

September 1, 2014

Via Electronic Mail

United Nations Working Group on Business and Human Rights
c/o United Nations Office of the High Commissioner on Human Rights
Email: wg-business@ohchr.org

Re: Comments in Response to the United Nations Working Group on Business and Human Rights' ("UNWG") Public Consultation on National Action Plans ("NAPs") to Implement the Guiding Principles on Business and Human Rights ("UNGPs")

Dear Members of the UNWG:

Accountability Counsel is pleased to submit the following comments and recommendations on the UNWG's consultation document on the substantive elements to include in NAPs to implement the UNGPs ("Consultation Document"). We are an organization dedicated to supporting community access to remedy through non-judicial grievance mechanisms. We welcome this opportunity to use lessons learned from our work in communities around the world to strengthen action by States to fulfill their duty to protect against business-related human rights abuses and ensure access to effective remedy when such abuses do occur.

Our submission focuses on the third pillar of the UN 'Protect, Respect and Remedy' Framework on access to remedy. The UNWG has invited information on four issues, and we set out our comments on these issues below.

I. Access to remedy is a substantive element that should be addressed in every NAP.

Issue: "What substantive elements should be addressed in an NAP?"

Among the substantive elements identified in the Consultation Document, access to remedy for business-related human rights abuses should, in particular, be addressed in every NAP. The UN's 'Protect, Respect and Remedy' Framework underscores the importance of this element by regarding it as a standalone pillar. As the UN Special Representative on business and human rights has observed, the proscription of certain corporate conduct by States would mean little without effective mechanisms to investigate, punish and redress violations.¹

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), para. 82 [hereinafter "SRSG April 7, 2008 Report"].

II. Ensuring transnational access to remedy is an important means of addressing the worst cases of business-related human rights abuses.

Issue: “Amongst those elements, which have the greatest potential to prevent, mitigate and redress adverse business-related human rights impacts?”

The above issue raised by the UNWG calls for a prioritization of State action. One important way to determine which State action to prioritize in NAPs is to consider which substantive elements can address the worst types of commonly occurring business-related human rights abuses.

The worst cases of business-related human rights harm disproportionately occur where governance challenges are the most serious, namely, in low income countries, in countries that have recently been or still are in conflict, and in countries where the rule of law is weak.² Due to globalization, many cases of such abuse directly or indirectly involve foreign investment and funding.³

At the root of this problem is what the UN Special Representative on business and human rights has termed a “governance gap”:⁴ the extraterritorial jurisdiction of the courts of home States⁵ and the extraterritorial reach of their laws and regulations are too limited; at the same time, host States⁶ do not provide adequate access to remedy, often because of weak governance capacity and the purported imperatives of “development.”⁷ Further, international law and international legal institutions do not cover non-State actors except in narrow circumstances.⁸

Transnational access to remedy would increase the likelihood of preventing and redressing business-related human rights abuses in countries with poor governance where victims have no viable recourse by providing alternative avenues of redress. It would also empower those harmed to contribute to the enforcement of prevention measures imposed by home States and regional or international entities, thereby ensuring their effectiveness. Our following recommendations on grievance mechanisms with transnational reach are directly relevant to improving transnational access to remedy.

² Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, U.N. Doc. E/CN.4/2006/97 (Feb. 2006), para. 27, available at <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>.

³ See e.g. Christophe Schwarte and David Wei, “International Approaches to Corporate Accountability,” (working paper for the Foundation for International Environmental Law and Development), p. 3, available at <http://www.stakeholderforum.org/fileadmin/files/Field%20International%20Approaches%20to%20Corporate%20Sustainability.pdf> [hereinafter “FIELD Article”] (noting that the vast majority of cases filed with the National Contact Points of States adhering to the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises were from foreign developing countries.)

⁴ SRSG April 7, 2008 Report, paras. 3 and 14.

⁵ A “home State” is the State in which a business enterprise is incorporated or domiciled.

⁶ A “host State” is the State in which the relevant harmful business-related activities are occurring.

⁷ See Natalie L. Bridgeman and David B. Hunter, “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism,” 20 GEO . INT ’L . ENV . L.R. 187, 225 B(f) (2008) (identifying and examining the reasons for enforcement gaps in home and host States) [hereinafter “FIAM Article”]. See also SRSG, April 7, 2008 Report, para. 14.

⁸ See FIAM Article, pp. 205-207.

III. Access to Remedy: Practical and Substantive Considerations.

Issue: “Comments on the draft list of practical and substantive considerations to help States to develop and enact a national action plan to implement the Guiding Principles included in the [Consultation Document].”

Issue: “What are concrete examples of good practice concerning the substantive elements identified?”

A. NAPs should address access to effective remedy for harm arising from States’ economic and financial relationships.

Access to remedy for harm arising from States’ economic and financial relationships is one essential aspect of the access to remedy pillar. These relationships include States’ memberships in international financial institutions (“IFIs”) and the direct or indirect provision of financing, support and aid to business enterprises by State-linked agencies.

States have a duty to protect against business-related human rights harm arising from their economic and financial relationships. Guiding Principle 4 recognizes this duty, stating that States should take “additional” steps to protect against human rights abuses by business enterprises that receive substantial support and services from State agencies. The State-business nexus can be both direct and indirect. Notably, the commentary to Guiding Principle 4 notes that the more reliant a business enterprise is on the State or taxpayer support, “the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”⁹

Ensuring access to effective remedy is essential to fulfilling the State duty to protect against human rights abuses by business activities that the State directly or indirectly supports.¹⁰ This applies whether or not such abuses occur within the State’s territory and/or jurisdiction.

Importantly, failures by States to ensure access to remedy for harm arising from their economic and financial relationships are contributing to today’s “governance gaps.” Through State-linked entities such as IFIs, national development aid agencies and national export finance agencies, States are often involved in the funding flows supporting business-related human rights abuses in the countries where they frequently occur.

This issue is hence an essential component of ensuring access to remedy through NAPs. In concrete terms, this means that NAPs should address the accountability of IFIs of which the State is a member and State-linked agencies that support business enterprises, as well as access to effective remedy for people who experience business-related human rights abuse linked to these institutions.

⁹ UNGPs, p. 7.

¹⁰ See SRSR April 7, 2008 Report, para. 82 (“Effective grievance mechanisms play an important role in the State duty to protect....”)

B. Non-Judicial Remedy

Strengthening access to judicial remedy should be a continuous priority for States in their capacities as home and host States. In that regard, we affirm the view adopted by the UNGPs that “[e]ffective judicial mechanisms are at the core of ensuring access to remedy.”¹¹

At the same time, we strongly believe that non-judicial mechanisms can “play an essential role in complementing and supplementing judicial mechanisms.”¹² We set out below key considerations relating to access to non-judicial remedy that States should include in their NAPs.

1. IFI Accountability Mechanisms

Guiding Principle 10 recognizes that the State duty to ensure access to effective remedy applies when States participate in multilateral institutions, including IFIs.¹³ Further, the duty of IFI member States to ensure that the IFI provides access to effective remedy is in accordance with Guiding Principle 4. Member States of IFIs have contributed taxpayer funds as capital to the IFI and exercise control as shareholders of these institutions. States’ executive directors on IFI boards have the power to vote for or against IFI activities. State membership in IFIs therefore falls within the State-business nexus described in Guiding Principle 4.

Moreover, IFIs are bound by general rules of international human rights law and have a baseline international human rights obligation to avoid causing or contributing to human rights abuses.¹⁴ IFIs are businesses that are unique because of their ownership by multiple States, and their human rights obligations are no less than the corporate responsibility of private banks to ensure access to remedy.¹⁵ As with private banks, IFIs likewise benefit from

¹¹ UNGPs, p. 28.

¹² UNGPs, p. 30.

¹³ UNGPs, p. 12 (“States retain their international human rights law obligations when they participate in such institutions.”) See also United Nations Office of the High Commissioner on Human Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (2013), p. 28, available at <http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf> [hereinafter “OHCHR Accountability Report”], citing Fons Coomans, “Application of the International Covenant on Economic Social and Cultural Rights in the framework of international organizations”, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, vol. 11, Armin von Bogdandy and Rüdiger Wolfrum, eds. (Leiden, Netherlands, Martinus Nijhoff Publishers, 2007), pp. 359–390. (“[T]he Committee on Economic, Social and Cultural Rights, which reviews the implementation of the International Covenant on Economic, Social and Cultural Rights, has concluded that the Covenant imposes obligations on its State parties as members of IFIs....”).

¹⁴ OHCHR Accountability Report, p. 28. See also “Tillburg Guiding Principles on World Bank, IMF and Human Rights” in WORLD BANK, IMF AND HUMAN RIGHTS, Willem van Genugten, Paul Hunt and Susan Mathews, eds., (Nijmegen, Netherlands, Wolf Legal Publishers, 2003) pp. 247-255, paras. 3, 5, available at <http://www1.umn.edu/humanrts/instree/Tilburgprinciples.html> (noting that IFIs, as international legal persons, have “international legal obligations to take full responsibility for human rights respect in situations where the institutions’ own projects, policies or programmes negatively impact or undermine the enjoyment of human rights.”).

¹⁵ See Natalie Bridgeman, *Human Rights responsibilities of private sector banks. The policy required to “Respect” and provide “Access to Remedy”* (Jul. 2010), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Banking-and-Human-Rights-Paper.pdf>. See also Letter dated November 27, 2013 from the OHCHR to the Chair, OECD Working Party for Responsible Business Conduct, available at <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf> [hereinafter “OHCHR Guidance on FIs”]; Letter dated December 3, 2013 from the UNWG to the Chair, OECD Working Party for Responsible Business Conduct, available at <http://www.ohchr.org/Documents/Issues/Business/LetterResponseToOECD.pdf>.

the reputational and risk management benefits of ensuring access to remedy. IFI member States, being shareholders, have a duty to ensure that IFIs comply with these obligations.¹⁶

a) Host States

Regardless of whether they are member States of IFIs, host States have a duty to ensure access to remedy for abuses occurring within their territory and/or jurisdiction, as recognized by Guiding Principle 25. The following considerations are based not only on host States' duties as members of IFIs, but also their duties as host States.

- *Identify and implement all necessary measures to ensure that the activities of IFI accountability mechanisms within the State's territory and/or jurisdiction are able to proceed without interference.*

Attempts by complainants or would-be complainants to access remedy through IFI accountability mechanisms may be thwarted by interference within the host State. Complainants and the civil society organizations assisting them have met with reprisals and intimidation, including from interested corporations and state officials.¹⁷ The host State is implicated where law enforcement agencies and officers fail to prevent and address such conduct amounting to violations of the law. Further, host States have also posed obstacles by barring IFI accountability mechanisms from entering the country to carry out their functions.¹⁸ In such situations, the host State is in breach of the State duty to ensure access to remedy, which necessarily requires that States not *prevent* access to remedy by their acts or omissions.

Host States should cooperate with IFI accountability mechanisms and not obstruct them from carrying out their functions. Member States of IFIs that obstruct these mechanisms undermine the credibility and legitimacy, and ultimately the effectiveness, of the accountability mechanisms they have a duty to support. Host States should also fulfill their law enforcement duties to prevent and address reprisals and intimidation against those seeking to access IFI accountability mechanisms.

[hereinafter "UNWG Guidance on FIs"] (discussing the responsibility of financial institutions to respect human rights).

¹⁶ This is similar to the responsibility of institutional investors, including minority shareholders, to prevent and mitigate the adverse human rights impacts of the businesses in which they invest; importantly, IFI member States have a *closer* relationship to the adverse human rights impacts arising from the IFI's activities than ordinary institutional investors. See Letter dated April 26, 2013 from OHCHR to Centre for Research on Multinational Corporations (SOMO), available at <http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>; OHCHR Guidance on FIs; and UNWG Guidance on FIs (discussing the human rights responsibilities of institutional investors, including minority shareholders.).

¹⁷ For example, in a case involving labor violations on tea plantations in Assam, India, tea garden workers faced threats and retaliation from company management after interacting with staff of the International Finance Corporation's ("IFC") Compliance Advisor Ombudsman ("CAO"), to deter them from raising their complaints to the CAO. See CAO, *CAO Assessment Report Regarding labour concerns in relation to IFC's Tata Tea project (#25074) in Assam, India* (Nov. 2013), p. 12, available at http://www.accountabilitycounsel.org/wp-content/uploads/2013/06/Tata_Tea_CAO_Assessment_Report_November_6_2013.pdf.

¹⁸ For example, the Chinese authorities denied permission to the Asian Development Bank's accountability mechanism to conduct a project site visit for purposes of conducting a compliance review of the Fuzhou Environmental Improvement Project. See Asian Development Bank, *2009 Annual Report. Compliance Review Panel*, pp. 6-8, available at [http://compliance.adb.org/dir0035p.nsf/attachments/CRP_AnnualReport2009.pdf/\\$FILE/CRP_AnnualReport2009.pdf](http://compliance.adb.org/dir0035p.nsf/attachments/CRP_AnnualReport2009.pdf/$FILE/CRP_AnnualReport2009.pdf).

- *Identify and implement all necessary measures to ensure that adequate remedial action is undertaken following findings of non-compliance by IFI accountability mechanisms.*

The results and findings of IFI accountability mechanisms too often do not translate into needed preventive and remedial action. In many cases, host States' action and support is needed but lacking. For example, the harm in question may be caused or contributed to by poor oversight or implementation of projects by State agencies.¹⁹ In such situations, the host State has a duty to provide adequate remedy for its failures, including providing any reparations required.

In addition, as IFI accountability mechanisms have no enforcement powers, host States can complement the mechanisms by using their enforcement powers to ensure remedial action by companies. In particular, when the mechanism's findings show that there are violations of national laws, such State enforcement is simply a basic State duty.

Host States should take all necessary steps to implement and support the remedial action needed to address findings by IFI accountability mechanisms. The responsibility the State bears is greater when its actions or omissions have caused or contributed to the harm in question. In those situations, the host State should identify lessons learned and take all necessary steps to prevent the relevant acts or omissions from occurring again.

b) IFI Member States

- *Identify and implement all necessary measures to ensure that complainants or potential complainants have access to information they need to access IFI accountability mechanisms.*

The Consultation Document rightly recognizes that States should ensure access to information on grievance mechanisms and how they may be used, including implementing capacity-building measures. In the IFI context, this means that IFI member States must ensure that the IFIs and their clients give information about the IFI accountability mechanisms to all potentially project-affected people.²⁰

¹⁹ For example, in a case involving the operations of a private oil company in the Peruvian Amazon, failures in government oversight and enforcement allowed oil contamination and spills caused by the company to continue for years without proper prevention, mitigation and redress, causing severe human rights and environmental abuses. See Letter dated April 6, 2010 from the Shibibo-Konibo indigenous people of Canaán de Cachiyacu and Nuevo Sucre, Peru to the CAO, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2011/12/Maple-CAO-Complaint-Ing1%3%A9s.pdf>.

²⁰ Accountability Counsel and other civil society organizations have consistently recommended to IFIs that their accountability mechanisms improve on outreach efforts and the information available to local communities that could be affected by the IFI's projects; however, adoption of such practices has been uneven. See e.g. Letter dated October 28, 2009 from Accountability Counsel et al. to the African Development Bank Compliance Review and Mediation Unit, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/1.25.13-Accountability-Counsel%E2%80%99s-Letter-to-the-AfDB.pdf>; Letter dated March 2011 from Accountability Counsel et al. to the Asian Development Bank, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/3.31.11-Joint-Comments-on-ADB-AM-Draft1.pdf>; Letter dated September 30, 2013 from Accountability Counsel et al. to the Inter-American Development Bank Independent Consultation and Investigation Mechanism, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2013/08/9.30.13-MICI-Review-Comments.pdf>.

Moreover, for IFI accountability mechanisms specifically, access to information on IFI involvement is also essential. In order to invoke an IFI accountability mechanism, those affected first need to know whether a nexus exists between an IFI's financing and support and the harmful business-related activity.

In addition, access to information about the harmful activity itself is necessary for those affected to know their rights and substantiate their complaint. The disclosure of project information to those affected is usually itself an IFI environmental and social safeguard. Importantly, disclosure of project information also impacts access to remedy. Without project information, locally affected people may not participate in a complaint made by other locals because they do not know that the project's impacts will eventually reach them too. Project information also enables complainants to assert the best case they can when using an IFI accountability mechanism, which is especially important given the power imbalances they usually face.

Although IFIs have public disclosure policies for making such information available, these policies are not always fully implemented.²¹ Further, the policies themselves may be inadequate to meet the information needs of potential complainants. For example, IFI public disclosure policies may contain broad exceptions to protect the interests of member States, that can have the effect of hindering complainants from accessing remedy.²²

Access to information is also a particular concern where an IFI finances a financial intermediary, such as a private equity fund or a State-linked investment or development fund, which in turn finances projects and other business-related activities. These financial intermediaries often have no or inadequate public disclosure policies and practices.²³ IFIs may fail to require their client financial intermediaries to publicly disclose what projects they are involved in and other needed project information.²⁴

²¹ See, e.g., CAO report, *CAO Audit of IFC Investment in Corporacion Dinant S.A. de C.V., Honduras* (Dec. 20, 2013), available at http://www.cao-ombudsman.org/cases/document-links/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf (finding the IFC non-compliant with its public disclosure policy in a case involving forced evictions and violence by security forces against farmers in palm oil plantations in Honduras).

²² See, e.g., *The World Bank Policy on Access to Information* (effective from Jul. 1, 2013), para. 14, available at <http://documents.worldbank.org/curated/en/2013/07/17952994/world-bank-policy-access-information> (providing that information provided by a member State or third party in confidence is to be withheld if the member State or third party does not consent to disclosure).

²³ See, e.g., Letter of Complaint dated April 15, 2011 from Odisha Chas Parivesh Sureksha Parishad and the Delhi Forum to the CAO, available at http://www.cao-ombudsman.org/cases/document-links/documents/IndiaIFComplaint_April152011_web.pdf (describing the difficulties faced by the complainants in securing "the most fundamental information" about a coal-based power plant project in Odisha, India that receives financing from an IFC-supported State-linked infrastructure development fund). See also Complaint dated February 10, 2014 from Inclusive Development International et al. to the CAO, available at <http://www.cao-ombudsman.org/cases/document-links/documents/ComplainttoCAOreDragonCapital-HAGL.pdf> (highlighting that the lack of transparency surrounding rubber concessions owned by a company financed by an IFC-supported private investment fund made it impossible for third parties to comprehensively monitor and assess compliance with the IFC's safeguard policies).

²⁴ See, e.g., CAO report, *CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries* (Oct. 10, 2012), p. 25, available at http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf (agreeing that "[e]xternal observers raise a legitimate concern that the constraints posed on disclosure [by the IFC's Policy on Disclosure of Information] effectively mean there is no information publicly available about the end use of IFC's funds [where the IFC's client is a financial intermediary]. ... In the CAO's sample, depending on the type of client and investment, there were parts of the sample portfolio where IFC itself did not have the information on the end use of funds available, other than on an aggregated level collected by the client...").

Member States of IFIs should take all necessary steps to ensure that:

- the IFI's policies require the IFI and its clients to give all potentially project-affected people basic information about the IFI's accountability mechanism and how to access it;
- the IFI's policies require the IFI and its clients to publicly disclose IFI involvement in projects and the end use of IFI funds;
- the IFI's policies favour public disclosure and ensure that complainants and potential complainants have access to all information about projects' environmental and social impacts, and their assessment and management; and
- the IFI fully implements its own public disclosure policy.

States that are project proponents should have a policy of publicly disclosing IFI involvement in their projects, and State-linked financial intermediaries should have a policy of publicly disclosing the identity of the projects they are financing. States that are project proponents or financial intermediaries should ensure that complainants and potential complainants have access to all information about the project's environmental and social impacts, and their assessment and management. The information described would rarely, if at all, need to be confidential. States should therefore not use confidentiality provisions in IFI public disclosure policies to withhold disclosure of such information.

- *Identify and implement all necessary measures to ensure remedial action in response to the findings of IFI accountability mechanisms.*

Bank management and State and non-State borrowers too commonly fail to take adequate, or any, remedial action in response to findings and recommendations by IFI accountability mechanisms.

Member States of IFIs should ensure and support needed remedial action by using their leverage vis-à-vis the IFI, even though they are not the host States in question. As an example of good practice, the United States has enacted legislation to require the U.S. executive director of each international financial institution of which it is a member “to seek to ensure that each such institution responds to the findings and recommendations of its accountability mechanisms by providing just compensation or other appropriate redress to individuals and communities that suffer violations of human rights, including forced displacement, resulting from any loan, grant, strategy or policy of such institution.”²⁵ The United States has also legislated for the U.S. executive director of the relevant IFIs to report regularly to governmental committees on steps these IFIs are taking to support the implementation of remedial action in specific cases.²⁶ Reporting requirements can increase transparency and public pressure on IFIs and the other relevant parties.

²⁵ U.S. Consolidated Appropriations Act, 2014 (Pub.L. 113-76), section 7029(e) [hereinafter “U.S. Appropriations Act”].

²⁶ See U.S. Appropriations Act, section 7029(f) (requiring reporting on steps being taken by the World Bank to provide redress to families at Boeung Kak Lake in Cambodia harmed by the World Bank-funded Land Management and Administration Project. The World Bank Inspection Panel found that the World Bank's non-compliance with its safeguard policies contributed to the harm suffered.). See also U.S. Appropriations Act, section 7043(c)(5) (requiring reporting on steps being taken by the World Bank and Inter-American Development Bank to support the implementation of a reparations plan agreed to by the Guatemalan government for communities harmed by the Chixoy dam in Guatemala. The case was investigated by a

IFI member States should also consider acting through their executive directors to require IFIs to take necessary remedial action,²⁷ to withhold approval of inadequate remedial action plans,²⁸ and to stop disbursements or other support for projects or borrowers that are failing to take needed remedial action.²⁹

IFI member States should also require compliance bonds from parties seeking IFI support. These bonds should give the IFI the right to the funds secured in the event of substantial or wilful non-compliance with its safeguard policies. Doing so would give the IFI additional leverage and resources where the relevant parties refuse to respond cooperatively to adverse findings by IFI accountability mechanisms.

- *Identify and implement all necessary measures to ensure the effectiveness of IFI accountability mechanisms based on the criteria set out in Guiding Principle 31.*

IFI member States should take steps to improve IFI accountability mechanisms. In doing so, they should regularly assess the mechanisms' effectiveness based on the criteria in Guiding Principle 31 and use those findings to call for and contribute to the improvement of the mechanism's policies and practices. These assessments should include but not be limited to the usual periodic reviews of IFI accountability mechanism policies.

In addition, when an IFI or its accountability mechanism proposes to change the mechanism's rules and policies, IFI member States should evaluate these proposed changes using the criteria in Guiding Principle 31 and oppose changes that fall short. One important example is the recent introduction of the "Pilot Program" at the World Bank Inspection Panel that enables cases eligible under the Panel's rules to be denied registration and investigation even where the Panel finds evidence of violations.³⁰ It hence conflicts with the criteria in Guiding Principle 31 that the mechanism be legitimate and accessible. IFI member States

commission that included IFI representatives, demonstrating that an IFI member State's duty to ensure the IFI provides access to remedy should not be limited to only situations where the matter has been investigated by the IFI's designated accountability mechanism.).

²⁷ There have been recent cases where IFI management refused to accept adverse findings by the IFI's accountability mechanism. *See, e.g.*, Letter dated Nov. 12, 2013 from Accountability Counsel et al. to the President of the World Bank, available at http://www.ciel.org/Publications/CAO_WB_12Nov2013.pdf (citing as examples of this problem the IFC-funded Tata Mundra power plant project in India and the World Bank-funded Eskom energy project in South Africa).

²⁸ The rules and policies of IFI accountability mechanisms usually provide for the IFI's board of directors and/or president to have final decision-making power over remedial or corrective actions proposed in response to the mechanisms' findings. *See, e.g.*, *CAO Operational Guidelines* (2013), § 4.4.5, available at http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf; Inter-American Development Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* (2010), para. 71, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37940284>; Asian Development Bank, *Accountability Mechanism Policy 2012*, paras. 190-191, available at <http://www.adb.org/sites/default/files/accountability-mechanism-policy-2012.pdf>.

²⁹ For example, the World Bank suspended lending to Cambodia due to the government's refusal to take steps to remedy harm arising from Cambodia's implementation at Boeung Kak Lake of the World Bank-funded Land Management and Administration Project. *See* 'World Bank stops funds for Cambodia over evictions,' REUTERS (Aug. 9, 2011), available at <http://www.reuters.com/article/2011/08/09/cambodia-worldbank-idUSL3E7J920D20110809>.

³⁰ *See* Letter dated August 27, 2014 from Accountability Counsel et al. to the World Bank President and the Inspection Panel Chair, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2014/08/8.27.14-Letter-to-President-and-Panel-re-Pilot.pdf>.

should, through their executive directors, vote against such proposals that undermine the effectiveness of IFI accountability mechanisms.

2. State-based Non-Judicial Grievance Mechanisms

State-based non-judicial grievance mechanisms that address business-related human rights abuses include the accountability mechanisms of national export finance agencies and development aid agencies,³¹ as well as the National Contact Points (“NCPs”) of States that adhere to the Organisation for Economic Co-operation and Development’s Guidelines for Multinational Enterprises (“OECD Guidelines”).

- *Identify and implement all necessary measures to ensure adequate independent oversight over State-based non-judicial grievance mechanisms.*

As the reach of these mechanisms extends to overseas business activities, they have been especially prominent in attempts to access remedy transnationally. There are, however, serious questions about the effectiveness of many of these mechanisms. Many OECD NCPs have come under fire for generally being ineffective. A report by the former UN Special Representative on business and human rights observed that “many NCP processes appear to come up short when measured against [the effectiveness criteria in Guiding Principle 31].”³² Civil society actors have underscored this serious concern based on complainants’ experiences using the NCPs.³³ Also, State-linked agencies such as the U.S. Overseas Private Investment Corporation’s Office of Accountability and the Canadian CSR Counsellor have attracted strong criticism due to their handling of cases.³⁴ Further, the very low numbers of

³¹ E.g. U.S. Overseas Private Investment Corporation Office of Accountability, Japan Bank for International Cooperation Examiner for Environmental Guidelines (“JBIC Examiner”), Japan International Cooperation Agency Examiner for Environmental Guidelines (“JICA Examiner”), Export Development Canada Compliance Officer, Canada’s Office of the Extractive Sector Corporate Social Responsibility Counselor, the Netherlands’ Entrepreneurial Development Bank Independent Complaints Mechanism, and Australia’s Export Finance and Insurance Corporation’s Complaints Mechanism.

³² SRSR April 7, 2008 Report, para. 98.

³³ See, e.g., OECD Watch, *Assessment of NCP Performance in the 2013-2014 Implementation Cycle* (Jun. 2014), available at http://oecdwatch.org/publications-en/Publication_4090/at_download/fullfile [hereinafter “NCP Assessment 2014”] (concluding from an analysis of specific instances handled that long-standing problematic trends of high rates of cases rejected, unequal treatment of parties and inordinate delays in handling cases were continuing). See also, University of Essex et al., *Submission to Inquiry of All Party Parliamentary Group on International Corporate Responsibility into UK Export Finance* (Jun. 11, 2012), para. 3.1.6, available at <http://appgicr.files.wordpress.com/2012/07/essex-melbourne-and-core.docx> (noting that the “National Contact Point mechanism has been widely criticised for its lack of transparency and impartiality”).

³⁴ See Accountability Counsel, *Case Study on the OPIC Office of Accountability: Bias, Cultural Insensitivity and Lack of Transparency within the Mechanism*, available at <http://www.accountabilitycounsel.org/wp-content/uploads/2013/03/4.12.12-OPIC-OA-problems-in-Mexico-case.pdf>; Letter dated April 23, 2013 from International Corporate Accountability Roundtable to the U.S. Secretary of State John Kerry, available at <http://accountabilityroundtable.org/analysis/civil-society-consultation-for-us-country-visit-of-un-working-group-on-business-and-human-rights-2/>; “Mining watchdog agency called ‘bogus PR job,’” CBCNews (Oct. 31, 2011), available at <http://www.cbc.ca/news/canada/mining-watchdog-agency-called-bogus-pr-job-1.978674>; “The Federal CSR Counsellor Has Left the Building - Can we now have an effective ombudsman mechanism for the extractive sector?” MiningWatch Canada (Nov. 1, 2013), available at <http://www.miningwatch.ca/blog/federal-csr-counsellor-has-left-building-can-we-now-have-effective-ombudsman-mechanism-extracti>.

cases filed with and accepted by some accountability mechanisms of State-linked agencies are cause for concern.³⁵

States should ensure that there is adequate *independent* oversight over these mechanisms. Such oversight should include regular assessments of the mechanisms' policies and practices, based on the effectiveness criteria in Guiding Principle 31, and crucially, all necessary action to respond to the findings of these assessments.

- *Where the State adheres to the OECD Guidelines, identify and implement all necessary measures to ensure effective appeal and/or review of NCPs' decisions in specific cases.*

NCPs' findings and decisions in specific cases (known as "specific instances") have had serious failings.³⁶ In many cases, the composition and structure of NCPs may not lend them to reliable decisions. Most NCPs are dominated by government personnel, and many are housed primarily within government departments tasked with promoting business, trade and investment, which gives rise to conflicts of interest.³⁷ Further, perhaps because NCPs' range of functions go beyond handling complaints, many NCPs are not staffed by personnel with specific expertise relevant to appropriately handling specific instances, such as a background in international human rights issues, mediation or handling company-community disputes.³⁸

Yet, there are very few safeguards to ensure that NCPs' decisions or findings in specific instances are impartial and well-substantiated. Very few NCPs have any type of review process available for parties to a specific instance. Although the OECD has an Investment Committee that can determine whether an NCP has correctly interpreted the OECD Guidelines and oversee its handling of specific instances, it may not question the NCP's findings or statements (except on questions of interpretation), or overturn the NCP's

³⁵ For example, based on the annual reports of the JBIC and JICA Examiners, from 2003 to date, only two complaints have been filed with the JBIC Examiner, and one with the JICA Examiner; only the complaint to the JICA Examiner was registered. *See also*, FIELD Article, p. 12 (stating, in relation to the Export Development Canada Compliance Officer, that "[o]ut of the 23 complaints received through 2009, only six were determined to fall under the Compliance Officer's mandate").

³⁶ *See, e.g.*, NCP Assessment 2014. *See also*, 'US: Review of the National Contact Point for the OECD Guidelines for Multinational Enterprises' (Nov. 3, 2010), Human Rights Watch, <http://www.hrw.org/news/2010/11/08/us-review-us-national-contact-point-oecd-guidelines-multinational-enterprises> (canvassing problems with decisions by the U.S. NCP and noting that Asian OECD members like Japan and South Korea "continue to shield their companies from the consequences of poor environmental and labor standards and a lack of transparency."); Rights and Accountability in Development et al., *Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises 2008* (Nov. 2008), p. 36, available at <http://oecdwatch.org/files/raid-fit-for-purpose-report> (describing the U.K. NCP's withdrawal of its decision in the case involving serious human rights harm caused by an oil pipeline project spanning Azerbaijan, Georgia and Turkey, acknowledging that there had been serious procedural failures in the handling of the case.).

³⁷ SRSG April 7, 2008 Report, para. 98; Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena* (Jan. 2008), p. 99, available at http://shiftproject.org/sites/default/files/Report_28_Mapping.pdf [hereinafter "Rees Report"].

³⁸ *See* Rees Report, p. 99; *Report of the U.S. State Department Stakeholders Advisory Board (SAB) on Implementation of the OECD Guidelines for Multinational Enterprises* (Feb. 24, 2014), available at <http://www.state.gov/e/eb/adcom/aciep/rls/225959.htm>.

decisions.³⁹ Moreover, the procedure is not available to complainants.⁴⁰ The availability of judicial review, on the basis that an NCP is a public administrative body, is uncertain.

There is a pressing need for States to find solutions to ensure that complaints brought before NCPs are fairly decided based on correct interpretations of the OECD Guidelines. There are around forty States with NCPs, and these States are the source of a large majority of the world's foreign direct investment outflows.⁴¹ The vast majority of cases filed with NCPs from 2001 to 2010 concerned alleged harm occurring in developing countries.⁴² As noted by the former UN Special Representative on business and human rights, NCPs have the potential to be a very important vehicle for remedy, especially for complainants who have no alternative avenues.⁴³ Potential solutions include expanding the powers of NCP advisory bodies to review NCP decisions and providing for judicial review.

- *Identify and implement all necessary measures to ensure remedial action in response to the findings of State-based non-judicial grievance mechanisms.*

States should take all necessary steps to ensure and support remedial action in response to the findings of State-based non-judicial grievance mechanisms, including through the use of their enforcement powers. Even where the harm in question is occurring outside a State's territory, the State would still have jurisdiction over businesses that are headquartered or have operations in the country. Where the businesses in question have received funding and support from the State, the State should use this leverage to ensure that they carry out the remedial action needed.

C. Ensuring Access to Supporting Civil Society Organizations

- *Identify and implement all necessary measures to ensure access to civil society organizations that can assist in the use of grievance mechanisms.*

The Consultation Document rightly recognizes that the availability of assistance from civil society organizations in accessing grievance mechanisms is needed to ensure access to effective remedy. Although the policies of non-judicial grievance mechanisms may be more accessible for the layperson than rules governing court processes, affected communities may still struggle to navigate these processes on their own. These communities are often vulnerable or marginalized communities who eke out subsistence livelihoods in remote regions and have very limited resources, limited or no literacy, and scarce access to the Internet. Notably, statistical findings by Accountability Counsel on the success of complaints filed with international accountability mechanisms suggest that advocates educated in using these mechanisms make a difference for affected communities in realizing positive outcomes.⁴⁴

³⁹ OECD Guidelines for Multinational Enterprises (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>, pp. 75, 88 [hereinafter "OECD Guidelines"].

⁴⁰ OECD Guidelines, pp. 68-69.

⁴¹ *OECD International Direct Investment Statistics 2013* (Apr. 2013), p. 13, available at http://www.keypeek.com/Digital-Asset-Management/oecd/finance-and-investment/oecd-international-direct-investment-statistics-2013_idis-2013-en#page14.

⁴² FIELD Article, p. 3.

⁴³ SRSG April 7, 2008 Report, para. 98.

⁴⁴ Findings to be published soon on www.accountabilitycounsel.org.

It is therefore important for States to take steps to ensure that affected communities have access to civil society organizations that can assist them in using grievance mechanisms. This at a minimum requires that States not obstruct access to such organizations. Host States too commonly wrongly regard complainants and the civil society organizations assisting them as threats to development and have clamped down on the activities of organizations perceived to be such threats, including by imposing regulatory restrictions. States should ensure that the use of legitimate grievance mechanisms is never regarded as an illegal activity.

We appreciate this opportunity to comment on the UNWG's Consultation Document. We invite members of the UNWG working on this initiative to contact us with any questions regarding our comments.

Sincerely,



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