** **

**February 2016 Consultation**

**Comments on the Revised Draft: Corporate Human Rights Benchmark**

Minority Rights Group International (MRG), an international non-governmental organization working to secure the rights of minorities and indigenous peoples, and Lex Justi, a law practice with a business and human rights specialty, would like to submit comments on the Revised Draft Measurement Themes and Indicators for the 2016 Corporate Human Rights Benchmark (CHRB) dated February 2016 (Revised Draft). In light of the intention of the drafters to publish the final methodology in March 2016, we take this opportunity to present our most salient comments on the Revised Draft.

We wish to begin by expressing our appreciation for the significant modifications made by the drafters to the earlier draft of December 2015, including enhanced inclusion of human rights principles, incorporation of a specific indicator relating to indigenous peoples’ free, prior and informed consent for the Extractives sector (although as noted in our comments below, we believe that this indicator could be strengthened), and the deduction of points for the use of indigenous lands without their free, prior and informed consent under the serious allegations. We also appreciate the transparent nature of the drafting of the Benchmark. The following is a summary of our main points and recommendations:

**1. Indigenous Peoples/Free, Prior and Informed Consent (FPIC)**

* We welcome the inclusion of FPIC for the Extractives sector in the Revised Draft (e.g. EX industry lock to indicator A.1.3. and Indicator EX D.1.4.), and would suggest consideration of a similar indicator in the AG industry locks and Agriculture indicators wherever there is a discrepancy between those and the EX industry locks and indicators. The increasing long-term lease or purchase of land for large-scale industrial agricultural projects also presents a threat to the rights of indigenous peoples to their lands, livelihoods and culture. We mention the purchase of land for palm oil and bio-fuel projects in particular.
* In addition to impacts of a Company’s project on the lands or territories of indigenous peoples where the project would be sited, an extractive project could also affect the livelihoods of these communities. In particular, the project may impact the availability of food, such as fish, of indigenous communities downstream from the project. It might also endanger wildlife traditionally used by the community on their lands adjacent to land utilised for the project. While we welcome the inclusion of EX D.1.7. on access to water and sanitation, this particular indicator does not address the effects of a project on the livelihood of indigenous peoples in areas adjacent to but affected by the project.
* A project could also have a significant impact on the culture of the indigenous community, including religious and other beliefs and practices that are central to the existence of the community, and might therefore mean the end of their cultures within a couple of generations (e.g. pastoralists, fisherpeoples, forest-dwellers).
* There is a subtle but important discrepancy in the importance given to indigenous peoples’ rights in the industry locks of B.2.2. In AG for Score 2, the list states: ‘land rights (including indigenous peoples rights and resettlement).’ This would imply that indigenous peoples’ rights are a subset of land rights or somehow subsumed under them. In EX for Score 2, the list states more correctly, ‘indigenous peoples rights, land rights (including resettlement).’ Given that the impact on indigenous communities of large-scale industrial agricultural projects can be as devastating as extractive projects and affect the whole spectrum of indigenous peoples’ rights – and not just land rights – we would suggest that this discrepancy be corrected and that the two lists be written as in EX for Score 2, with indigenous peoples’ rights mentioned by itself and not in parentheses nor as a subset of land rights.

**Recommendations:**

* Include respect for indigenous peoples’ rights and the free, prior and informed consent of indigenous peoples in the AG industry lock similar to the one for the EX industry lock in A.1.3.
* Insert an indicator concerning the free, prior and informed consent of indigenous peoples similar to EX D.1.4. after AG D.3.4.a. and b. that would apply to both the Company’s own operations and its supply chain.
* Rephrase the first paragraph of EX D.1.4. to read:

‘The Company respects indigenous peoples’ rights in its processes to decide whether and how to carry out projects (or changes to existing projects) that impact on land and natural resources subject to traditional ownership or occupation or under customary use by indigenous peoples or on indigenous peoples’ cultural heritage….’

* Rephrase B.2.2. so that AG for Score 2 also reads ‘indigenous peoples’ rights, land rights (including resettlement)...’

**2. Land Rights**

* The phrase ‘legitimate tenure rights’ is used in a number of indicators (i.e. in the industry locks of A.1.4, in EX. D.1.3., EX D.1.4., and AG. D.3.4.a. and b., and the EX industry lock of A.1.5.) While the FAO’s Voluntary Guidelines on Responsible Governance of Tenure uses the term ‘legitimate’, we find use of the term problematic in the context of the draft CHRB. The term ‘legitimate’ implies a determination of conformity to the national laws, which may actually disenfranchise the rights of certain persons and groups, particularly customary land rights holders and indigenous peoples. Moreover, the determination of whether the person or community has ‘legitimate tenure rights’ would certainly vary depending upon whether it is the government or persons or community asserting tenure rights, which would place the Company in a difficult position of assessing whether such rights are ‘legitimate’. In particular, we would note that while EX D.1.4. recognises that lands or territories may be ‘traditionally owned or occupied or customarily used by indigenous peoples’, these rights to the land may not be recognised or registered by the government.
* In order for a Company to proceed with the lease, acquisition or other arrangements for use of land, it may first be necessary to clarify the legally recognised rights to lands and territories of indigenous peoples, as has been recognised by the World Bank in its July 1, 2015 draft of its Environmental and Social Framework (para. 21).

**Recommendation:**

* Delete the word ‘legitimate’ where it is used in connection with ‘tenure rights,’ for example, in A.1.4., EX D.1.4., AG D.3.4.a. and b., and the EX industry lock of A.1.5, and introduce into the score categories, most likely score 2, that the Company has prepared a plan to support the legal recognition of land rights of affected persons and communities.

**3. Vulnerable and marginalised groups**

* We note that the term ‘vulnerable’ is used in several places to describe persons whose rights may be affected (i.e. A.1.3., EX D.1.3., and AG D.3.4.a. and b.). However, we believe that the word ‘marginalised’ is sufficient. Many representatives of marginalised communities believe that the word ‘vulnerable’ is in itself reductive and marginalising in that it depicts affected persons as passive in the face of human rights abuses as opposed to characterising them as active rights-owning individuals.
* The *Summary report: Key Insights and Revised CHRB Approach from June – October 2015 Consultations*, dated December 2015 notes that ‘vulnerable groups’ will be broken down into specific groups. We would suggest that an annex listing marginalised groups in as an exhaustive manner as possible be attached to the Benchmark, but be subject to additions. This Annex would also serve to assist companies in becoming more aware of the groups of persons who should be given heightened attention in connection with their projects and operations.
* In addition, the text in the A.1.3. indicator provides for the Company to commit ‘to respecting the human rights of individuals belonging to specific groups or populations that require particular attention, where they may be at heightened risk of becoming vulnerable or marginalised if adversely impacted by the Company’s activities.’ However, Score 1 adopts a more encompassing approach to this group in providing that the Company commits ‘to respect the internationally recognised human rights of individuals belonging to specific groups or populations that require particular attention’. We would note that the first formulation frames the commitment in terms of groups ‘becoming vulnerable or marginalised’ as a result of the Company’s activities and that the term ‘particular attention’ does not clearly articulate the potential persons or communities. We strongly believe that even where there are marginalised individuals and communities that may not become more marginalised as a result of a project, particular attention to the impacts of the project on them is required.

**Recommendations:**

* Delete the term ‘vulnerable’ in sections A.1.3., Ex. D.1.3., and AG D.3.4.a. and b. and use only the term ‘marginalised’.
* Also, include an Annex to the Benchmark that would identify marginalised groups of persons. We would suggest that civil society organisations be consulted to assist with the development of such an Annex.
* In the text of indicator A.1.3., render the wording relating to individuals belonging to specific groups or populations more consistent with the phrasing relating to marginalised groups or populations used in Score 1.

**4. Stakeholder engagement/consultation**

* To ensure that the engagement/consultation processes are rights respecting, we believe that the definition in the Glossary of ‘Stakeholder engagement/consultation’ should be strengthened to encourage regular and continuous information sharing in ways that are relevant and appropriate to the affected community.

**Recommendation:**

* Modify the first sentence of the definition ‘Stakeholder engagement/consultation’ to read: ‘An ongoing process of interaction, dialogue and sharing of information between a company… ‘

**5. Performance: Serious Allegations**

* We were somewhat surprised to note that in the chart of thresholds for inclusion as a level 1 Allegation, that for Health and Safety the allegation must involve ‘5 or more deaths or serious injuries’ and if within the company’s supply chain then ‘10 or more deaths or serious injuries’. As the purpose of health and safety rules within an entity, as well as health and safety regulations, are to prevent deaths or serious injuries, we find the thresholds to be high and would suggest that 1 death or serious injury should constitute a ‘serious allegation’. In practice, a facility that has a serious death or injury will need to re-evaluate its practices and thus, its policies.
* The Summary Report dated December 2015 indicates that ‘Scoring in this section will focus on *deducting* points’, however, we do not see this reflected in the introductory text to section E. Of greatest concern to us is that based on the existence of only three indicators in this section, if only 1 or 2 points are deducted (based on the Score 1 or 2), a Company may have egregious human rights impacts but still receive a high overall score.

**Recommendations:**

* Replace ‘5’ and ‘10’ in the column of ‘Threshold for the type of allegations that would be included under Level 1’ for the ‘Health and Safety’ category with ‘1’.
* The points deducted for serious allegation indicators should be weighted in order to significantly offset the points awarded to the Company overall.

**6. Additional Points**

**Consistency between the Key Industry Risks chart (page 38) and industry locks**

* We note some discrepancies between the risks listed in the chart ‘Key Industry Risks in the Company’s Own Operations and/or Business Relationships’ on page 38 and the rights included in some of the industry locks, specifically:
* A.1.5. EX industry lock: security forces and women’s rights are not included
* A.1.5. AP industry lock: working hours are specifically mentioned, but not the other key labour rights, including child labour and forced labour, which leads to ambiguity. (We note that Score 1 explicitly mentions freedom of association and collective bargaining.)
* A.2.3. EX industry lock: security forces are not included
* B.1.3 EX industry lock: security forces are not included

**Recommendations:**

* Where the rights listed in the industry locks exclude some of the risks listed in the chart of ‘Key Industry Risks’ on page 38, the industry locks should be modified to stipulate all key industry risks listed in the chart.
* In addition, for the purpose of consistency, in the ‘Key Industry Risks’ chart on page 38, we would suggest giving consideration to inserting ‘working’ to create ‘Excessive working hours’ and to add ‘Collective Bargaining’ after ‘Freedom of Association.’

**A.2.3 Performance incentives and B.1.3. Incentives and performance management**

* We wonder about the wisdom of using the phrase ‘at least one of the following’ when describing the specific areas of attention to be paid by the Board and senior managers in the industry locks. Quite apart from the human rights implications, most (if not all) of these areas will be governed by national legislation, so surely Board members and senior managers should be incentivised to pay attention to all of the areas mentioned.

**Recommendation:**

* Modify the wording in Score 1 of A.2.3. as well as in the industry locks to A.2.3. and B.1.3. to encourage performance incentives for Board members and senior managers to be linked to respect for all salient human rights for the particular Company.

**C.1. Grievance Mechanism**

* The box above indicator C.1. sets forth the 8 criteria for effectiveness and ‘Effectiveness criteria’ is defined on p. 64 in the Glossary. We were able to locate the following criteria in the text:
* UNGP 31 (b) Accessibility in C.1.
* UNGP 31 (c) Predictable in C.4., although it does not require the Company to provide information on the means to monitor implementation, as required under UNGP 31(c)
* UNGP 31(f) Rights-compatible – C.5., although it only concerns nonretaliation over concerns/complaints made and does not express that the outcomes and remedies are consistent with international human rights law standards
* UNGP 31(g) A source of continuous learning – C.7.
* UNGP 31(h) Based on engagement and dialogue – C.3.

However, there does not appear to be any reference to the ‘legitimate,’ ‘equitable’ or ‘transparent’ aspects of the non-judicial mechanism. (UNGP 31(a, d, e))

**Recommendation:**

* Indicator C.1. should also reflect that the channel(s) or mechanism(s) should be legitimate and C.4 should reflect the ‘transparent’ and ‘equitable’ aspects contained in UNGP 31(d and e).

**B.1.4.a. and b. Communication/dissemination of policy commitment**

* We would suggest that this indicator require communication of human rights standards associated with other salient human rights risks, in addition to the ILO core labour standards. This would provide greater consistency with indicator B.2.2 .concerning the Assessment of risks and impacts identified (salient risks and key industry risks).

**Recommendation:**

* The parenthetical Note in indicators B.1.4.a and b. should be revised to read:

‘(Note: In order to get any Score under this indicator, the human rights policy communicated must mention human rights associated with the Company’s salient human rights risks and the ILO….)’

**B.1.8. Framework for engagement with potentially affected stakeholders**

* We do not believe that a Company should be awarded a point solely for a description of its systems and/or processes for stakeholder engagement. The Company should be required to actually engage with stakeholders.

**Recommendation:**

* Score 1 of B.1.8. should require the Company to describe not only the frequency and triggers for engagement, but also provide information on actual such engagement by stakeholder group. Thus, the portion of the sentence ‘The Company …..OR’ should be deleted.

Carl Söderbergh, Director of Policy & Communications

Minority Rights Group International

Corinne Lewis, Partner

Lex Justi

26 February 2016