

**Submission to the United Nations Regarding United States Human Rights Obligations
Under the UN Guiding Principles for Business and Human Rights**

Accountability Counsel
accountabilitycounsel.org

September 15, 2014

I. Executive Summary

1. Accountability Counsel submits this report to highlight the actions the United States government must take to fully implement the Access to Remedy pillar of the U.N. Guiding Principles on Business and Human Rights (the “Guiding Principles”). The Access to Remedy pillar calls for States to take appropriate steps to redress business-related human rights abuses, including creating non-judicial grievance mechanisms¹ for affected communities to voice their complaints.
2. International development projects run by U.S. corporations or funded by the U.S. government, either directly or through its participation in International Financial Institutions (“IFIs”) such as the World Bank, have a tremendous impact on local communities, both in the U.S. and abroad. However, access to effective remedy for harm caused by these projects is currently lacking or inadequate to meet the objectives of the Access to Remedy pillar of the Guiding Principles. Non-judicial grievance mechanisms can provide communities suffering from business-related human rights abuses caused by internationally financed projects with a forum for accessing remedy. To fulfill its obligations under the Guiding Principles, the U.S. should create non-judicial grievance mechanisms in institutions where they do not exist and reform existing mechanisms to lower barriers to access and increase transparency. Furthermore, the U.S. should take all necessary steps to implement and support the remedial action needed to address findings by IFI non-judicial grievance mechanisms, referred to as independent accountability mechanisms (“IAMs”). These recommendations are illustrated below through analysis of particular institutions that require additional action and reform by the U.S. government in order to provide effective access to remedy.

II. Access to Effective Remedy for Communities Affected by U.S.-Financed Projects

3. In 2011, the U.S. endorsed the Guiding Principles, which require states to protect against business-related human rights abuses 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,² including through non-judicial means.³ To ensure that non-judicial grievance mechanisms are effective, they should be legitimate,

¹ Non-judicial grievance mechanisms are formal complaint processes outside of the legal system through which aggrieved parties can seek redress for their injuries.

² United Nations Guiding Principles on Business and Human Rights, art. 3, para. 25.

³ *Id.* at art. 3, para. 27.

accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.⁴

4. Projects funded by the U.S. government or run by U.S. corporations are routinely linked to human rights abuses occurring internationally. Under the framework established in the Guiding Principles, these stakeholders share responsibility for wrongdoing through actions that cause, contribute to or are directly linked to abuses on the ground. As such, it is essential that the U.S. government take steps towards providing remedies for business-related abuses at home and abroad.
5. The ability of international communities suffering from business-related human rights abuses to access effective non-judicial grievance mechanisms is particularly critical in light of the April 2013 *Kiobel v. Royal Dutch Petroleum* decision by the U.S. Supreme Court, which places significant restrictions on foreign citizens' ability to seek recourse in U.S. courts for business-related human rights abuses that occur abroad.⁵ Therefore, strengthening non-judicial grievance mechanisms should be a priority for the U.S. to fully implement the Guiding Principles and ensure that those suffering from serious human rights abuses are provided with access to effective remedy.
6. The U.S. is not currently meeting its obligations under the Guiding Principles. Although it has made strides in the last four and a half years to improve its non-judicial grievance mechanisms, these mechanisms have remaining weaknesses that prevent them from being a forum for provision of effective remedy for business-related human rights abuses. The following sections outline specific actions that the U.S. should take to provide access to effective remedy for abuses resulting from U.S. investments and U.S. corporate actions.

A. US Export-Import Bank

7. For the 2013 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, approved loans and guarantees totaling over U.S. \$113.8 billion and enabled U.S. exporters to reach the markets of over 167 countries.⁶ Although Ex-Im-supported projects have been associated with serious human rights abuses,⁷ Ex-Im does not have a non-judicial grievance

⁴ *Id.* at art. 3, para. 31.

⁵ See *Kiobel v. Royal Dutch Petroleum Co. et al.*, 133 U.S. 1659 (2013) (holding that the presumption against extraterritoriality applies to the Alien Tort Statute). Following *Kiobel*, it is unclear under what circumstances U.S. courts have jurisdiction over business-related human rights abuses that occur in other countries.

⁶ 2013 EXPORT-IMPORT BANK ANN. REP., 31, available at <http://www.exim.gov/about/library/reports/annualreports/2013/annual-report-2013.pdf>.

⁷ For example, the Ex-Im financed Papua New Guinea Liquefied Natural Gas Project has received criticism for unsafe mining practices in contravention of international standards, which may have contributed to a deadly landslide at the project site. *ExxonMobil's New Guinea Nightmare*, THE NATION (April 30, 2014), available at <http://www.thenation.com/article/179618/exxonmobils-new-guinea-nightmare?page=0,3>. See also *ExxonMobil's Rocky Road to LNG Project in Papua New Guinea - video*, THE GUARDIAN (April 30, 2014), available at <http://www.theguardian.com/environment/video/2014/may/01/exxon-mobil-rocky-road-lng-papua-new-guinea-video>. The project has also been accused of causing increased violence in the area surrounding the project site, force

mechanism dedicated to addressing community complaints about such projects and capable of providing access to effective remedy.⁸

8. **Recommendation:** Given Ex-IM's tremendous reach and potential to impact the lives of individuals affected by projects it supports, the U.S. government should develop an Ex-Im grievance mechanism in accordance with the Guiding Principles to ensure that communities experiencing human rights abuse related to Ex-Im-supported projects have access to effective remedy.

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

9. The Overseas Private Investment Corporation ("OPIC") helps U.S. corporations gain footholds in emerging markets, and helps to promote the social and economic development of less developed countries, by providing financing, guarantees, and political risk insurance to investors. Following a Congressional mandate to do so,⁹ OPIC took an initial step towards addressing potential human rights abuses associated with the projects that it supports by establishing a non-judicial grievance mechanism to receive complaints from project-affected people.¹⁰ However, this mechanism, called the Office of Accountability ("OA"), has overly burdensome procedural requirements for filing complaints that prevent many affected people from accessing remedy through the OA process.
10. For example, the OA limits the time frame in which complaints can be filed, refusing to accept complaints that are filed after an OPIC loan has been fully paid back or after its insurance contract is terminated.¹¹ This restriction allows OPIC clients to avoid accountability by repaying their loans and denies access to remedy to many communities facing human rights abuses from OPIC projects.

involuntary resettlement, and health concerns for local indigenous groups. *ExxonMobil's Papua New Guinea LNG Project*, PACIFIC ENVIRONMENT (July 30, 2014), available at <http://pacificenvironment.org/article.php?id=3189>.

⁸ Ex-Im does have an Office of Inspector General ("OIG"), whose mission is "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." *Report on the PNG LNG Project Financing*, OFFICE OF INSPECTOR GENERAL EXPORT-IMPORT BANK OF THE UNITED STATES (June 18, 2014), available at <http://www.exim.gov/oig/upload/PNG-LNG-INSPECTION-REPORT-508-Final-Redacted-2.pdf>. However, the OIG mandate does not include a goal of providing access to remedy for people who have suffered or fear human rights abuse from Ex-Im projects. Its founding documents are vague as to whether environmental and social harms fall within its purview. 5 U.S.C. app. 3 §4(a)(3) (1978).

⁹ House of Representatives Report 108-339 for the Overseas Private Investment Corporation Amendments Act of 2003, Pub.L. 108-158 ("The Committee encourages OPIC to follow the example of the best practices of [multilateral and bilateral financial] institutions and work with all stakeholders to establish an accountability mechanism and continue its `transparency initiative"), available at <http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1%28hr339%29>.

¹⁰ See OPIC website at <http://www.opic.gov/who-we-are/office-of-accountability>.

¹¹ OPIC OA Operational Guidelines Handbook for Problem-Solving and Compliance Review Services, §4.2.2 (2014) [hereinafter OPIC OA Operational Guidelines], available at http://www.opic.gov/sites/default/files/files/final_draft_OA_guidelines.pdf.

11. Between 2008 and 2011, OPIC approved three loans to Buchanan Renewables (“BR”), totaling U.S. \$216.7 million for a biomass project in Liberia. The project proposed to cut down rubber trees for biofuel, rejuvenating family farms and creating sustainable energy for Liberia. Instead, the project harmed its intended beneficiaries. As a result, in January 2014, hundreds of Liberian farmers, charcoal producers and workers filed a complaint to OPIC demanding redress for the serious human rights, labor and environmental abuses, including sexual abuse of local women by company employees, caused by the project.¹² The project ultimately failed and BR 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.
12. However, because BR abruptly closed the project and paid back its loans in early 2013, the complaint was not eligible for the OA process. After an extensive media campaign and efforts to mobilize congressional support, the President and CEO of OPIC directed the OA to “conduct a robust, independent internal review of OPIC’s overall experience with the project, in order to generate lessons that might be applied to future projects,” even though the OA was not required to investigate the complaint.¹³ Although complainants welcomed this step, they have continually been told by the OA that it is outside the mandate of the review for the OA to suggest any remedy for aggrieved parties or even determine whether any remedy is warranted. Thus, although some attempt is being made to investigate OPIC’s role in the abuses, the complainants are still being left without access to effective remedy for serious human rights abuses caused by a U.S.-funded project.
13. Additionally, the OA has exhibited a failure to provide an equitable and rights-compatible process, thereby preventing communities from accessing effective remedy.¹⁴ While the OA Operational Guidelines state that objectivity “by avoiding pre-conceptions” is one of its guiding principles,¹⁵ 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.¹⁶ 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.

¹² More information on this case is available at <http://www.accountabilitycounsel.org/communities/current-cases/liberia-biomass-project-of-buchanan-renewables/>.

¹³ Internal Memorandum, 1, OPIC Office of the President (Feb. 20, 2014), *available at* <http://www.opic.gov/sites/default/files/files/ELL%20request%20memo.pdf>.

¹⁴ See Case Study on the OPIC Office of Accountability: Bias, Cultural Insensitivity, and Lack of Transparency within the Mechanism, Accountability Counsel (April 12, 2012) (detailing instances in which the OA Director openly favored one party and criticized the decisions of another while facilitating a dialogue process), <http://www.accountabilitycounsel.org/wp-content/uploads/2013/03/4.12.12-OPIC-OA-problems-in-Mexico-case.pdf>.

¹⁵ OPIC OA Operational Guidelines at §3.2.

¹⁶ The OA offers two types of services: problem solving and compliance review. During problem solving, the OA seeks to resolve conflicts between affected communities and OPIC clients by facilitating a dialogue process. In a compliance review, the OA investigates and reports on OPIC’s implementation of its own relevant policies. See <http://www.opic.gov/who-we-are/office-of-accountability/a-guide-for-communities>.

14. A case brought by Accountability Counsel on behalf of three communities in Oaxaca, Mexico highlights the dangers of this policy. In that case, the OA acknowledged that it relied on observations it had made during problem-solving site visits to reach substantive compliance-related conclusions.¹⁷ 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 his subsequent compliance findings. Such institutionalized bias damages the legitimacy and equity of the mechanism and inhibits an effective remedy process.
15. **Recommendations:** The U.S. government should reform the OA to ensure that communities affected by OPIC-supported projects have access to remedy that is legitimate, accessible, predictable, equitable, transparent and rights-compatible, in line with the Guiding Principles. Specifically, the OA should extend its cut-off period for accepting complaints and eliminate other complex procedural barriers, to ensure that people harmed by OPIC projects are able to access its services. The OA should additionally reform its policies to promote objectivity and reduce the risk of bias.

C. U.S. National Contact Point

16. Per the obligations set forth in the Organization for Economic Cooperation and Development (“OECD”) Guidelines for Multinational Enterprises (“the Guidelines”), the U.S. maintains a National Contact Point (NCP) to further the effectiveness of the Guidelines. The OECD Guidelines put forth recommendations on good corporate behavior, which NCPs are designed to promote. NCPs also accept complaints regarding Guidelines violations and many countries consider their NCPs as bodies that help implement their obligations under the Access to Remedy pillar of the Guiding Principles.¹⁸
17. The U.S. NCP suffers from serious limitations that prevent it from providing a forum for access to effective remedy for business-related human rights abuses. While the U.S. government has made significant improvements to the U.S. NCP since the last Universal Periodic Review, further reforms are needed to ensure it provides a forum for access to effective remedy for those suffering human rights abuses that are caused by U.S. multinational enterprises (“MNEs”) or to which they have contributed or been directly linked.
18. In particular, the U.S. NCP should have the authority to investigate complaints, make findings of fact and draw conclusions as to whether the Guidelines have been violated, as well as make recommendations regarding how to correct such violations. 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

¹⁷ See Comments on the OPIC Office of Accountability Draft Operational Guidelines Based on Experience from the Cerro de Oro Case, Accountability Counsel (Oct. 18, 2013), <http://www.accountabilitycounsel.org/wp-content/uploads/2013/08/OPIC-OA-Review-Cerro-de-Oro-Letter.pdf>.

¹⁸ U.S. Government on Business and Human Rights: Letter to the UN Working Group, A.2.f, Dan Baer, Deputy Assistant Secretary, Bureau of Democracy, Human Rights and Labor (Dec. 10, 2012), available at <http://www.humanrights.gov/2012/12/10/u-s-government-on-business-and-human-rights-letter-to-the-un-working-group/>.

authority,¹⁹ indicating that nothing in the Guidelines precludes the U.S. government from empowering the U.S. NCP to take such steps.

19. Additionally, affected communities face great obstacles in accessing and effectively addressing their concerns through the NCP process. The U.S. NCP does not specify whether it will provide services in a foreign language or pay for translations when a requestor is not fluent in English. This severely limits the ability of many non-English speaking communities to access the NCP process.
20. Finally, the U.S. NCP's strict confidentiality rule, which is without parallel at other NCPs, unnecessarily restricts the transparency of the mechanism and deters groups that themselves operate transparently from filing complaints. The NCP further 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, and threatens to punish a breach of confidentiality by discontinuing the process.²⁰
21. **Recommendations:** The U.S. government should continue to reform the U.S. NCP to ensure that it can provide access to effective remedy for business-related human rights abuses. Specifically, its policy 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's policy should be reformed to make the office accessible to vulnerable communities experiencing human rights abuses caused by U.S. MNEs, or to which they have contributed or been directly linked, including by specifying that it will provide translation services and other necessary assistance to enable proceedings to be conducted in the language in which complainants are most comfortable. Finally, the U.S. NCP should strive to be transparent in its operations, including by allowing parties to publish their complaints.

D. 2014 U.S. Appropriations Bill

22. On January 17, 2014, President Obama signed the 2014 fiscal year appropriations bill into law. Attached to the bill was a rider that brings the U.S. closer to meeting the requirements of the Guiding Principles to provide access to remedy to communities suffering human rights abuse from U.S.-supported projects. The rider requires that the U.S. refrain from funding IFIs that do not require independent evaluations of all their projects.²¹ The rider also requires the U.S. to

¹⁹ 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-oecd.pdf.

²⁰ U.S. NCP Procedures for Specific Instances Under the OECD MNE Guidelines (Nov. 2011),], available at <http://www.state.gov/e/eb/oecd/usncp/links/rls/166661.htm>.

²¹ Consolidated Appropriations Act of 2014 §7029(a) (2014) ("None of the funds appropriated under title V of this Act should be made as payment to any international financial institution unless the Secretary of the Treasury certifies to the Committees on Appropriations that such institution has a policy and practice of requiring independent, outside evaluations of each project and program loan or grant and significant analytical, non-lending

ensure that IFIs respond to the findings of their accountability mechanisms by providing just compensation or other forms of redress to victims of human rights abuses resulting from IFI-supported projects.²² Effectively, this language requires the U.S. to play an active role in ensuring that accountability mechanisms are a forum for provision of effective remedy for human rights violations. Given the U.S.'s vast financial contributions to many of the largest IFIs, the rider can be a strong tool to influence IFIs to provide access to effective remedy to affected communities, in line with the requirements of the Guiding Principles.²³

23. Nonetheless, because the rider is part of an appropriations bill, the status of the rider after the bill expires on September 30, 2014 is unclear.
24. **Recommendation:** The U.S. should act immediately to turn the access to remedy provision of the 2014 Appropriations Act into permanent law.

III. Conclusion

25. By endorsing the U.N. Guiding Principles on Business and Human Rights, the U.S. has committed to the principal of access to remedy. To fulfill this commitment, the U.S. should establish effective non-judicial grievance mechanisms at funding agencies whose activities expose them to the risk of causing, contributing to or being directly linked to business-related human rights abuses. Where such mechanisms already exist, but are not currently able to provide access to effective remedy, the U.S. should implement key reforms. As outlined above, these include ensuring that these mechanisms are rights-compatible; expanding the breadth of claims that are covered and ensuring that the mechanisms are accessible to vulnerable communities in all regions from which complaints could be filed; expanding the tools and opportunities for recourse available at these mechanisms; ensuring legitimate, equitable and predictable processes through clear procedures; increasing transparency; and committing to providing access to remedy through permanent laws governing U.S. funding to IFIs.
26. Accountability Counsel urges the U.S. government to take these steps towards full implementation of the Guiding Principles. Our clients around the world who have been harmed by U.S.-funded projects are depending on these essential changes to secure access to effective remedy.

activity, and the impact of such loan, grant, or activity on achieving the institution's goals, including reducing poverty and promoting equitable economic growth, consistent with effective safeguards.”).

²² *Id.* at §7029(e) (“The Secretary of the Treasury shall instruct the United States executive director of each international financial institution 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.”).

²³ See Comments in Response to the United Nations Working Group on Business and Human Rights’ Public Consultation on National Action Plans to Implement the Guiding Principles on Business and Human Rights, Accountability Counsel (Sept. 1, 2014), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/9.1.14-Submission-to-OHCHR-on-NAPs.pdf>.