

U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises



Final Statement

Specific Instance between Jamaa Resources Initiatives and a U.S.
Company for conduct in Kenya

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November 24, 2017

Executive Summary

The U.S. National Contact Point (U.S. NCP) for the OECD Guidelines for Multinational Enterprises (“the Guidelines”) offered mediation services between the parties – Jamaa Resources Initiatives (hereinafter referred to as “Jamaa”) and a U.S. company operating in Kenya (hereinafter referred to as the “Company”) – regarding operations in Kenya.

The U.S. NCP offered mediation on issues raised by Jamaa in the Specific Instance, but mediation was not established because the Company declined to participate in mediation through the office of the U.S. NCP, citing ongoing legal proceedings.

Offering mediation on this Specific Instance is in no way a determination on the merits of the claims presented, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties to voluntarily, confidentially, and in good faith, reach a cooperative resolution of their concerns.

Substance of the Specific Instance

In October 2016, Jamaa, a Kenya-based non-governmental organization (NGO) that promotes and facilitates collaborative links within and among communities, individuals, and local businesses, submitted a Specific Instance to the U.S. NCP alleging that the Company practiced conduct in Kenya inconsistent with the Guidelines’ [Chapters II, III, IV, V, and VI](#) concerning disclosure, human rights, workers’ rights, and the environment.

The issues raised in the Specific Instance cover a period from 2011 to the submission date. In the Specific Instance, Jamaa alleges that the Company’s activities have had negative impacts on local communities and on the environment, including on the indigenous communities.

To address the allegations, in their submission Jamaa requested the following actions from the U.S. NCP:

- Lead a fact-finding mission in Kenya in order to actively investigate and verify the facts on the ground;
- Facilitate mediation between the parties, and in doing so ask the Company to:
 - Adopt and implement a company-wide human rights and environmental policy to end and prevent future negative impacts on the environment and the local community;
 - Allow workers the freedom of association, including the right to organize a trade union and bargain collectively;
 - Provide remedy for the community members whose human rights have allegedly been violated; and,
 - Provide local communities with remedy for past harms.
- Issue a Final Statement with a determination as to whether the Company breached the Guidelines.

Following the submission, the U.S. NCP notified Jamaa that the submission had been received and informed Jamaa of the U.S. NCP policies and procedures. The U.S. NCP then shared the Specific Instance with the Company, also explaining its policies and procedures.

In a call with the U.S. NCP, the Company representative stated that there was no truth to Jamaa's allegations. They also said that because of ongoing legal proceedings and on advice from counsel, the Company was unable to formally respond to the allegations. They also stated that the company has progressive labor, human rights, and environmental policies that are well known within the communities in which it operates. The representative shared that the Company has complied with all Kenyan legal requirements. The Company did not formally respond to the allegations in writing, but invited the U.S. NCP or others from the U.S. embassy to visit the farm to see the situation.

While acknowledging that participation in this process is voluntary, the U.S. NCP regrets that the Company decided not to formally respond in writing to the allegations raised in the Specific Instance nor share further information regarding the Company's position.

Recommendation

The U.S. NCP encourages all companies to implement the OECD Guidelines.

Decision

After thorough review of information shared by both parties, on February 10, 2017 the U.S. NCP offered mediation services to assist the parties to undertake a dialogue to seek a mutually agreed upon resolution of issues. On February 28, 2017, the Company declined to participate in mediation through the office of the U.S. NCP, citing ongoing legal proceedings. While acknowledging again that mediation is voluntary, the U.S. NCP regrets that the company did not agree to participate in mediation. Because mediation could not be established, the U.S. NCP brings this Specific Instance to a close with this Final Statement, which is published [online](#) at www.state.gov/USNCP.

The U.S. NCP believes that while judicial action may resolve some of the issues at hand, a broader process of mediation could lead to resolution of issues which are not before the courts and will advance the implementation of the Guidelines, if in fact they are not being properly implemented by the Company. The U.S. NCP encourages the parties to begin a dialogue on the issues raised, and the office stands ready to consider future requests for mediation by the parties under the auspices of the U.S. NCP.

Due to uncertainty about the elections and concerns about election violence, the U.S. NCP, in consultation with the U.S. Embassy, deferred publication of the Final Statement until after the national elections.



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Annex: Details of U.S. NCP Specific Instance Process and Outcome of Initial Assessment in this Specific Instance

I. Context and Background on the U.S. NCP

The [OECD Guidelines for Multinational Enterprises](#) (the “Guidelines”) are voluntary recommendations for companies regarding responsible business conduct in a global context. The Guidelines are addressed to multinational enterprises (“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 encouraging their MNEs to promote and implement the Guidelines in their global operations and appointing a national contact point (NCP) to assist parties in seeking a mutually satisfactory resolution to issues that may arise under the Guidelines.

As a part of its function, the U.S. NCP addresses issues relating to implementation of the Guidelines, raised in the form of a Specific Instance, with regards to the business conduct of an MNE operating or headquartered in the United States. The office of the U.S. NCP handles such instances in accordance with its [procedures](#), which are based on the Guidelines.

The U.S. NCP’s primary function is to assist affected parties, when appropriate, in their efforts to reach a mutually satisfactory resolution and its role is to offer mediation to facilitate the resolution of the matter and, where appropriate, make recommendations as to how the enterprise might make its business practices more consistent with the Guidelines. The U.S. NCP does not make a determination as to whether a party is acting consistently with the Guidelines, and the U.S. NCP does not have legal authority to adjudicate disputes submitted under this process.

The offer of mediation is in no way an acknowledgement of or determination on the merits of the claims presented, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties in voluntarily, confidentially, and in good faith, reaching a cooperative resolution of their concerns. For the company’s part, a decision to participate in this process would not have implied any prima facie admission of conduct inconsistent with the Guidelines.

In mediation, the parties are responsible for arriving at their own solution, and the process is designed to create an environment for cooperative problem solving between the parties. The parties are in control of the outcome of an agreement. Participation is voluntary and no parties would be compelled to violate the law or waive their rights under the law during the NCP process. If the parties can reach an agreement through mediation or other means, the U.S. NCP would consider requests by the parties to follow up on implementation.

II. Conducting the Initial Assessment

Per the Guidelines procedures, upon receiving a Specific Instance, the U.S. NCP conducts an Initial Assessment. The Initial Assessment does not determine whether the company has acted consistently with the Guidelines, but rather is a process to determine whether the issues

raised are bona fide and merit further examination. Per the Guidelines procedures, the Initial Assessment is conducted based on:

- Identity of the party and its interest in the matter
- Whether the issue is material and substantiated
- Likely link between the enterprise's activities and the issue raised
- Relevance of applicable law and procedures, including court rulings
- Treatment of similar issues in other domestic or international proceedings
- Contribution of the specific issue to the purposes and effectiveness of the Guidelines

The U.S. NCP contributes to the resolution of issues that arise relating to implementation of the Guidelines raised in Specific Instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The U.S. NCP works to facilitate dispute resolution in a confidential, efficient, and timely manner with an aim toward a forward-looking, good-faith resolution and in accordance with applicable law.

III. Confidentiality

Consistent with the U.S. NCP procedures, once the Specific Instance proceedings begin at the time of submission, parties are expected to strictly respect the confidentiality of all communications (including the Specific Instance itself). Parties may publicly reference the submission of the case but should not disclose information learned during the NCP process. A failure to honor confidentiality expectations may be considered bad faith and may lead to the U.S. NCP terminating the process and issuing a Final Statement.

In June 2016, prior to filing the case, Jamaa consulted the U.S. NCP in person, informing the U.S. NCP of the potential submission. In that conversation, Jamaa and the U.S. NCP discussed U.S. NCP procedures, including confidentiality.

However, in October 2016 Jamaa failed to honor the U.S. NCP policy on confidentiality by CC'ing an NGO not a party to the Specific Instance on the submission e-mail to the U.S. NCP. That NGO subsequently posted Jamaa's Specific Instance submission on its website. In both ways, the confidentiality policy was not respected. When the U.S. NCP learned of this, it contacted Jamaa, noting the breach of U.S. NCP confidentiality policy, and asked that the submission be removed from the other NGO's website, and that the other NGO not be included in future correspondence on the Specific Instance unless it was a formal party. Jamaa apologized for the confusion, had the NGO remove the submission, and reconfirmed its commitment to honor confidentiality. While this could have been grounds for dismissing the Specific Instance per U.S. NCP policy, in the spirit of collaboration and to allow all parties the opportunity for dialogue, the U.S. NCP contacted the Company, explaining the confidentiality issues and offered the opportunity to utilize the Specific Instance mediation service. The Company did not offer comment on the confidentiality issues.

IV. Outcome of the Initial Assessment

Per the Guidelines, the U.S. NCP took the following issues into account when considering whether Jamaa's concerns merited further consideration.

a. Identity of the party and its interest in the matter

Jamaa reports that it is a Kenyan NGO that exists to promote social responsibility of governments, international finance institutions, the African Union and Regional Commission, foreign direct investors, corporate organizations and individuals in East Africa through capacity building, advocacy, networking, research and technical support for a just and equitable society. Since 2011, Jamaa claims it has investigated the activities of these institutions and the consequences of their activities for local communities and the environment. According to its submission, Jamaa works closely with the indigenous communities from the relevant location.

The American owned Company is a diversified farming operation in western Kenya producing agricultural products. According to the Company, it has invested over \$40,000,000 in its operations. The Company states that it has added to the food security of the country and to the local economy. The Company states that it contributes significantly to local education. For reasons related to safety and security of parties involved in this unique circumstance, the Company has been anonymized.

b. Whether the issue is material and substantiated

Jamaa has provided information in the form of research, articles, reports, and videos alleging the misconduct on issues such as human rights, workers' rights, transparency and disclosure, community and stakeholder engagement, and environment issues by the Company. The U.S. NCP, per its established procedures, makes no determination whether a violation of the Guidelines has taken place.

c. Link between Respondent's activities and issues raised

The Specific Instance raised by Jamaa alleges that the Company violated the Guidelines on issues relating to human rights, workers' rights, transparency and disclosure, community and stakeholder engagement, and the environment, regarding communities in the areas where they operate.

d. Relevance of applicable law and procedures, including court rulings

The Company alleges that the persons on behalf of whom Jamaa submitted the case and who, therefore, are a party to the Specific Instance are the same persons who are charged by the Kenyan police for the destruction of the Company's property, and that an active case against them awaits a hearing.

Jamaa has responded that the parallel proceedings underway do not cover any of the issues raised in the complaint. While one signatory of the complaint is involved in a civil suit with the Company regarding alleged trespassing, the complainants believe the issues raised in the

complaint would benefit from mediation with the Company and would not affect the current proceedings.

The U.S. NCP considers that its mediation services could play a positive role in assisting the parties in facilitating a dialogue on the issues raised in the Specific Instance and reaching a mutually acceptable solution. The U.S. NCP believes that while judicial action may resolve some of the issues at hand, a broader process of mediation could lead to resolution of issues which are not before the courts and will advance the implementation of the Guidelines.

e. How similar issues have been, or are being treated in other domestic or international proceedings

The U.S. NCP is not aware of similar proceedings.

f. Whether the consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines

The U.S. NCP considers that its mediation services could play a positive role in assisting the parties in facilitating a dialogue on the issues raised in the Specific Instance and reaching a mutually acceptable solution. Consistent with the criteria in the U.S. NCP procedures for Specific Instances (as established in the Guidelines themselves), the U.S. NCP determined in the course of its Initial Assessment that the matters raised merit further consideration, and are relevant to the implementation of the Guidelines.

Despite the submitters request, the U.S. NCP does not make a determination as to whether the enterprise that is subject to the Specific Instance has acted consistently with the Guidelines nor does the U.S. NCP have legal authority to investigate, prosecute or adjudicate issues submitted under this process.

V. Role of the Interagency Working Group and the U.S. Embassy

Per its standard procedures, the U.S. NCP consulted and received input from its U.S. government experts throughout the process, including the decision to offer mediation. The Company sought U.S. Embassy assistance in advocating for law enforcement and judicial due process relating to trespassing and destruction of property. The Embassy has also discussed threats and intimidation against representative of the Company. The Ambassador and other Embassy officials have met with and spoken to representatives from the Company and an Economic Officer visited the farm this year. The Embassy continues to engage with the Company and the Government of Kenya on this issue.