

Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

July 27, 2015

The Right Honourable David Cameron
Prime Minister of the United Kingdom
10 Downing St
London SW1A 2AA
United Kingdom

Re: Update to U.K. National Action Plan on Business and Human Rights

Dear Prime Minister Cameron,

We write regarding the U.K. Government's revision to its National Action Plan, entitled *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*. This process to update the National Action Plan (NAP) by the end of 2015 presents an important opportunity to assess how the government can proactively address the most pressing business and human rights issues relevant to U.K. companies.

At the Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute at Columbia University, we believe that outward investment by responsible business enterprises can help accelerate sustainable development in host countries. Key to this result is ensuring that business operations respect human rights. A NAP can help in this regard by supporting businesses in identifying serious areas of concern, and by establishing government commitments to take steps to ensure that its outward investors respect human rights in their operations abroad.

Based on our ongoing work on international investment, as well as our recent conference focused on home country efforts to regulate foreign investment for sustainable development,¹ we urge the U.K. Government to include in its revised NAP the issue of land rights as they relate to outward investment, particularly investment in large-scale agricultural, forestry, infrastructure, and extractive projects. Identifying land issues within the NAP will help alert U.K. investors to the particular human rights risks that arise with large-scale projects involving the transfer of land use rights. In addition, "home country measures" focused on sectors with significant tenure-related risks can help ensure that U.K. companies respect human rights and operate consistently with the United Nations Guiding Principles on Business and Human Rights, regardless of the operating environment and regulatory capacity of the host country.

1. Highlighting land rights in the U.K. NAP

In many countries, access to land is critical for livelihoods and closely linked to the realization of certain human rights, such as the right to food. Business actions that negatively affect land access can therefore have significant repercussions for the human rights of land users and former land users.

Yet land rights occupy a tenuous position in the human rights arena. They are closely linked to a number of codified human rights found in human rights treaties, but land rights per se are not codified in international legal instruments,² with the exception of rights for indigenous peoples.³ The growing recognition of the

¹ For more information on the conference, including the background paper, please visit <http://ccsi.columbia.edu/2014/11/12/raising-the-bar-home-country-efforts-to-regulate-foreign-investment-for-sustainable-development/>.

² Although there is currently no internationally recognised and codified general human right to land, property rights are recognized in some international and regional human rights instruments. For more information on the right to property

importance of land rights for the realization of human rights, however, has led some, including the then-UN Special Rapporteur on the Right to Food, to assert that there is an emerging right to land in international human rights law.⁴ The outsized importance of land rights and land access for the realization of human rights has also been flagged recently by the United Nations High Commissioner for Human Rights, which noted in a report that “considering land issues from a human rights perspective allows for the clarification of [government] obligations, but also for the achievement of development and humanitarian goals, poverty eradication and the realization of human rights.”⁵

Land rights are therefore in the unique position of being highly significant to the realization of a number of human rights, while also often being overlooked by businesses assessing their human rights risks and responsibilities. Some businesses and corporate advisors are, however, beginning to recognize the importance of addressing land rights issues, and have incorporated such considerations into human rights impact assessments, one of the primary human rights due diligence tools advocated for by the UN Guiding Principles on Business and Human Rights.

We respectfully suggest that the U.K. Government highlight within its NAP the importance of corporate respect for land rights. This could help increase corporate understanding of the link between land rights and human rights, thereby assisting companies in ensuring that all relevant human rights issues are factored into corporate decision-making. In addition, the NAP could provide concrete guidance for how U.K. companies can ensure respect for land rights, building off of the existing references in the current NAP to mechanisms for the promotion of good corporate behavior, including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and the Principles for Responsible Investment in Agriculture and Food Systems.⁶

2. Using the U.K. NAP to assess how the government can monitor and regulate outward investment in sectors with significant tenure-related risks

Land tenure is defined by the Food and Agriculture Organization of the United Nations as “the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land”.⁷ In many countries, conflicts over land tenure issues frequently emerge when land occupied by communities is subsequently allocated to an investment project. Land tenure risks are particularly prevalent and costly in the agriculture, forestry, infrastructure, and mining sectors, owing to the land-dependent nature of those sectors.⁸

U.K.-domiciled companies are prominent outward investors in these sectors,⁹ and are thus susceptible to land tenure risks, which can cause delays, significantly increase project costs, and even imperil the solvency of the investor companies encountering such conflicts.¹⁰ Land tenure risks also increase the potential for U.K. companies to negatively affect human rights linked to land rights, as discussed above.

as it relates to human rights, see Christophe Golay and Ioana Cismas, ‘Legal Opinion: The right to property from a human rights perspective’ (2010), <http://ssrn.com/abstract=1635359>.

³ ILO Convention 169, Article 14 gives indigenous peoples rights of ownership and possession over lands they traditionally occupy; see also United Nations Declaration on the Rights of Indigenous Peoples, Article 26.

⁴ Olivier De Schutter, ‘The Emerging Human Right to Land’ (2010) 12 International Community Law Review 303.

⁵ Report of the United Nations High Commissioner for Human Rights, U.N. Doc. E/2014/86 (July 11, 2014), para. 12.

⁶ Described in the current U.K. NAP as the “forthcoming Principles on Responsible Agricultural Investment (RAI), FAO/CFS.”

⁷ Food and Agriculture Organization, FAO Land Tenure Studies 3: Land Tenure and Rural Development, para. 3.1, <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf>.

⁸ The Munden Project, ‘The Financial Risks of Insecure Land Tenure: An Investment View’, December 2012, p. 2.

⁹ See, eg, *Mining giants - the top ten richest mining companies*, <http://www.mining-technology.com/features/featuremining-giants---the-top-ten-richest-mining-companies-4203262/> (2 of the top 10 richest mining companies are headquartered in London). According to the Land Matrix, which has documented over 1,000 land deals, the U.K. ranks fifth for outward investments in large-scale land acquisitions, <http://www.landmatrix.org/en/get-the-idea/web-transnational-deals/>.

¹⁰ The Munden Project, op. cit., p. 2.

We respectfully submit that the U.K. Government should use the NAP process to assess the range of regulatory and voluntary “home country measures” that it could implement to monitor and regulate outward investment in these sectors in order to encourage U.K. companies to respect human rights in their outward investment. Home state measures for countries like the U.K. are particularly important because U.K. businesses will often carry out land-based investments in contexts where host state officials may be unable to properly regulate investor conduct, and because international guidelines applying to these sectors do not have the ability to compel, or otherwise sufficiently assure, that business operations are implemented responsibly and in compliance with human rights.

The U.K. Government could strengthen existing regulatory measures applicable to extractive industry investments to ensure that land rights issues are adequately articulated and addressed by U.K. companies operating at home or abroad. The government could also extend similar measures, including requirements for increased monitoring, reporting, and transparency, to all investments by U.K.-domiciled businesses that are land-based or that otherwise may encounter land tenure risks. In light of the U.K. Government’s commitment to the third pillar of the UN Guiding Principles on Business and Human Rights, other government initiatives under the NAP could include steps to provide victims of human rights and land rights violations with access to remedy, as well as efforts to exclude human rights violators from investment agreement protections.

Given the high potential for significant human rights abuses when investments affecting land access are not conducted responsibly, we urge the U.K. Government to use the NAP process to consider what concrete measures the U.K. Government could and should implement to encourage responsible business conduct related to land-based investments.

Conclusion

The U.K. Government has shown true leadership as the first country to publish a National Action Plan implementing the UN Guiding Principles on Business and Human Rights. In this NAP revision process, we encourage the Government to ensure that the NAP reflects the urgent issue of land rights as it relates to U.K. business conduct, particularly land-related outward investment.

Thank you for your consideration of these comments. Should you have any questions, we would be happy to discuss this further.

Sincerely,



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CC: Francis Evans, Senior Policy Adviser, Business Environment Directorate, Department for Business, Innovation & Skills