and child labour; Cargill's disclosure of information related to its purchase of Uzbekistan-origin cotton in Uzbekistan.

## **NEXT STEPS**

16. The UK NCP will formally contact both parties to ask whether they are willing to engage in conciliation/mediation, through the use of a professional mediator engaged by the UK NCP, with the aim of reaching a settlement. If both parties are so willing, the UK NCP will then liaise with both parties to arrange the conciliation/mediation meetings.
17. If a conciliated/mediated solution is possible, the UK NCP will reflect the successful outcome of this process in its Final Statement without making a determination as to whether the company has acted inconsistently with the Guidelines.
18. If a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will conduct a separate examination into the complaint and will reflect in its Final Statement the outcome of this examination, and a determination of whether the company has acted inconsistently with the Guidelines.

## **8 March 2011**

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<sup>6</sup> OECD, *Procedural Guidance*, annexed to the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises*, in OECD, *OECD Guidelines for Multinational Enterprises*, 2008, paragraph I(C), pp. 34 (downloadable from <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - visited on 4 February 2011).

**UK National Contact Point for the OECD Guidelines for Multinational Enterprises**

**Nick Van Benschoten, Sergio Moreno**