

April 25, 2016

Via Electronic Mail

President Barack Obama
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500

Re: Submission for U.S. National Action Plan on Responsible Business Conduct

Dear President Obama:

In light of the impending release of the U.S. National Action Plan on Responsible Business Conduct (“NAP”), Accountability Counsel takes this opportunity to follow up on the first of our three NAP submissions to Secretary Kerry, which included recommendations for the U.S. OECD National Contact Point (“NCP”).¹

As a member of OECD Watch and the U.S. NCP’s Stakeholder Advisory Board, we are encouraged by its recent efforts to improve clarity around the specific instance process,² engage with various stakeholders, including U.S. embassies, and respond to many of the recommendations contained in the Board’s 2014 report.³ We also commend the U.S. Department of State for allocating additional staff and resources to the U.S. NCP. However, the U.S. NCP still falls short from realizing its obligations. Despite many recent positive changes, it fails to keep step with its counterparts abroad, implement best practice, and provide meaningful and effective access to remedy.

Governments adhering to the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) must establish an NCP to promote the Guidelines and handle complaints against companies that have allegedly failed to adhere to the Guidelines’ standards, which refer to and draw from the UN Guiding Principles on Business and Human Rights (“Guiding Principles”).⁴ As a fundamental component of this role, an NCP must fulfill three obligations: (1) promote responsible business conduct, (2) protect human rights, and (3) ensure access to effective remedy in a manner consistent with the Guiding Principles and the OECD Guidelines.

¹ See January 15, 2015 letter to Secretary Kerry (attached), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/1.15.2015-Accountability-Counsel-NAP-submission.pdf>.

² See, e.g., U.S. Department of State, *A Guide to the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, Oct. 29, 2015, available at <http://www.state.gov/e/eb/oeecd/usncp/usncpguide/248956.htm>.

³ See U.S. State Department Stakeholders [sic] Advisory Board (SAB) on Implementation of the OECD Guidelines for Multinational Enterprises, *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/aciepr/rls/225959.htm>.

⁴ OECD Guidelines for Multinational Enterprises (2011), pt. IV, para. 36 (commentary).

We maintain that the U.S. NCP is *not capable* of delivering on the second and third of those three obligations due to the following issues that may require executive leadership to change.

In our 2015 submission, we identified issues related to:

- **overly strict confidentiality rules** that undermine the transparency principles espoused by this Administration and deter participation in NCP proceedings;
- **the U.S. NCP's failure to investigate complaints, make findings of fact, or draw conclusions** as to whether the OECD Guidelines have been violated. This includes the ability to deny federal procurement and contracting opportunities to enterprises that violate the Guidelines; and
- **obstacles for communities and labor unions seeking to access the U.S. NCP in order to effectively address** their concerns, including potential barriers for non-English language speakers.

Accountability Counsel urges the U.S. government to implement our 2015 recommendations to address these core deficiencies and provide adequate resources and support so that the U.S. NCP can serve as the model that it should be. We believe these recommendations are in line with the G-7 Leaders' Declaration from June 8, 2015, which includes an express commitment to "strengthening mechanisms for providing access to remedies including the National Contact Points" and "ensur[ing] that our own NCPs are effective and lead by example."⁵

We reiterate our request that the NAP prioritize these steps towards full implementation of the Access to Remedy pillar of the Guiding Principles and its obligations under the OECD Guidelines. Our clients and millions like them around the world who have been harmed by U.S.-funded projects and the conduct of U.S. businesses are depending on these changes in order to secure meaningful and effective remedy.

Thank you for the opportunity to contribute to the NAP development process.

Sincerely,



Kindra Mohr
Policy Director
Accountability Counsel

cc: Secretary of State John Kerry; Bureau of Democracy, Human Rights, and Labor at the U.S. Department of State; Office of the U.S. NCP

⁵ G-7 Leaders' Declaration (Schloss Elmau, Germany), June 8, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.

January 15, 2015

Via Electronic Mail

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

Re: Submission for U.S. National Action Plan on Responsible Business Conduct

Dear Secretary Kerry:

In response to the U.S. government's announcement on November 20, 2014, we are writing to submit a first round of comments and recommendations for the U.S. National Action Plan on Responsible Business Conduct ("NAP"). Accountability Counsel defends the environmental and human rights of communities around the world through the use of non-judicial grievance mechanisms. Because of our involvement in supporting community access to remedy and as a member of the U.S. National Contact Point's ("NCP") Stakeholder Advisory Board, we are particularly interested in ensuring that the U.S. NAP promotes responsible business conduct, protects human rights, and ensures access to effective remedy in a manner consistent with the UN Guiding Principles on Business and Human Rights ("Guiding Principles") and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines"). Given our focus as an organization, we offer this submission to highlight the actions that the U.S. government must take to fully implement the Guiding Principles and the OECD Guidelines, particularly with regard to access to remedy.

The Guiding Principles call for States to take appropriate steps to redress business-related human rights abuses, including creating non-judicial grievance mechanisms for affected communities to voice their complaints.¹ The OECD Guidelines draw from the Guiding Principles² and stress that States have a duty to protect human rights³ and enterprises should take measures to prevent, mitigate, and remediate adverse human rights impacts.⁴ The OECD Guidelines also set forth provisions for the creation of NCPs to help adhering governments

¹ Non-judicial grievance mechanisms are official complaint processes outside of the legal system through which aggrieved parties can raise and seek remedy for business-related human rights grievances. *See* United Nations Guiding Principles on Business and Human Rights, art. 3, para. 25 (commentary) (hereinafter "Guiding Principles").

² OECD Guidelines for Multinational Enterprises (2011), pt. IV, para. 36 (commentary) (hereinafter "OECD Guidelines").

³ *Id.*, at pt. IV.

⁴ *Id.*, at pt. I, sec. II, para. 14 (commentary).

promote compliance with the OECD Guidelines, in part by addressing allegations regarding U.S. business conduct that is inconsistent with the corporate responsibility to respect human rights.

I. Introduction

U.S. corporations and U.S. government-funded projects have a tremendous impact on communities around the world. Many of these projects are linked to human rights abuses occurring internationally. Both government and corporate actors may share responsibility for wrongdoing through their ambivalence, willful ignorance, and in some cases, even actions that directly cause or contribute to abuses on the ground. Through State-linked entities such as national development aid and export finance agencies and international financial institutions (“IFIs”), States may financially support projects linked to these business-related human rights abuses. Moreover, U.S. corporations are often involved in serious human rights allegations resulting from their business operations or the projects that they support. As such, it is essential that the U.S. government take steps towards providing access to remedy for business-related abuses that occur both at home and abroad.

The United States has a duty to protect against business-related human rights abuses arising from its economic and financial relationships. As stated in the Guiding Principles, “[u]nless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.”⁵ Ensuring access to effective remedy is fundamental to fulfilling this duty.⁶ The United States also has an obligation under the OECD Guidelines to encourage U.S. corporations to engage in responsible business practices and effectively respond to allegations that they have failed to do so.⁷

Strengthening access to judicial remedy for business-related human rights abuses should be a continuous priority for the United States. In that regard, we affirm the view adopted by the Guiding Principles that “[e]ffective judicial mechanisms are at the core of ensuring access to remedy.”⁸ In addition, we strongly believe that non-judicial grievance mechanisms can “play an essential role in complementing and supplementing judicial mechanisms.”⁹

Non-judicial access to remedy is particularly critical in light of the April 2013 *Kiobel v. Royal Dutch Petroleum* decision by the U.S. Supreme Court.¹⁰ Following *Kiobel*, it is unclear under what circumstances U.S. courts have jurisdiction over business-related human rights abuses that occur in other countries. Because those suffering human rights abuses as a result of

⁵ Guiding Principles, at art. 3, para. 25 (commentary).

⁶ See 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 (“Effective grievance mechanisms play an important role in the State duty to protect....”).

⁷ See OECD Guidelines, at Preface, para. 9 and pt. II, sec. I.

⁸ Guiding Principles, at art. 3, para. 26 (commentary).

⁹ *Id.*, at art. 3, para. 27 (commentary).

¹⁰ *Kiobel v. Royal Dutch Petroleum Co. et al.*, 133 US 1659 (2013) (holding that the presumption against extraterritoriality applies to the Alien Tort Statute).

U.S.-funded projects abroad may have few other options for recourse, strengthening non-judicial grievance mechanisms must also be a priority for the U.S. government in order to provide access to effective remedy to those suffering serious human rights abuses. An essential component of the U.S. NAP should therefore be the creation and maintenance of accessible, effective, and fair non-judicial grievance mechanisms.

Non-judicial grievance mechanisms can ensure that there is accountability for human rights violations resulting from corporate misconduct or U.S. financial and technical support of international projects. The U.S. NAP should include a plan to create non-judicial grievance mechanisms in institutions where they are non-existent and reform existing mechanisms to lower barriers to access, increase transparency, and institute financial or other remedial elements into the framework of these mechanisms in order to compensate for harms that have occurred. Accountability Counsel's recommendations regarding non-judicial grievance mechanisms are based on our analysis of particular institutions that require additional action and reform in order to provide access to effective remedy.

II. Operationalizing Access to Remedy

In 2011, the United States endorsed the Guiding Principles, which require states to protect against human rights abuses by businesses through effective policies, legislation, regulations, and adjudication. The third pillar of the Guiding Principles requires States to ensure that when abuses do occur, those affected have access to effective remedy,¹¹ through both judicial and non-judicial means.¹² To ensure that non-judicial grievance mechanisms are effective, they should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.¹³ Furthermore, the OECD Guidelines call on adhering States to establish NCPs that will serve as dispute resolution mechanisms to handle 'specific instances' of alleged breaches of the Guidelines.¹⁴

The United States is not currently meeting its obligations under the Guiding Principles and the OECD Guidelines. Although the government has made strides in the last five years to improve its existing non-judicial grievance mechanisms, these mechanisms have remaining weaknesses, including procedural pitfalls that prevent them from serving as forums for access to effective remedy for business-related human rights abuses. Furthermore, some U.S. government entities that finance, support, or facilitate business-related human rights abuses abroad lack non-judicial grievance mechanisms, leaving affected communities without a forum to access remedy. The following sections outline specific actions that should be included in the U.S. NAP to ensure access to effective remedy for harms resulting from U.S. investments and U.S. corporate actions.

¹¹ Guiding Principles, at art. 3, para. 25.

¹² *Id.* at art. 3, para. 27.

¹³ *Id.* at art. 3, para. 31.

¹⁴ *See* OECD Guidelines, at pt. II, sec. I, para. 1 and pt. IV, para. 46 (commentary).

A. U.S. National Contact Point

In line with its obligations under the OECD Guidelines, the United States maintains an NCP to further the effectiveness of the Guidelines.¹⁵ However, serious limitations in the U.S. NCP's current procedures for handling specific instances prevent it from serving as an effective remedial mechanism for corporate human rights abuses.

In particular, the U.S. NCP's strict confidentiality rule, which is an outlier compared to the rules of other NCPs, unnecessarily restricts the transparency of the mechanism and deters groups, which themselves operate transparently, from filing complaints. The NCP expects both parties to keep all matters relating to complaints confidential, including requiring the party filing the complaint to keep the text of its complaint secret. A breach of confidentiality can lead to discontinuation of the process.¹⁶

Additionally, the U.S. NCP's current procedures do not give it the authority to investigate complaints, make findings of fact, or draw conclusions as to whether the OECD Guidelines have been violated. Investigations and compliance findings can prompt companies to improve their corporate practices and can play an important role in remedying human rights abuses. High performing NCPs in other countries have such authority,¹⁷ indicating that nothing in the Guidelines precludes the U.S. government from empowering the U.S. NCP to take such steps. By neglecting to provide these services, the U.S. NCP fails to ensure access to effective remedy for business-related human rights abuses and fails to follow best practices for NCPs.

Affected communities also face great obstacles in accessing and effectively addressing their concerns through the U.S. NCP.¹⁸ For example, the U.S. NCP does not guarantee that services will be available in a foreign language or that it will pay for translations when a requestor is not fluent in English, thus limiting the ability of non-English speaking communities to access the NCP process. Furthermore, the U.S. NCP's procedures do not set forth a clear process that it will follow when there are parallel legal proceedings.¹⁹ This ambiguity threatens the mechanism's predictability, transparency, and legitimacy, and fails to live up to the policy and practice of the best-performing NCPs around the world.²⁰

¹⁵ *Id.*, at pt. II, sec. I, para. 1.

¹⁶ U.S. Department of State, *U.S. NCP Procedures for Specific Instances Under the OECD MNE Guidelines* (Nov. 2011), available at <http://www.state.gov/e/eb/oeecd/usncp/links/rls/166661.htm> (hereinafter "U.S. NCP Procedures").

¹⁷ The United Kingdom and Norwegian NCPs, for example, conduct investigations and make determinations as to whether a party to an NCP complaint has breached the OECD Guidelines. See Norwegian NCP Procedures at p. 9, available at http://www.regjeringen.no/upload/UD/Vedlegg/ncp/complaints_guidelines.pdf; U.K. NCP Procedures at 5.1, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31822/11-1092-uk-ncp-procedures-for-complaints-oe.cd.pdf.

¹⁸ See Guiding Principles, at art. 3, para. 31.

¹⁹ *U.S. NCP Procedures*, available at <http://www.state.gov/e/eb/oeecd/usncp/links/rls/166661.htm>.

²⁰ For example, the United Kingdom NCP specifies that it will hear complaints even where there are on-going parallel proceedings unless it is necessary to suspend a complaint to avoid serious prejudice to a party in that parallel proceeding. 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>. This policy is preferable to the current U.S. NCP procedures because it stresses that the NCP will seek to play a

Recommendations: The U.S. NAP should include a rights-based approach to reforming the NCP’s procedures, with a view to ensuring that it is providing access to effective remedy for business-related human rights abuses and encouraging corporate actors to take preventative and remedial measures in the face of potential and actual abuses. Specifically, the NCP should strive to be more transparent in its operations, including by allowing parties to publish their complaints. The NCP’s procedures should be revised to empower the U.S. NCP to make findings of fact and determinations of compliance with the OECD Guidelines, as well as recommendations for bringing projects into compliance. The U.S. NCP should take steps to make its office more accessible to vulnerable communities abroad, including by guaranteeing translation services and other necessary assistance to enable proceedings to be conducted in the language in which requestors are most comfortable. Finally, the NCP should adopt a parallel proceedings policy that will ensure that it provides a forum for access to effective remedy in all cases in which doing so will not interfere with formal legal proceedings.

B. The Overseas Private Investment Corporation’s Office of Accountability

The Overseas Private Investment Corporation (“OPIC”) is the U.S. government’s development finance institution, working with the U.S. private sector to help U.S. corporations gain a foothold in emerging markets while supporting development abroad. OPIC-supported projects have a broad range of impacts for communities living on or near project sites.²¹ This is particularly consequential in light of the September 2014 review by OPIC’s Office of Accountability (“OA”), which revealed that OPIC has serious institutional deficiencies and accountability gaps that contribute to project failure and harm on the ground.²² Yet, OPIC has displayed a lack of concern with providing access to effective remedy to project-affected people.²³

Although OPIC took the initial step (under Congressional guidance²⁴) of establishing the OA to receive complaints from project-affected people, the OA: (1) has not been able to provide objective and unbiased services to affected communities; (2) maintains high procedural

useful role in resolving disputes wherever possible and does not force complainants to choose among paths for seeking remedy for their injuries.

²¹ See Accountability Counsel and Green Advocates International, *Fueling Human Rights Disasters: An examination of the U.S. Overseas Private Investment Corporation’s Investment in Buchanan Renewables* (Jan. 22, 2014), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2013/02/Fueling-Human-Rights-Disasters-smaller-file.pdf>.

²² OPIC, *OA Review: Buchanan Renewable Energy Projects in Liberia* (Sept. 2014), available at [http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report\(1\).pdf](http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report(1).pdf) (hereinafter “OA Review”).

²³ Even where OPIC has acknowledged the severity of allegations arising from projects it has funded, it has not gone as far as to say that affected communities should be provided with access to remedy where human rights abuses are found. See OPIC Office of Accountability, Memorandum from Elizabeth Littlefield, President, OPIC to Keith Kozloff, Director (Feb. 20, 2014), available at <http://www.opic.gov/sites/default/files/files/ELL%20request%20memo.pdf>.

²⁴ See House of Representatives Report 108-339 for the Overseas Private Investment Corporation Amendments Act, 2003, Pub.L. 108-158 (directing OPIC to create an accountability mechanism that is “responsive to stakeholders’ considerations ...[.] accessible to project-affected parties; and insure the independence and integrity of the evaluations and advice provided...”).

requirements for filing complaints thus effectively barring many affected people from accessing remedies through the OA accountability process; and (3) is currently completely unstaffed.

The OA has failed to provide objective and unbiased problem-solving and compliance review services,²⁵ thereby preventing communities from accessing fair, equitable, and effective remedy through the OA process.²⁶ While the OA Operational Guidelines state that objectivity “by avoiding pre-conceptions” is one of its guiding principles,²⁷ significant risk of bias has been institutionalized at the OA through the office’s practice of having the same person conduct both the problem-solving and compliance review functions for each complaint. The OA Director, who is in charge of both of these functions, is likely to form opinions and pre-conceptions during the course of a problem-solving exercise, which may lead to bias and inequitable outcomes when he or she subsequently conducts a compliance review.

A case brought by Accountability Counsel on behalf of three communities in Oaxaca, Mexico, highlights the dangers of this practice. In that case, the OA acknowledged that it relied on observations it had made during dispute resolution site visits to reach substantive compliance-related conclusions.²⁸ The OA not only formed inappropriate opinions while serving as a “neutral” problem-solving facilitator, but also allowed these opinions to form the basis of subsequent compliance findings. Such institutionalized bias damages the legitimacy and equity of the mechanism and inhibits an effective remedial process.

In addition, the OA’s procedural requirements limit the time frame in which requests for compliance review can be filed, making complaints ineligible when they are filed after an OPIC loan has been fully paid back or after an insurance contract is terminated.²⁹ This restriction allows OPIC clients to escape liability by repaying their loans to OPIC and denies remedy for many communities facing harm from OPIC projects – harm that may not become apparent until after a project has been completed and OPIC’s loan has been repaid.

For example, between 2008 and 2011, OPIC approved three loans to biomass company Buchanan Renewables (“Buchanan”), totaling U.S. \$216.7 million. Buchanan systematically

²⁵ The OA offers two types of services: problem-solving and compliance review. During the problem-solving process, the OA seeks to resolve conflicts between affected communities and OPIC clients by facilitating a dialogue. In a compliance review, the OA investigates and reports on OPIC’s implementation of its own relevant policies. See OPIC, *A Guide for Communities and Other Affected Parties*, <http://www.opic.gov/who-we-are/office-of-accountability/a-guide-for-communities> (last visited Jan. 14, 2015).

²⁶ See Case Study on the OPIC Office of Accountability: Bias, Cultural Insensitivity, and Lack of Transparency within the Mechanism (Apr. 12, 2012), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2013/03/4.12.12-OPIC-OA-problems-in-Mexico-case.pdf> (detailing instances in which the OA Director openly favored one party and criticized the decisions of another while facilitating a problem-solving process); Comments on the OPIC Office of Accountability Draft Operational Guidelines Based on Experience from the Cerro de Oro Case (Oct. 18, 2013), <http://www.accountabilitycounsel.org/wp-content/uploads/2013/08/OPIC-OA-Review-Cerro-de-Oro-Letter.pdf>.

²⁷ OPIC, *OPIC OA Operational Guidelines Handbook for Problem-Solving and Compliance Review Services*, (2014), §3.2 (hereinafter “OPIC OA Operational Guidelines”).

²⁸ OPIC, *Cerro de Oro Hydroelectric Project Compliance Review Appraisal Report* (Apr. 27, 2012), pp. 11-12, available at http://www.opic.gov/sites/default/files/docs/042712-cerrodeoroappraisalreport-english_0.pdf.

²⁹ *OPIC OA Operational Guidelines* at §4.2.2.

failed to provide workers with adequate protective equipment and safety training and failed to pay some workers. The company took no action to prevent male supervisors from sexually exploiting female workers or when Buchanan-employed managers abused subsistence charcoal producers by demanding bribes – or sex from women – to access wood the company had promised to give them for free. Furthermore, indigenous, smallholder farmers who had subsisted on income from their rubber trees were left struggling to satisfy basic needs and some were left worse off than if the project had never existed.³⁰

The project ultimately failed, and Buchanan abruptly withdrew from the project area in early 2013, devastating local communities who were once self-sustaining and leaving adults and children with dirty drinking water that is contaminated to this day. To date, the Liberians who were harmed by this project have never received any redress or compensation for the injuries they have suffered. The affected communities in Liberia wished to file a complaint, but found that their complaint would be ineligible for the OA process simply because OPIC's loans had been paid in full when Buchanan withdrew from the project.

Despite the limitations in the OA's rules, complainants submitted a complaint directly to OPIC's President and CEO, which coincided with a public campaign and efforts to mobilize Congressional support. OPIC's President and CEO then directed the OA to conduct a review of the impacts of OPIC's investment in Buchanan, even though the OA was not required to investigate the complaint under its Operating Procedures. This review, released in September 2014,³¹ identified numerous institutional deficiencies and accountability gaps at the agency and found credible evidence that serious human rights abuses had occurred. If OPIC's President and CEO had not directed the OA to conduct the review, essentially using her discretion to overrule the OA's Operating Procedures, there would have been no reporting on OPIC's failures and the harms suffered by the Liberian communities. Major procedural barriers such as this abrupt filing cut-off period prevent victims of serious human rights abuses from accessing remedy through the OA in a predictable manner.

Additionally, since September 2014, the OA has been completely unstaffed, leaving communities harmed by OPIC-supported projects without an independent office to receive their complaints. The OA Director, who is the only dedicated personnel assigned to the OA, left OPIC after completing his term.³² OPIC has yet to hire for the Director position. Congressional leaders have called on OPIC to undertake an open and competitive hiring process to fill the vacancy and have given OPIC 90 days to inform Congress of its plans to address the findings and recommendations in the OA's September 2014 review of the failed project in Liberia.³³

³⁰ More information on this case is available at <http://www.accountabilitycounsel.org/communities/current-cases/liberia-biomass-project-of-buchanan-renewables/>. See also *OA Review*, available at [http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report\(1\).pdf](http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report(1).pdf).

³¹ *OA Review*, available at [http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report\(1\).pdf](http://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report(1).pdf).

³² See OPIC, *OA Director's Fiscal Year 2014 Letter* (Sept. 19, 2014), available at <http://www.opic.gov/sites/default/files/files/oa-director-letter-fy14.pdf>.

³³ "Explanatory Statement Regarding the House Amendment to the Senate on H.R. 83." Congressional Record 160: 151 (Dec. 11, 2014) p. H9954. See Consolidated and Further Continuing Appropriations Act, 2015 (Pub.L. 113-235), §4 (2015).

Nevertheless, Liberian communities must still cope with the negative consequences of the project and have not seen any change on the ground as a result of this process. Despite the significant findings in the September 2014 review and the subsequent Congressional interest in institutional reforms at OPIC, the agency has refused to consider providing remedy for affected Liberians. Nor, to our knowledge, does it have plans to reform the OA or create a related redress process that would allow it to identify and provide appropriate remedy in future cases in which communities suffer harm as a result of OPIC-supported projects.

Recommendations: In the process of developing the NAP, the U.S. government should include plans to reform the OA in order to ensure that communities affected by OPIC-financed projects are afforded access to remedy that is legitimate, accessible, predictable, equitable, transparent, and rights-compatible, in line with the Guiding Principles. Specifically, the OA should change its policies and practices to promote objectivity and remove opportunities for the mechanism to be swayed by bias, ensuring that its remedial services are legitimate and equitable. In order to increase accessibility, the OA should extend the eligibility cut-off period for complaints and eliminate other complex procedural barriers.

The NAP also provides an opportunity to ensure that OPIC's plans for addressing the findings and recommendations in the OA's September 2014 review are aligned with the government's broader efforts to realize the Guiding Principles. As a part of OPIC's reform, the government should also encourage the agency to develop a framework through which funds or other methods of redress are available to communities when harms are found. This framework, which may involve a bond or insurance arrangement with OPIC clients, should be developed through a transparent public consultation process.

C. U.S. Export-Import Bank

For the 2014 fiscal year, the U.S. Export-Import Bank ("Ex-Im"), which promotes U.S. goods and services in international markets by providing export-financing products to U.S. companies, had a total exposure of U.S. \$112 billion, thus enabling U.S. exporters to reach the markets of over 178 countries.³⁴ Although Ex-Im has the potential to cause serious human rights abuses through its products,³⁵ Ex-Im has no non-judicial grievance mechanism explicitly dedicated to addressing community complaints about Ex-Im-supported projects and capable of providing access to effective remedy for harm that results from its projects.³⁶

³⁴ Ex-Im Bank, *2014 Export-Import Bank Annual Report*, p. 51, available at

http://www.exim.gov/about/library/reports/annualreports/2014/upload/EXIM-2014-AR_WEB.pdf.

³⁵ For example, Pacific Environment, a San Francisco based environmental organization, forecasts that Ex-Im's financing of ExxonMobil's Papua New Guinea Liquefied Natural Gas Project will have deleterious effects on the health of indigenous groups, lead to an increase in violence, and force involuntary resettlement. Pacific Environment, *ExxonMobil's Papua New Guinea LNG Project* (Jul. 30, 2014), available at <http://pacificenvironment.org/article.php?id=3189>.

³⁶ The Ex-Im's OIG has a mission "to conduct and supervise audits, investigations, inspections, and evaluations related to agency programs and operations; provide leadership and coordination as well as recommend policies that will promote economy, efficiency, and effectiveness in such programs and operations; and prevent and detect fraud, waste, abuse, and mismanagement." The OIG Export-Import Bank of the United States, *Report on the PNG LNG Project Financing* (June 18, 2014), available at <http://www.exim.gov/oig/upload/PNG-LNG-INSPECTION->

Although the Ex-Im Office of Inspector General (“OIG”) engages in certain project review and investigative functions, independent accountability mechanisms, such as OPIC’s OA, are distinct from the functions of an OIG, which focuses on financial problems, such as fraud, waste, and abuse, and internal economy, efficiency, and effectiveness. There are serious concerns about the effectiveness or ability of an OIG in performing the specialized functions of an accountability mechanism.

Recommendations: Given the tremendous reach of Ex-Im and the potential impact it has on communities through its supported projects, the U.S. NAP should include plans to develop a dedicated grievance mechanism at Ex-Im in accordance with the Guiding Principles to ensure that individuals harmed by Ex-Im supported activities have access to effective remedy.

D. FY2015 Appropriations Legislation and IFI-related Provisions

As the largest contributor to IFIs,³⁷ the United States possesses substantial influence over IFI policy and practice through its voting rights. As an IFI member State with considerable weight, the United States should ensure and support remedial action by using its leverage vis-à-vis each IFI of which it is a member.

The recently enacted FY2015 Appropriations legislation contains a number of provisions related to accountability at IFIs, requiring that their activities be monitored and subjected to effective safeguards against harm to communities and the environment. For example, the legislation requires the U.S. Department of Treasury to oppose any World Bank policy that provides less protection than the Bank’s current environmental and social safeguard requirements. It also requires the U.S. representative at the World Bank, under the instruction of the Secretary of the Treasury, to vote against any new loans or grants if the Bank weakens its safeguards. Furthermore, the Secretary of Treasury must instruct the U.S. representative at each IFI to seek that the IFI conducts “rigorous human rights due diligence and human rights risk management.”³⁸

This legislation’s focus on the importance of environmental and human rights in U.S. policy towards IFIs is noteworthy, but the new provisions also create several additional IFI-related requirements for the Department of Treasury, adding to a list of mandates that have been enacted over the years. It is unclear whether there is a comprehensive, well-planned strategy that comprises these mandates and serves as the foundation for their implementation. The NAP process may be an opportunity to streamline Treasury’s approach toward IFIs and their accountability mechanisms and ensure that it is aligned with the government’s broader efforts to realize the Guiding Principles.

[REPORT-508-Final-Redacted-2.pdf](#). The OIG, however, never previously addressed concerns or complaints regarding environmental or social harm arising from projects funded by Ex-Im. 5 U.S.C. app. 3 §4(a)(3) (1978).

³⁷ See Rebecca M. Nelson and Martin A. Weiss, Congressional Research Service, *Multilateral Development Banks: How the United States Makes and Implements Policy* (Apr. 29, 2014).

³⁸ Consolidated and Further Continuing Appropriations Act, at §7029(d).

Furthermore, despite the law's attention to environmental and human rights, it fails to address the role of the U.S. government in ensuring that IFIs have the proper procedures and tools in place to ensure access to effective remedy to communities when abuses occur. The FY2014 Appropriations legislation required the U.S. representative of each IFI "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."³⁹ Those provisions were absent from the FY2015 Appropriations legislation, and IFI accountability mechanisms still fall short when it comes to actually providing or requiring remedial action, leaving communities that have suffered harms without any form of substantive and/or tangible redress to compensate for their sufferings.

Recommendations: The U.S. government should take the opportunity through the NAP development process to assemble a consistent, structured U.S. agenda on IFIs that continues to promote and protect environmental and human rights and ensures that communities have adequate access to remedy for harm resulting from IFI-supported projects. In addition, in developing the NAP, the U.S. government should direct its IFI representatives to urge those institutions to take necessary remedial action in cases in which IFI projects fail to comply with social and environmental safeguards,⁴⁰ withhold approval of inadequate remedial action plans that fail to address instances of noncompliance,⁴¹ and stop disbursements or other support for projects or borrowers that are failing to take needed remedial action.⁴²

In particular, the NAP should include the adoption of a policy and development of a plan to coordinate with other IFI member States. This is necessary in order to ensure that IFIs themselves and/or parties seeking IFI support are willing and able to respond to the findings of IFI accountability mechanisms by providing compensation or similar forms of redress to those who suffer human rights violations resulting from IFI projects.

³⁹ U.S. Consolidated Appropriations Act, 2014 (Pub.L. 113-76), §7029(e) (2014) (emphasis added).

⁴⁰ 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).

⁴¹ 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.*, International Finance Corporation and Multilateral Investment Guarantee Agency, *CAO Operational Guidelines* (2013), at § 4.4.5, available at http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf; Inter-American Development Bank, *Policy of the Independent Consultation and Investigation Mechanism* (2014), at para. 49, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39313644>; Asian Development Bank, *Accountability Mechanism Policy 2012*, at paras. 190-191, available at <http://www.adb.org/sites/default/files/accountability-mechanism-policy-2012.pdf>.

⁴² 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>.

III. Conclusion

By endorsing the Guiding Principles, the U.S. government has committed to the principle of access to effective remedy. Moreover, by subscribing to the OECD Guidelines, the United States has committed to maintaining an NCP that can effectively address allegations of business conduct that is inconsistent with the corporate responsibility to respect human rights. To fulfill these commitments, the United States must establish non-judicial grievance mechanisms at funding agencies where they are lacking and implement key reforms at existing mechanisms, such as the U.S. NCP and the OPIC OA. As outlined above, necessary reforms include: expanding the breadth of claims that are covered by such mechanisms; expanding the tools and opportunities for recourse available at these mechanisms; ensuring legitimate, equitable, and predictable processes through clear procedures; increasing transparency; and instituting a coordinated strategy toward IFIs based on environmental and human rights protections and access to effective remedy.

Accountability Counsel urges the U.S. government to ensure that the NAP prioritizes these steps towards full implementation of the Access to Remedy pillar of the Guiding Principles and its obligations under the OECD Guidelines. Our clients around the world who have been harmed by U.S.-funded projects and U.S. business conduct are depending on these changes in order to secure effective remedy.

Thank you for the opportunity to contribute to the NAP development process. We look forward to engaging in further dialogue on business and human rights issues throughout this process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kindra Mohr', with a long horizontal flourish extending to the right.

Kindra Mohr
Policy Director
Accountability Counsel