

DRAFT FOR CONSULTATION – November 2011

(Comments should be sent to land@hrb.org by 31 May 2012)

Guidelines on Business, Land Acquisition, and Land Use: A Human Rights Approach

Context:

Land has enormous cultural and political significance. Business interest in land is for a different purpose – its economic value. Businesses invest in land for its potential and productive capacity. Land attracts traders and businesses seeking access to raw materials and natural resources (including agricultural productivity and fertility), or to set up manufacturing operations where adequate labour is available, or to develop real estate projects. Governments too want productive use made of land.

Individuals and communities have a continuous relationship with the land they live on and benefit from. Some have legal rights, other don't; some individuals and groups are willing to move, some aren't; some are willing to negotiate a better price or other terms of resettlement, and some prefer defending their rights using all the means at their disposal. When communities refuse to move, a company may turn to the State for assistance. In some such cases, the State may decide to deploy force, a step which has often led to human rights violations, sometimes grave. Such a contentious process violates many human rights, such as the right of peaceful protest, the right of participation, the right to seek, receive and impart information, the right to property, the right to life, the right to equality before law, and the right to an adequate standard of living.

Governments have increasingly sought to take over plots of land on behalf of business, using the doctrine of Eminent Domain, or compulsory purchase. Governments have that right, but they are obliged to do so in many jurisdictions only for "public purpose." Furthermore, under the United Nations human rights system, governments are expected to seek the free prior informed consent¹ of local populations though debates continue over whether "consent" is too high a standard and "consultation" is a more reasonable benchmark.²

While business in most cases has no control over actions that governments take with regard to land acquisition, all companies have human rights responsibilities, and should be aware of inherent risks of being complicit in actions governments take which lead to abuses, for example,

¹ See the Declaration of the Rights of Indigenous People, where Art. 10 says: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Also see the International Labour Organisation's convention 169.

² Furthermore, the implementation manual of the ILO for Convention 169 specifically states that communities whose consent is sought do not have veto rights over specific projects.

when the state (or its agents) uses force to secure land for public or private use. Under the United Nations “Protect, Respect, Remedy” framework for business and human rights, all companies have the responsibility to respect human rights, which means business should not infringe upon the rights of others, and should undertake due diligence before and during any business activity, to ensure that its actions are consistent with its responsibility to respect human rights.

The U.N. Guiding Principles on business and human rights define due diligence as a process which enables a company to be “aware of, prevent and address adverse human rights impacts.” Human rights due diligence comprises four essential components:

- Statement of policy articulating the company’s commitment to respect human rights;
- Periodic assessments of actual and potential human rights impacts of company activities and relationships;
- Integration of these commitments and human rights risk assessments into company decision-making; and,
- Tracking as well as reporting performance.

These proactive steps are important because in recent years, communities from many countries have waged campaigns³ against land acquisition by the state for private commercial purposes.

What more is a company to do when faced with disputes concerning land?

Some companies have begun performing due diligence, including undertaking risk analysis and impact assessments, before commencing operations, although questions remain as to whether the assessments are sufficiently robust and rigorous. While many of the processes constitute “good practices”, past legacy of what the company did or what other companies may have done, and the cumulative impact on human rights over many years, have combined to sow seeds of distrust between communities and companies. The asymmetrical nature of power relationships does not make the process any easier. This is why, when large companies seek access to land, public scrutiny increases. Some cases lead to conflict and then to human rights abuses.

To address such challenges, the following Guidelines for business acquisition and use of land, drawn from the human rights framework and principles of rights-based approaches to development, are intended to provide practical guidance for companies facing land related conflicts. This draft for consultation sets out the Guidelines in two parts. Part one deals with the fundamental principles that should inform business conduct; part two deals with processes a company should follow. The Guidelines are based on the results of consultations the Institute for Human Rights and Business organized in India, Colombia, South Africa, and Kenya between 2009 and 2011. A final round of consultations to discuss the current draft is planned for 2012.

³ These cases include indigenous communities struggling against oil, gas or mining companies in the Philippines, Guatemala, Ecuador, India, and elsewhere; farmers in India challenging the state’s plans to acquire their farmland to build factories; and litigants in the United States, fighting against the state’s decision to take over their homes to build an office complex with shopping facilities. Some of these cases have ended up in courts. But in many instances, the state has used force against the communities, leading to widespread human rights abuses, implicating the businesses involved, even if those companies may not have intended for those abuses to occur. With the increase in conflict over land between companies and communities, civil society organisations and human rights groups have criticised processes and outcomes, and victims have filed suits using tort laws against companies.

PART I.

PRINCIPLES:

Companies acquiring land for commercial purposes should be guided by three basic principles. These are:

1. **Transparency**⁴: Companies should be open and transparent about their motives and intentions when surveying a particular plot of land. Transparency is the means; accountability is the end. Early in the process of considering any land acquisition, they should clarify their plans and intentions to the communities that live and/or work there, or use that land. Companies should:

- Provide realistic estimates of the time needed to conduct such a survey;
- Share information about the number of jobs the project might create and how these will be filled;
- Explain whether recruitment will take place locally;
- Clarify the kind of products that will be sourced locally as a result of involvement in this context; and;
- Be clear about the policies to be put in place to compensate those who might suffer economic losses, including relocation.

2. **Non-Discrimination**⁵: The cornerstone of corporate activities relating to land should be the principle of non-discrimination. This means companies should not discriminate between individuals on the grounds of sex, age, disability, sexual orientation, language, religion, ethnicity, economic or any other status that places the individual at a disadvantage. This should apply in company policies towards consultation with communities, recruitment of individuals, compensating households that may have to be relocated (including women-led households), and in awarding of any contracts that form part of corporate operations. Companies should also ensure that entities that act on their behalf – for example, security forces, surveyors, engineers, contractors, community outreach officers – also operate under the same principle.

3. **Accountability**: Companies should ensure that open and fair consultation processes relating to land acquisition initiatives are conducted in all cases, and that grievance mechanisms are developed to ensure that any concern, complaint, or dispute is handled effectively, immediately, and in a consistent way, so that it does not escalate into a situation that could create a human rights crisis. While companies should be accountable to such mechanisms, grievance procedures of this nature are not meant to be a substitute for legal alternatives when the human rights abuse is grave and requires legal remedies.

⁴ The UN Office of the High Commissioner for Human Rights refers to transparency, accountability, participation, and state responsibility as the “core principles” for a rights-based approach to development. See *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation*, available at <http://www.ohchr.org/Documents/Publications/FAQen.pdf>. Together with the fundamental human rights principles of *universality, inalienability, indivisibility, inter-dependence and inter-relatedness, non-discrimination, participation and inclusion, and accountability and rule of law* these overarching principles create the human rights framework.

⁵ As noted above, equality and non-discrimination is one of the fundamental principles of human rights, and the Universal Declaration of Human Rights specifically states non-discrimination under Art. 7 and 23. Likewise, Art. 4, 20, 24, and 26 of the International Covenant for Civil and Political Rights deal with non-discrimination. So do Art. 2 and 10 of the International Covenant for Economic, Social and Cultural Rights

PART II.

GUIDELINES FOR BUSINESS ON THE PROCESS OF LAND ACQUISITION AND USE:

- 1. Conduct a baseline study:** Companies should conduct baseline studies of land being considered for acquisition. This includes a review of the productive capacity of the land, an estimate of the flora and fauna, natural resources of which people have traditionally made use, the local population and its demographic and socioeconomic profile, their professions, and the social infrastructure of the area, including primary health care centres, schools, roads, and other facilities.
- 2. Assess conflict potential and impact:** Land being an emotive subject and politically-charged, it is imperative and important for companies to ensure thorough impact assessments are conducted which include the risks operations might face in the area, but also risks posed to the communities through economic and other interventions.
- 3. Identify legal owners:** Companies should make every effort to identify the legal owners of any land being considered for acquisition. Contractually, they will be required to acquire the land from those who own it. In areas where legal titling does not exist or where there may be disputes over ownership, companies should seek out suitable alternative forms of evidence of customary ownership.

Companies should be aware that in certain cultures and societies, land ownership may not be in an individual's name. People making productive use of the land being acquired may not be the legal owners. They may be tenant farmers, with or without a formal agreement of the owners. Nevertheless, their customary rights should be taken into account as well. Companies should take particular care to identify women-run or women-owned households and property and treat them as equals.

In some countries, the rights of indigenous people are protected. But in areas of armed conflict and economic deprivation, there may be other communities, which also have claim to the area. They may have been displaced forcibly, or they may have lived in the area with the indigenous people, but without the formal legal protection that the indigenous enjoy. In such contexts, companies should ensure that everyone is treated equally, and follow the higher standard. In some areas, particularly in contexts of armed conflict, the community occupying land being considered for acquisition may have occupied it forcibly from people displaced internally. In such situations, companies should follow due process of law. The principle that should guide corporate conduct is of protecting the vulnerable: people who have worked on the land, don't have the legal title, and aren't occupying it forcibly should be treated such that they are not discriminated against and their human rights are protected when compared with those who have legal title. Particular attention should be paid to women's views regarding ownership. This may be difficult considering that many companies operate in areas where women are left out of formal political discourse. While companies do not have the mandate to replace governance structures, they must make every attempt to ensure that they seek out women's views and respect their rights.

4. Assess own needs fairly: Companies should make realistic assessment of the amount of land needed for business operations, and ensure that land being considered for acquisition meets a genuine need and not necessarily to build a “land bank”. Companies should avoid acquiring large plots in the adjacent area if projects under consideration do not require it, unless there are legitimate safety or security considerations that make such an arrangement necessary.

5. Make information accessible: Companies should make information about investment projects accessible to local communities in local languages and formats that are understandable. Companies should be clear about exploration – what minerals are being sought, what the associated values are, how royalties and taxes will be paid to governments and what amounts or proportion of production these might be, and how the project in question will contribute to the local economy.

There are times when after prospecting for a particular mineral, companies decide not to continue investment, because it is not economically viable. In such cases, companies should be transparent with the community about the reasons why particular steps have been taken. Companies should also provide clear information about the number of people that will be recruited and the levels at which they will be recruited, as well as the criteria for employment. Likewise, companies should provide clear policies regarding awarding contracts and the quality standards that will apply. Finally, companies should make compensation policies transparent in the event of pollution or any accident. Communities should also be informed if land will be returned upon completion of business operations, and in what condition, and after how many years, as well as the steps that will be taken to remediate the land.

6. Consult all stakeholders: Stakeholders should be defined in the broadest sense, to include those affected by the project – those who will have to move; those who might stay but may have to give up rights to their land; and those who may be affected by the project but who don’t live near the area. Consultations undertaken by companies should not only mean conversations with local governments and traditional chiefs. It also includes consulting those marginalised in such a discourse because of their status, including women, minorities (religion, language, or ethnicity), disability, sexual orientation, age, and so on.

7. Pay particular attention to women: Women face discrimination in many parts of the world, and many times their ownership rights are disregarded, and they are not consulted because of prevailing customs. Companies must seek out women’s groups and consult representative women from all levels of society. Where necessary, these consultations should take place in a secure environment, with women interlocutors representing company viewpoints at the discussions wherever possible. If ownership of land in question rests with women, they should be compensated; if it rests with men, steps should be taken to ensure that women’s rights are not violated. In cutting trees, designing roads, deciding locations of schools or primary health centres, access to waterways, and so on, companies have found that they have arrived at better outcomes when they have consulted with women⁶. Companies should ensure that their security

⁶ In some cultures, women may not enjoy the right to drive, or may not be able to travel safely to distant places. In such context, their access needs must be taken into account.

forces are trained in issues concerning gender-based violence.

8. Consult without armed guards: When conducting consultations with communities, companies have the responsibility to ensure that the consultation is in an environment without fear. “Free” in free, prior informed consent means just that. It means company officials should not go to communities with armed guards. If companies operate in areas where travel with armed guards is necessary for security reasons, they should not allow armed guards into the premises where the consultations are taking place, and provide no access for security forces to the content of the consultations. If consultation without the presence of armed guards is impossible, companies should seriously consider the consequences of operating in an environment where any economic activity is so dangerous and unwelcome.

9. Consult communities early and often: It is of vital importance that companies talk to communities as soon as new information is available. Dialogue with communities should be frequent and ongoing, and not a one-time exercise.

10. Continue to consult communities throughout the operation of the project: The process of consultation does not end with acquisition of land and relocation (where and if necessary). Companies should keep an ongoing dialogue through their presence in the area, which means throughout the duration of the project.

11. Ensure that the rights of disadvantaged groups are protected: Companies should make sure that full access is guaranteed for disadvantaged groups during the acquisition process, including compensation and relocation. Particular attention should be paid to those with special needs, including to groups that have faced discrimination.

12. Identify local needs: In developing compensation and relocation packages, companies should make sure that community practices are respected. Development literature⁷ suggests that cash compensation may be counter-productive in some contexts. It can fuel rivalries, foment violence, and lead to consumption patterns that might create more conflict. If cash compensation is given to the head of the household – typically men – the rights and needs of women may end up being abused or unacknowledged. At the same time, rather than deciding to compensate communities in kind, companies should consult local populations, and identify local needs and practices and respect those choices, provided that the community does not undermine rights of vulnerable groups within the community when making such decisions. More generally (and less contentiously) in some cases a community may prefer compensation to involve social infrastructure development such as construction of a primary health care centre, instead of providing cash to the local authority.

13. Use government support to ensure fair purchase of land: To the extent possible, companies should rely on government support only where necessary, and sparingly. Instead of seeking the involvement of government to acquire land on behalf of a company, efforts by companies to work towards developing good relationships with local communities directly impacted should be made. Governments have other more

⁷ See, for example, the Do No Harm Principles of the Collaborative for Development Action.

appropriate roles, like building infrastructure, establishing law and order, and protecting rights. Governments should be encouraged to conduct impartial and independent auctions through which land can be acquired legitimately from those wishing to sell.

14. Use government support for arbitration where appropriate: Companies should reinforce the government's role as the regulator, by ensuring that the state play its legitimate role in adjudicating matters of grave dispute. This will enhance the capacity of the state and prevent the undermining of the rule of law.

15. Avoid the use of armed forces for land clearance: As is the case with consultation, companies should never make use of armed forces for land clearance. Even if local laws permit such use, and even if the doctrine of Eminent Domain gives the state the right to take over land for public purpose, the use of armed forces to displace people against their will can be a crime under international law, and company officials could be held responsible for the abuses that might follow, as their complicity risk increases.

16. Avoid using the State to secure a community's consent: As noted above, if the community's consent is forced, and not free, then even if a company is able to begin a project, it will have ongoing problems, including protests, demonstrations, and in some instances, violent attacks, including abductions, or sabotage of its property. The roots of such discontentment lie in the way the land was acquired, or the project initiated. Companies should not use state force to seek consent.

17. Respect cultural norms but support international human rights standards and democratic processes: It is important for companies to support local culture, customs, standards, and norms. However, when those customs, standards and norms significantly vary from or clash with international laws, companies should uphold the international standard (unless the local standard is higher). This means, in countries where women do not have the right to own property, companies should seek ways to compensate women who have an ownership claim; in countries where democratic elections do not take place, companies should seek individual views through other means during the consultation process such that it does not expose the individuals to risks; and in countries where unelected village chiefs claim to speak for an entire community, companies should hold periodic meetings and consult interested groups frequently to get a proper assessment. Companies should not abide by discriminatory norms and perpetuate the abuse of rights.

18. Do not assume that communities being relocated wish to live together: Companies often assume that the best way to relocate a community is to replicate their current conditions elsewhere. Instead, companies should explore alternative ways, including providing a menu of options to people, so that informed choices can be made about what they wish to do with their compensation, where and how they wish to live, and provide opportunities for those who may wish to live differently.

19. Create structures that provide ongoing income stream to communities: Communities which have been displaced, and lived previously in areas where natural resources for commercial exploitation have been found, are often offered royalty, or other forms of compensation. Companies should explore alternatives, including creating

trust funds which provide income through annuity in perpetuity to those displaced and their future generations, as is being done in some countries and jurisdictions.⁸ Where laws permit it, companies can provide equity ownership to the community, so that the community gains from the investment in the long term.

20. Provide legal assistance to communities to realise their rights: In some countries, displaced communities find it difficult to access public services following their relocation. Companies can offer legal assistance to such communities to realise their rights.

21. Ensure that alternative accommodation is of same or superior quality and follow international standards: Companies should follow the highest international standards and provide alternative accommodation to those who agree to relocate. The IFC Performance Standards should guide their practices in this regard.

22. Provide and maintain access to rivers, lakes, grassland, or pasture, to communities dependent on such access: Even after relocation, communities may need access to certain areas where companies operate. This could include a better road providing access to the market or a railway station; source of water such as a lake or a river; land for pasture; or places of religious significance. Companies should always provide access to such facilities and locations. Ideally, land needed for such uses should not be acquired, but if this is the case, companies should not prevent communities, which previously occupied the land from gaining access to these places, unless there are extenuating circumstances, such as health or safety factors.

⁸ Notably, Alaska in the United States, certain Canadian provinces, Botswana, and Norway.