April 23, 2013

The Honorable John Kerry
Secretary of State
United States Department of State
2201 C Street, NW
Washington, DC 20520

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations.

We are writing to share recommendations for actions the U.S. government should take—with continued leadership from the Department of State—to more fully protect human rights in relation to business. We would like to take this opportunity to acknowledge the efforts of the Department of State, including those efforts undertaken by former Secretary of State Hillary Clinton and former Assistant Secretary of State for Democracy, Human Rights, and Labor, Michael Posner, to strengthen the U.S. Department of State's work on business and human rights.

This submission outlines a series of recommendations for action the U.S. government should take in line with the UN Guiding Principles on Business and Human Rights (UNGPs), which the U.S. government endorsed in 2011. Meeting the U.S. government's human rights obligation to protect against human rights abuses involving business will require a range of robust measures over time; rather than providing an exhaustive list here, we have focused on a small number of concrete, actionable steps that we believe should be taken without delay.

In particular, we recommend that the U.S. government:

A. Develop a national implementation plan for the UNGPs;
B. Use its regulatory authority to mandate human rights due diligence, including by exploring how procurement laws could be structured to require human rights due diligence;
C. Strengthen available remedies for human rights abuses involving business;
D. Ensure that U.S. government institutions themselves act in accordance with human rights norms, including with regard to official complaints mechanisms.

As background to these recommendations, we have included below a summary of steps taken by the U.S. government to date. We also describe throughout the letter ICAR initiatives that touch on some of the issues raised.

U.S. Government Actions to Date
We read with interest the December 10, 2012, letter from Deputy Assistant Secretary Dan Baer to the United Nations Working Group on Business and Human Rights, which detailed U.S. government efforts to implement the UNGPs. It highlighted several laws, regulations, and policies that the Department considers to be consistent with the UNGPs, as well as government efforts to actively engage with internal and external stakeholders.

For example, in 2012, the U.S. Department of State hosted three workshops tailored to the business, civil society and investor communities to foster discussion around implementation of the UNGPs. We welcome the initiative and commitment that the 2012 panels demonstrate. However, in future business and human rights activities we hope to see increased participation by representative labor unions and a more central and active role in the panels or forums for those groups that directly represent workers and other affected communities.

Outside of the UNGPs implementation work, the U.S. government has also sought to promote awareness and effectiveness of the OECD Guidelines for Multinational Enterprises and has strengthened the office of the National Contact Point (NCP) in the Bureau of Economic and Business Affairs (EB) by appointing dedicated staff and approving funds to support mediation through the Specific Instance procedure under the Guidelines. The U.S. government has also been actively involved in, and has developed initiatives promoting respect for, human rights in the extractive industries and private security industry, including the Voluntary Principles on Security and Human Rights (VPs), the Extractive Industries Transparency Initiative (EITI) and the International Code of Conduct for Private Security Service Providers (ICoC). The U.S. government has recently released its publication, "Reducing Child Labor and Forced Labor: A Toolkit for Responsible Businesses," and an Executive Order on "Strengthening Protections Against Trafficking in Persons in Federal Contracts." The Department of State also issued in 2012 draft "Reporting Requirements on Responsible Investment in Burma," which, when finalized, will require human rights due diligence reporting for U.S. persons seeking to invest in Burma.

We are aware of further developments since the December 10 letter, such as the U.S. government's release of its first public report on its efforts to implement the Voluntary Principles on Security and Human Rights.[1]

Recommendations

While we recognize that the U.S. government has taken some positive steps, there are numerous areas where further action is needed. We note, for example, that the U.S. government's letter to the United Nations Working Group on Business and Human Rights failed to address a series of suggestions ICAR had provided in a July 2012 ICAR submission to the Department of State. It is unclear how the U.S. government is planning to follow up on these previously identified suggestions. We now reiterate these requests and recommend that the U.S. government (a) develop a national implementation plan for the UNGPs, (b) ensure the development and protection of robust remedies for human rights violations, and (c) use its regulatory authority to mandate human rights due diligence, including through exploring how procurement laws could be structured to require human rights due diligence. In addition, we take issue with some language in the Department of State's December 10, 2012 letter, in particular concerning the status of efforts to integrate the concepts underlying the UNGPs into the OECD National Contact Point, Overseas Private Investment Corporation, and U.S. Export-Import Bank.

A. The U.S. Government Should Develop a National Implementation Plan

Currently, the U.S. government's efforts to implement the UNGPs lack a clear, publicly-articulated vision and strategy. We believe that such a plan is needed and that it would streamline and enhance the disparate government efforts at implementing the UNGPs. For example, a national implementation plan would provide clarity of expectation for all U.S. companies and create a framework for engaging directly with other governments and regional or global bodies to identify challenges and best practices. The plan should articulate how the U.S. government will comply with its duty to protect human rights across government agencies and departments.

It would be important that the U.S. national implementation address the full scope of the UNGPs, including a review of measures and detailed recommendations as needed under each of the Guiding Principles and with respect to both the obligations of government and the responsibilities of business enterprises themselves.

[1] The report is available at: http://www.state.gov/j/drl/rls/vprpt/2012/206029.htm

We believe that in order to encourage efficiency and accountability, the Department of State—and specifically the Bureau of Democracy, Human Rights and Labor—should be given clear ownership of the national implementation plan. We also believe that the implementation plan should be complemented by periodic monitoring and public reporting.

To begin, an initial national baseline study and gap analysis needs to be conducted in order to inform credible and strategic milestones. This process should be participatory, ensuring inclusion of rights-holders exposed to conditions of vulnerability. The U.S. government should therefore ensure there is outreach to and substantive engagement with civil society groups and impacted communities in the development of the plan.

B. The U.S. Government Should Mandate Human Rights Due Diligence by Companies

To uphold the state duty to protect human rights, ICAR believes that the U.S. government must take effective regulatory measures to ensure that business entities respect human rights, including by imposing binding requirements on business entities to carry out human rights due diligence. Strong, effective human rights due diligence procedures are fundamental to ensure that human rights are respected in company actions both inside and outside their home territories. We strongly urge the U.S. government to enact mandatory human rights due diligence requirements under U.S. law. We also call on the U.S. government (and others) to mandate independent monitoring and public reporting of companies' human rights impacts to verify compliance. These requirements should cover all business relationships, including suppliers, contractors, security forces, business partners and recipients of financing. Initially, however, priority could be given to those areas in which the state is a commercial partner in business, such as public procurement, state-owned enterprises and joint ventures, or in the provision of export credit guarantees.

In this light, we would like to draw your attention to two ICAR projects addressing due diligence requirements that we hope will assist the U.S. and other governments to make progress in this area. In 2012, ICAR, in conjunction with the European Coalition for Corporate Justice (ECCJ) and the Canadian Network on Corporate Accountability (CNCA), published "Human Rights Due Diligence: The Role of States," the results of an extensive research project designed to bring clarity to the ways in which States can, by law and regulation, require due diligence pertaining to human rights. This undertaking drew on an extensive consultation process with legal experts from across the world.

The principal conclusion of the Project was that there are four main regulatory approaches to available to ensure human rights due diligence in the business community: (1) requiring due diligence as a matter of regulatory compliance; (2) providing incentives and benefits to companies in return for demonstrating due diligence; (3) encouraging due diligence through transparency and disclosure mechanisms; and (4) constructing an incentive structure by combining aspects of these approaches. As a follow-up to that report, ICAR is developing a searchable database of examples from the report, in the hopes of assisting government officials, lawmakers, members of civil society and others in implementing human rights due diligence elements of the UNGPs.[2]

In addition, ICAR has recently launched a "Government Procurement Project" that is highly relevant to the U.S. government.[3] Governments at the federal and state level are large purchasers of goods and services and can therefore exert a tremendous amount of leverage on corporate actors to comply with requirements to compete for these lucrative contracts. There have already been a number of positive steps by the federal government here in the United States, as well as at the state level, to alter procurement policies and practices in ways that promote respect for human rights by corporations. Our Project seeks to build on this momentum by clarifying and building

[2] *See* International Corporate Accountability Roundtable, *Human Rights Due Diligence: The Role of States*, 60 *available at* http://accountabilityroundtable.org/campaigns/human-rights-due-diligence/.
[3] *See* International Corporate Accountability Roundtable, *Procurement, available at* http://accountabilityroundtable.org/campaigns/procurement/.

consensus around the U.S. government engaging in the state duty to protect human rights by building on procurement requirements that mandate businesses conduct human rights due diligence, or by prohibiting contracts with businesses that have been found to have violated human rights.

We would be happy to provide further details and will continue to share the findings and recommendations that emerge from this body of work.

C. The U.S. Government Should Strengthen Remedies for Human Rights Violations

The U.S. government should act to improve accountability, a core concept in international human rights law that is reflected in the UNGPs by a call for increased access to effective remedies. When harm occurs, the state must ensure an effective remedy is available to the victims, and business must meet its responsibility to respect human rights by cooperating with complaints processes, both judicial and non-judicial, as appropriate. Due diligence measures serve a valuable purpose as a means for companies to understand and address human rights related risks. They should not, however, be used to evade liability.

Recognizing the importance of addressing obstacles to justice and threats to legal remedy, the International Corporate Accountability Roundtable, European Coalition for Corporate Justice, and the Corporate Responsibility Coalition have recently launched the "Access to Judicial Remedy Project." The Project will result in a report that will affirm that, as part of the State duty to protect human rights, States must ensure that victims have access to judicial remedies in their jurisdictions. The report will further identify feasible opportunities to ensure that such remedy is accessible in the United States, United Kingdom, and European Union, where many corporations are headquartered.

As an interim step, the U.S. government—as part of the proposed national implementation plan—should undertake to prepare a comprehensive mapping of existing remedies that are available to redress human rights harms arising in the context of business activities, as well as to identify weaknesses and gaps. Such a study should be followed by action to strengthen existing judicial and non-judicial mechanisms of redress, removing barriers to ensure effective access, and creating new remedial mechanisms where needed through judicial, administrative, and legislative reform.

We note that much of the debate over judicial remedies for corporate human rights abuses in the United States has centred on the Alien Tort Statute (ATS). On April 17, 2013, the U.S. Supreme Court issued a ruling in *Kiobel v. Royal Dutch Petroleum* that adds a significant barrier to foreign claimants who seek a remedy for human rights abuses abroad. Although it does not preclude such claims, *Kiobel* calls into question the commitment of the United States to comply and give effect to international human rights norms and makes it harder for victims to hold companies to account for their global operations. U.S. lawmakers and executive officials should respond to this development by reaffirming the legal obligation of the United States to provide an effective remedy for all victims of human rights abuses that are attributable to companies and individuals that fall under its jurisdiction. However, the ATS is neither the beginning nor the end point of the obligation. All parts of the U.S. government, including the executive agencies, the Congress, and the courts, are responsible to remove the financial, legal, and logistical barriers to an effective and complete remedy that is consistent with international standards.

D. U.S. Government Institutions Should Themselves Act in Accordance with Human Rights Norms

The UNGPs stress the concept of "policy coherence," pointing out that governments should practice what they preach. Consistent with this recommendation, and to complement the recommendations above on judicial remedies, we encourage the U.S. government to ensure that all agencies and departments comply with international human rights standards in their operations, and to establish and improve the function of official complaints mechanisms so they can be effective in providing concrete redress for communities harmed by corporate conduct.

Below we focus on three institutions that were highlighted in the Department of State's December 10 letter as examples of implementation of the UNGPs, two of which have established complaints procedures. We also call attention to the policy incoherence of U.S. government support for companies through export credits, investment insurance and other means without a corresponding official requirement that the companies benefiting from such support act in a manner consistent with the UNGPs.

1. U.S. National Contact Point

The U.S. National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (Guidelines) is referenced in the December 10 Department of State letter to the U.N. Working Group as an avenue to address allegations of business conduct that is inconsistent with the corporate responsibility to respect human rights. Our assessment, however, is that the U.S. NCP falls short of its purpose to provide an effective avenue for resolving instances in which individuals, communities, workers organizations, or unions are harmed by business enterprises. We recognize that the U.S. government has taken some steps to improve the functioning of the NCP; however, further reforms are needed to address key structural weaknesses.

In particular, we believe that the NCP should be empowered to make findings of fact and draw conclusions as to whether the Guidelines have been breached–a feature that all the best-performing NCPs, including those of the United Kingdom, Norway, and Netherlands, have in common. Moreover, the U.S. NCP's strict confidentiality rule, a provision without parallel in other countries' NCPs, requires the complainant in a specific instance to keep secret the text of its complaint. This deters groups that operate transparently from filing complaints and should therefore be relaxed.

We also urge the NCP to elaborate on the specific procedure it intends to follow when there are parallel legal proceedings. We recommend adopting the approach of the U.K. NCP, which will suspend a specific instance "only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances."[4] Doing so would help ensure that the U.S. NCP can provide an effective avenue for redress in all cases in which doing so will not interfere with legal proceedings. Finally, to improve access to the NCP for all affected parties, the NCP's procedures should be available in major world languages, and the NCP should guarantee translation services to enable proceedings to be conducted in the languages in which complainants are most fluent.[5]

2. Overseas Private Investment Corporation's Office of Accountability

The December 10 Department of State letter to the UN Working Group cites the Overseas Private Investment Corporation (OPIC) as an example of an institution that contributes to the U.S. government's implementation of the UNGPs, based on its adoption of the International Finance Corporation's (IFC's) Performance Standards as the standard for review under OPIC's Environmental and Social Policy Statement, which addresses human and labor rights. The December 10 letter also discusses OPIC's Office of Accountability (OA) as an independent grievance mechanism consistent with the UNGPs' pillar on access to remedy for business-related human rights abuses. However, civil society groups have raised important questions about whether the OA's procedures and their implementation are in fact consistent with criteria for an effective mechanism laid out in Paragraph 31 of the

[4] *See Department for Business, Innovation & Skills, Approach of the UK NCP to Specific Instances in Which There are Parallel Proceedings,* 2009, URN 09/1354, *available at* http://www.bis.gov.uk/files/file53069.pdf.

[5] *See* joint civil society letter signed by several ICAR members that details concerns about the U.S. NCP and recommendations, *available at* http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/6.23.11-OECD-NCP-Letter-to-Fernandez.pdf, and detailed annex to Assistant Secretary Fernandez, *available at* http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/6.23.11-Coalition-Annex.pdf.

UNGPs, namely with respect to transparency, predictability, equitability, and continuous learning.[6] Notably, Accountability Counsel (a member of ICAR) has critiqued OPIC's role in relation to a complaint about the Cerro de Oro Hydroelectric Project, citing among other factors a perceived OPIC staff bias in favor of the company and an absence of due transparency.[7] Regarding transparency, we note that the OA—which has operated since 2005—only made its operational guidelines publicly available in 2012, hampering the ability of complainants to make effective, predictable, and equitable use of the mechanism. It is important that OPIC and the OA take further steps to improve transparency in its policies, which are currently under review, as well as the consultation procedures, to ensure that all interested parties, including affected or potentially affected groups, are able to participate in the review. Other matters that merit further attention include ensuring that the OA builds stakeholders' trust in the mechanism, that grievance processes are carried out in culturally and contextually appropriate manners so that complainants can fully and effectively participate, and that lessons from the grievance processes are documented and used to inform future OPIC lending.[8]

3. U.S. Export-Import Bank

The U.S. Export-Import Bank (Ex-Im Bank) has adopted the IFC Performance Standards and the Equator Principles, which are a voluntary set of standards for determining, assessing, and managing social and environmental risk in project finance, as part of the requirements for their borrowers. These standards, however, are not fully consistent with international human rights norms. For example, although a 2012 IFC update of the Performance Standards incorporated some human rights language, it does not require its clients to undertake a human rights impact assessment, stating only that it might be "appropriate" in limited high-risk circumstances.[9] By contrast, the UNGPs, under Principle 4, specifically call on governments to "take additional steps to protect against human rights abuses by business enterprises that . . . receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence." Accordingly, Ex-Im Bank should commit to respecting human rights in their lending activities and require borrowers to comply.

Furthermore, adoption of standards constitutes only the first step, and the victims of human rights violations have no way of holding Ex-Im Bank accountable for adherence to those standards. This concern has been voiced, for example, in relation to requests that the Ex-Im Bank review the social and environmental impacts of the Kusile Coal Power Plant in South Africa, to which it has not responded, as well as disputes arising out of the Ex-Im Bank supported Sasan Coal Power Plant in India.[10] Ex-Im Bank should establish measures for impacted communities to

---

[6] *See* United Nations Guiding Principles on Business and Human Rights, paras. 31(c)-(e), (g), U.N. Human Rights Council, 17th sess., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[7] *See 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.

[8] For a critique by Accountability Counsel of OPIC's role in relation to a complaint about the Cerro de Oro Hydroelectric Project, *see 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.

[9] See the joint civil society submission to the Office of the High Commissioner for Human Rights on "the Need for the World Bank Group to Implement Human Rights Standards," March 28, 2012, at http://www.hrw.org/news/2012/03/28/submission-report-business-and-human-rights-and-un-system. *See* INTERNATIONAL FINANCE CORPORATION, *Performance Standards on Environmental and Social Sustainability* 3 n. 12 (2012) ("In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.").

[10] *See* Kate Sheppard, *Internal Review Dings World Bank's Funding of Massive Coal Plant*, MOTHER JONES, Dec. 9,

raise complaints and seek resolution. To date, Ex-Im Bank has strongly opposed proposals, including a provision in a House bill,[11] to establish an independent grievance mechanism to enhance human rights accountability in its operations; such a position is inconsistent with the U.S. government's commitment to the UNGPs.

Thank you very much for your consideration of these recommendations. We look forward to working with you and your team to advance the business and human rights agenda at the Department of State and throughout the U.S. government.

Yours sincerely,

Amol Mehra, Esq.

Director

International Corporate Accountability Roundtable

amol@accountabilityroundtable.org

2011, *available at* http://www.motherjones.com/blue-marble/2011/12/internal-report-dings-world-banks-funding-massive-coal-plant (indicating "South African environmental groups requested an investigation" by Ex-Im Bank of impacts of Kusile Coal Power Plant); *US Ex-Im Bank May Fund Giant Coal Plants in South Africa, India*, SUSTAINABLEBUSINESS.COM NEWS, Aug. 11, 2010, *available at* http://www.sustainablebusiness.com/index.cfm/go/news.display/id/20838 (indicating that "[l]ocal communities in India are actively protesting the Sasan project, as it will displace 6,000 people, and emit between 26-27 million tons of carbon dioxide annually").

[11] *See* H.R. Report No. 112–201 (2011), Securing American Jobs Through Exports Act of 2011, H.R. 2072, sec. 10, http://www.gpo.gov/fdsys/pkg/BILLS-112hr2072rh/pdf/BILLS-112hr2072rh.pdf.