April 24, 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 of EarthRights International on the U.S. National Action Plan on Responsible Business Conduct

Dear Secretary Kerry:

EarthRights International (ERI) is pleased to submit these recommendations to the U.S. Government on its National Action Plan on Responsible Business Conduct.

ERI is a non-governmental organization based in Washington, DC, Lima, and Thailand that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. We have engaged heavily with the U.S. Government on policy matters addressing human rights abuses committed in the context of business operations, particularly with the relation to the evolving situation in Burma.

These comments are organized into three areas with which ERI has extensive expertise: transparency and access to information, land rights, and the right to a remedy. Broadly, our recommendations seek to lower barriers to access to justice, guide the U.S. Government toward actions that respect and protect human rights, and put information in the hands of affected communities that will enable them to protect and promote their own rights in the face of corporate wrongdoing.

Right to a Remedy

As an organization that represents communities in litigation against companies for human rights abuses, collaborates with U.S. and foreign lawyers to bring legal actions and develop accountability systems in various regions of the world, and regularly engages with the U.S. Government on issues of remedy and accountability, ERI is well placed to advise the U.S. Government on implementation of its obligations under Pillar III of the

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U.N. Guiding Principles. With this in mind, we recommend the National Action Plan should include the following measures on access to a remedy for human rights abuses:

Executive actions

1. Strengthen government-sponsored accountability, dispute resolution, and grievance mechanisms

Principle 27 of the U.N. Guiding Principles directs states to provide state-based non-judicial grievance mechanisms to fill in gaps in judicial remedies. The U.S. Government should strengthen its observance of Principle 27 by taking the following steps:

Strengthen the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises. The U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises (U.S. NCP) can entertain complaints in specific instances in which individuals or communities claim that a U.S. based company or a company operating in the U.S. has been operating in a way that is inconsistent with the OECD Guidelines. The NCP may offer to mediate a solution between the parties, and it may also issue a Final Statement that, under current U.S. NCP rules, is limited to describing the process of mediation and the extent to which both parties engaged in the process.

The U.S. NCP's handling of complaints in specific instances has been criticized broadly. Some of those criticisms – in particular, a failure to handle complaints in a timely manner, lack of transparency and predictability, the near-complete neglect of Final Statements, and a reluctance to engage forcefully with companies – have been at least partly remedied in recent years. However, due to policies the U.S. Government has enacted (or failed to enact) that constrain both the NCP's activities and the consequences of its actions, this mechanism still has a long way to go before it will be an effective avenue for resolving human rights-related disputes between communities and companies.

We recommend that the U.S. Government adopt the following policies, which could bring the U.S. in line with best practice among OECD NCPs:

- Direct the NCP to make factual determinations – to the best of its ability – as to whether companies' conduct is consistent with the OECD Guidelines, and include such determinations in their Final Statements. This requires ensuring that the NCP has sufficient resources to enable proper fact-finding.[1]

[1] Fact-finding by NCPs is regarded as a good practice for NCPs. *See* OECD WATCH, ASSESSMENT OF NCP PERFORMANCE IN THE 2013-2014 IMPLEMENTATION CYCLE (June 2014). Although many NCPs do not engage in fact-finding, OECD Watch found, for example, that a joint agreement involving ArcelorMittal was aided by the joint fact-finding mission conducted by the UK, Norwegian, and Luxembourg NCPs. *Id.* at 16.

- Lift the U.S. NCP's strict confidentiality requirements, which prevent complainants from even making public the text of their complaint against a company and serve as a deterrent for communities, trade unions, and civil society organizations that have a responsibility of transparency to their constituents.
- Review possibilities for attaching consequences to a determination of non-compliance with the OECD Guidelines or a company's decision not to engage in good faith in mediation over a substantiated specific instance claim.[2] Some OECD countries require companies seeking export credit assistance, political risk insurance, and other forms of state-based financial aid to certify their compliance with the OECD Guidelines.[3] Such clauses could be made a part of the contracts they sign with the Ex-Im Bank or OPIC, and could have third-party beneficiary clauses giving enforcement rights to affected communities. Other possibilities include loss of access to trade promotion services or trade preferences.

Create grievance mechanisms for all U.S. agencies that are involved in business activities abroad. To ERI's knowledge, the only corporate-facing U.S. agency that has a grievance mechanism that is available to communities and individuals affected by the human rights impacts of a beneficiary company's operations is the Overseas Private Investment Corporation (OPIC). OPIC is, however, not the only agency that provides assistance to corporations in ways that could result in negative human rights impacts. In the international context alone, the U.S. Ex-Im Bank, the U.S. Department of Commerce, and USAID all work with and through companies in ways that could produce serious

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[2] In Canada, companies that refuse to participate in the NCP process will face withdrawal of the Canadian Trade Commissioner Service and other government advocacy support abroad, including issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions. Government advocacy support will not be provided to companies that do not "embody CSR best practices." Additionally, a designation of non-compliance with CSR practices is a factor considered by Export Development Canada in determining whether to provide financing and support. *See* GOVERNMENT OF CANADA, *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*, Jan. 12, 2015, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

[3] For example, the Belgian Export Credit Agency incorporates the OECD Guidelines in its investment guarantees and all export credit guarantees. *See* REPORT BY THE CHAIR OF THE 2010 MEETING OF THE NATIONAL CONTACT POINTS, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 12 (2010). In the Netherlands, to apply for export credit insurance, companies must indicate their familiarity with the Guidelines and agree to their implementation. Government of the Netherlands, *Export Credit Insurance*, http://www.government.nl/issues/entrepreneurship-and-innovation/excport-credit-insurances-eci. In France, in order to receive export credits or investment guarantees companies must sign a declaration that they have "read and understood the OECD guidelines." Germany requires companies to affirm awareness of the OECD guidelines as part of the application process for investment guarantees, while foreign investors in Slovenia who apply through the public tender process must declare they will comply with the Guidelines. *See* OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2014. Responsible Business Conduct by Sector, 83-88, (2014), http://www.oecd-ilibrary.org/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2014/activities-of-national-contact-points-for-the-oecd-guidelines-for-multinational-enterprises_mne-2014-4-en.

impacts on human rights. The Ex-Im Bank, for example, had to withdraw funding for a major Freeport McMoRan copper project in 1995 because of environmental protests.

None of these agencies has a formal grievance mechanism or dispute resolution/problem-solving office to which affected individuals or communities could apply for redress. At the same, various laws and judicial doctrines, such as sovereign immunity and limitations on the liability of financiers for the impacts of projects they fund, shield the U.S. Government and these agencies from accountability in court for the full measure of their responsibility under the U.N. Guiding Principles, leaving victims with no effective avenue to vindicate their rights.

The U.S. Government should review the operations of its various agencies and departments to ensure that non-judicial grievance mechanisms exist that recognize the responsibility of state investment and trade promotion agencies and contracting principles to mitigate the human rights impacts of corporate operations. These grievance mechanisms should be fully consistent with the effectiveness criteria set forth in the U.N. Guiding Principles. The U.S. Government should give consideration to the possibility of creating a consolidated "one-stop" grievance process for all such executive agencies.

Furthermore, a community's participation in a grievance mechanism or dispute resolution/problem-solving office should not preclude any individual members of the community who choose not to participate in the non-judicial process from seeking redress by other means. Likewise, as a matter of public policy, any agreements between a company and affected community or individual(s) to engage in a grievance mechanism should not contain unreasonable provisions precluding litigation. For example, parties should not be encouraged or required to waive their right to a judicial remedy in order to receive compensation or other benefits

Require concessions that lower barriers to remedy as conditions of U.S. Government assistance or contracts. The U.S. Government should consider incorporating provisions in the contracts it signs with companies that receive public assistance or procurement contracts that would lower barriers to an effective remedy in case of negative human rights impacts. We have already recommended above that the U.S. government require a commitment from corporations to abide by the OECD Guidelines for Multinational Enterprises, and the inclusion of third-party beneficiary clauses allowing affected communities to enforce that commitment.

In order to improve access to a remedy, such contracts and agreements could include, for example:

- Express assumption of liability by a U.S. entity – the parent company of a foreign operating subsidiary, for example – for claims arising out of alleged violations of internationally recognized human rights

- A commitment by companies not to invoke the *forum non conveniens* doctrine in future litigation, should it arise, over abuses alleged to have taken place in the country of operation
- For companies operating in high-risk sectors or zones where security is a particular concern, a contractual commitment to abide by the Voluntary Principles on Security and Human Rights

2. Announce interpretations of customary international law binding on the United States as declarations to treaties or statements of administration legal policy.

In the last decade, both the Executive Branch and some U.S. courts have interpreted customary international law in ways that are contrary to the prevailing international standards and have limited accountability for corporate-related human rights abuses. The U.S. Government should review its options to declare its interpretation of customary international law, much as it has done in the contexts of the international law of the sea[4] and international humanitarian law[5], on the following topics:

- The applicability of certain international human rights prohibitions – including the prohibitions on genocide, torture, war crimes, and crimes against humanity – to legal persons, affirming that these prohibitions apply to both natural and juridical persons.
- The proper *mens rea* for aiding and abetting and other forms of liability under customary international law, which is "knowing participation," i.e. knowledge that one's conduct will assist or contribute to the commission of a human rights violation.[6]

3. Renounce and counter the use of legal doctrines that immunize companies from liability in cases involving international human rights abuses.

In a number of cases in U.S. courts, this administration and past administrations have taken positions or actions that seek to insulate companies from liability for their

[4] Through policy papers, presidential statements, statements at the U.N. and the Freedom of Navigation program, the U.S. consistently advocates for the adherence to customary international law on the Law of the Sea, as is now reflected in the United Nations Convention on the Law of the Sea. , U.S. DEPARTMENT OF STATE, *Maritime Security and Navigation*, *at* http://www.state.gov/e/oes/ocns/opa/maritimesecurity/.
[5] The U.S. has not ratified the two Additional Protocols to the 1949 Geneva Conventions. However, the U.S. has publicly declared that significant portions reflect customary international law. LTC JEFF A. BOVARNICK ET AL., LAW OF WAR DESKBOOK 21-22 (MAJ Gregory S. Musselman ed., 2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf.
[6] *See* EARTHRIGHTS INTERNATIONAL, THE INTERNATIONAL LAW STANDARD FOR CORPORATE AIDING AND ABETTING LIABILITY: PRESENTED TO THE U.N. SPECIAL REPRESENTATIVE TO THE SECRETARY GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (July 2006), https://www.earthrights.org/sites/default/files/publications/UNSRSG-aiding-and-abetting.pdf; *Prosecutor v. Tadic*, Case No. SCSL-03-01-A, Judgment, ¶ 436 (Sept. 26, 2013).

complicity or direct participation in human rights abuses. For example, in *Kiobel v. Royal Dutch Petroleum*, the administration filed an amicus brief arguing that the Alien Tort Statute does not apply to certain classes of cases involving foreign defendants and plaintiffs.[7]. In a number of cases during the previous administration, the U.S. government submitted letters to the courts insisting that adjudication of international human rights claims was contrary to the foreign policy interests of the United States.[8] The administration should review these cases and commit to refraining from taking affirmative actions that would shelter companies from civil liability for human rights abuses.

In other cases, companies have sheltered behind doctrines that are meant to protect the government rather than private parties. In *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), for example, defendants argued that they were immune from suit because the preemption of tort law on the battlefield extends to military contractors. In other cases, companies have argued that human rights claims should be dismissed based on international comity, the political question doctrine, federal preemption, and other doctrines.[9] . The administration should review the means by which companies seek to avoid accountability and develop a strategy to counter them, either through intervention in cases, Letters of Interest, proclamations of executive policy, or legislative proposals.

4. Channel legal aid toward international human rights claims.

Human rights litigation – especially transnational litigation against major companies – is expensive, despite the availability of a number of funding arrangements such as contingency fee arrangements. This is a major barrier to the filing of meritorious litigation. The Legal Services Corporation could help to alleviate this shortfall by

[7] *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013) (No. 10-1491) (Opining that courts should apply doctrines such as forum non conveniens "at the outset of litigation, and in as expeditious a manner as possible, to ensure that foreign defendants are not subject to protracted legal proceedings in cases that are better litigated abroad.").

[8] *See* Brief for the United States as Amicus Curiae at 12, *Exxon Mobil Corp. v. Doe*, 554 U.S. 909 (2008) (No. 07-91) (opining that adjudication of respondents' state-law tort claims – murder, torture, sexual assault, battery, false imprisonment, and other torts – would interfere with the United States' conduct of foreign policy). See also Supplemental Brief for the United States of America, as Amicus Curiae at 4, *Doe I v. Unocal Corp*., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628) (arguing that "[i]t would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-a[-]vis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power"); Brief for the United States as Amicus Curiae in Support of Petitioners at 12–16, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919); Brief for the United States as Amicus Curiae at 5–12, *Presbyterian Church of Sudan v. Talisman Energy*, Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States of America, as Amicus Curiae at 5–8, *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2326-CV).

[9] *See Mujica v. Occidental Petroleum Corp. (Mujica I)*, 381 F. Supp. 2d 1134, 1138 (C.D. Cal. 2005) (international comity); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 523 (4th Cir. 2014) (federal preemption).

prioritizing funding to legal aid organizations that participate in litigation against companies for human rights abuses.

5. Revisit U.S. Model BIT to reconsider application of investor-state dispute settlement.

For decades, the U.S. has insisted that bilateral investment treaties and free trade agreements should include provisions allowing investors to compel host governments to arbitrate investment disputes – provisions that companies have increasingly abused to hamstring the capacity of host governments to regulate in the public interest[10] or even allow private judicial processes to take their course.[11] Investor-state dispute settlement (ISDS) can be problematic because it affects the rights of third parties – often the very communities whose suffering due to pollution, economic deprivation or labor abuses caused by corporations has prompted the government to regulate in the first place – without allowing those parties access to the proceedings or the right to defend their interests or pursue counter-claims.[12]

The administration should undertake a review of the use of ISDS in bilateral investment treaties and consider a) removing ISDS from the U.S. Model BIT, or b) substantially hedging ISDS to ensure that it does not infringe on a host government's sovereignty and right to regulate in the public interest, and is open to participations and counter-claims by third parties such as communities affected by corporate operations.

Legislative actions

1. Support state-level legislation to remove barriers to litigation of human rights claims involving companies

While the federal government has typically been the focal point for accountability for corporate human rights abuses to date, states have a concomitant responsibility and ability to act in ways that complement federal policy. States have, for example, passed procurement statutes that require due diligence for conflict minerals in the supply chain. As for litigation and remedies, legislation has been introduced to extend statutes of

[10] *See, e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12.

[11] For example, in an arbitration between U.S.-based petroleum giant Chevron and Ecuador, Chevron essentially used the tribunal to avoid paying a $18 billion judgment Ecuadorian courts rendered against the company in favor of Ecuadorian plaintiffs as damages for environmental harm arising out of Chevron's affiliates' oil operations in Lago Agrio, Ecuador. *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, First Interim Award on Interim Measures (Jan. 25, 2012), available at http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf (requiring Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment").

[12] For example, EarthRights International represented Ecuadorian indigenous federations who sought to present an *amicus* brief to the arbitral panel in the Chevron case cited *supra* note 11, a request that was denied by the panel because both of the parties did not consent.

limitations for civil claims arising out of certain types of human rights abuses in Massachusetts and California.

The federal government should make clear as an executive policy that such efforts do not conflict with the federal government's exercise of foreign policy and are in fact an important component of the government's commitment to implement the U.N. Guiding Principles and fulfill its obligations under international law. The government should also consider providing guidance and encouragement to states to take actions that improve access to remedy in state courts. These actions could include (but are not limited to):

- Extending (or eliminating) statutes of limitation for civil claims arising out of human rights abuse[13];
- Ensuring that companies operating within a state can be subject to general personal jurisdiction, e.g. by requiring all foreign companies doing business in the state to submit to general personal jurisdiction for claims arising out of human rights abuse;
- Enacting or strengthening anti-SLAPP suit legislation in order to protect plaintiffs in human rights cases
- Creating explicit causes of action for violations of international human rights and humanitarian law that expressly apply to legal as well as natural persons
- Reforming *forum non conveniens* to exclude international human rights claims.

2. Review laws relating to international human rights standards to ensure that all apply expressly to corporations and encompasses abuses that took place abroad.

The U.S. has a number of statutes that seek to create accountability for violations of international human rights standards, either expressly or through judicial interpretation. These include the Alien Tort Statute, the Torture Victims Protection Act, the Trafficking Victims Prevention Act, and criminal statutes prohibiting genocide, war crimes, torture, and terrorism. For some of these statutes, the courts have decided that corporations cannot be held liable; for others, the status of corporate liability or extraterritorial application may be ambiguous. The administration should conduct a review of these statutes, and propose legislative amendments as needed to ensure that each of them applies to legal persons, and that it covers acts committed outside the United States as long as the corporate defendant is subject to personal jurisdiction in the United States.

[13] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (March 21, 2006) ("Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.").

3. Reform *forum non conveniens* to expressly exempt international human rights claims.

The doctrine of *forum non conveniens*, whereby a judge may exercise discretionary power to dismiss a case that would be substantially more suited to litigation in a foreign forum, can be a serious barrier to remedies in U.S. courts. The administration should consider a legislative initiative to reform the federal *forum non conveniens* doctrine – and should support state-level initiatives to do the same – to expressly exempt claims arising out of violations of internationally recognized human rights.

The administration should also review other options for establishing this principle; for example, the U.S. Government could intervene in cases in which defendants assert *forum non conveniens* to argue that it is not in the interests of U.S. foreign policy for international human rights claims to be dismissed in favor of litigation in foreign forums.

4. Support existing legislative initiatives that enhance corporate accountability for serious abuses. The following Senate and House bills, if passed, would help promote corporate compliance with basic human rights standards enshrined in the Guiding Principles and OECD Guidelines:

Protect Democracy from Criminal Corporations Act (H.R. 450): Reasonable limitations should be imposed on the actions of corporations convicted of criminal felonies that demonstrate dishonesty or a breach of public trust. This bill seeks to amend the Federal Election Campaign Act of 1971 to prohibit a corporation from making a disbursement of funds in connection with a campaign for federal, state, or local elections for six years after the corporation either been criminally convicted or enters into a non-prosecution or other agreement with the Attorney General in response to a criminal charge.

Global Magnitsky Human Rights Accountability Act (H.R. 624): The President should endeavor to take more steps to prevent human rights abusers from enjoying access to American resources, which would incentivize greater accountability worldwide. The bill seeks to grant the executive branch the power to punish foreign human rights abusers by preventing them from entering or conducting business in the United States after receiving credible evidence of wrongdoing. This act would also require the President to publish a list of those sanctioned by the act and the justification for doing so.

Corporate Politics Transparency Act (H.R.418): This bill seeks to amend the Securities Exchange Act of 1934 to require that quarterly and annual reports of an issuer, any proxy solicitation or consent or authorization in respect of any security, and the issuer's registration statement disclose total political expenditures in support of or in opposition to any candidate for federal, state, or local public office made by the issuer during the preceding six-year period. This bill requires such disclosures to include: (1) the name and political party affiliation of each candidate in support of whom or in opposition to whom a political expenditure was made; (2) the amount of each such expenditure; (3) the public

office that such candidate was or is seeking; (4) the relevant state, city, or district; and (5) a statement of the issuer's interest in and reason for making such expenditure.

Dangerous Products Warning Act (H.R.96): Businesses should be held accountable for knowingly withholding discovered information about dangerous risks associated with their products or services in order to avoid liability, as the impacts to human health and livelihoods can sometimes rise to the level of human rights abuse. This bill seeks to amend the federal criminal code to impose a fine and/or prison term of up to 5 years on any business entity or product supervisor with respect to a product or business practice who knows of a serious danger associated with such product or business practice and knowingly after discovering such danger to inform an appropriate federal agency, warn affected employees, and inform other affected individuals. It imposes a fine and/or prison term on any individual who intentionally discriminates against an employee who informs a federal agency or warns employees of a serious danger associated with a product or business practice.

No Tax Write-offs for Corporate Wrongdoers Act (S.169): Corporations and individual business owners should not be able to deduct the cost of court-ordered punitive damages to victims of their corporate abuses as an "ordinary" business expense. This bill seeks to close this unjust tax loophole, which is currently authorized by law. This bill seeks to amend the Internal Revenue Code to: (1) deny a tax deduction for any amount paid or incurred for punitive damages in connection with any judgment in, or settlement of, any legal action; and (2) include any amount paid as punitive damages in gross income for income tax purposes.

Government Settlement Transparency and Reform Act (S. 413): No person or company should be rewarded through tax breaks or deductions for violating laws and regulations. This bill seeks to amend the IRS Code to prohibit tax deductions when the money paid was related to violations of the law. It also promotes transparency by imposing stronger reporting requirements on the government related to these fees paid as fines or restitution.

Land Rights

Executive Action

1. Develop plan for implementing the highest standards of land tenure security and responsible resettlement across U.S. Government assistance programs.

While the U.S. Government has a well-established set of legal principles that it must follow when taking actions that affect land tenure within the United States, many actions that it takes – especially through its foreign assistance and investment promotion arms – may negatively affect land tenure security in foreign countries. For example, the U.S. has been criticized for supporting initiatives through the G8 New Alliance for Food Security

and Nutrition that may in fact undermine land tenure security.[14] The Voluntary Guidelines on the Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) provide a widely accepted set of principles and standards by which governments can ensure fair treatment and responsible management of land tenure, with the aim of promoting food security. However, they are geared largely toward host countries, i.e., the countries in which the land in question is located, rather than focusing on the responsibilities of donor countries. The IFC's Performance Standards provide highly regarded standards on indigenous peoples' land rights and responsible resettlement. Certain U.S. agencies, such as OPIC, have adopted the Performance Standards when considering applications for assistance, but others have not. The U.S. should therefore develop a plan for implementing and respecting the highest standards on land tenure security and resettlement in its actions abroad across all government agencies, to ensure that it does not provide assistance to companies or contract with entities that destabilize land tenure.

The U.S. can lead by example in this field; it could also seek to organize a multilateral initiative to ensure that the governments of donor countries or home countries for foreign investment act responsibly and protect land tenure.

2. Use vote on the Boards of international financial institutions to promote responsible resettlement in the development context.

In the last few years, Congress has passed statutes directing the U.S. Executive Directors of various international financial institutions to use their votes to promote or protect land rights in particular cases. Rather than using its voting power as an *ad hoc* tool, the U.S. should commit to independently assessing land rights and resettlement for projects that are large enough to require a Board vote, and to disapprove projects that: a) will require large-scale displacement and where insufficient consideration has been given to alternatives that would not require such displacement; b) do not include adequately protective resettlement plans; c) have not properly consulted with affected communities and obtained their free prior and informed consent and/or d) would have other avoidable adverse impacts on land rights.

3. Provide incentives to both countries and companies to act responsibly on land tenure issues.

As the U.S. Government demonstrated when it included reporting on land rights due diligence in the Responsible Investment Reporting Requirements for Burma, a failure to investigate competing claims to land tenure and use can contribute to human rights

[14] *See, e.g.*, OXFAM INTERNATIONAL, FOR WHOSE BENEFIT? THE G8 NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION IN BURKINA FASO, Oxfam Briefing Note (May 22, 2014), *at* https://www.oxfam.org/sites/www.oxfam.org/files/bn-whose-benefit-burkina-faso-g8-new-alliance-220514-en.pdf.

abuses and destabilize foreign investment. The U.S. Government should seek ways to encourage land rights due diligence, including through the following measures:

- Require reporting on land rights due diligence in appropriate contexts, such as where the President has invoked his emergency powers under the International Emergency Economic Powers Act (IEEPA) and U.S. investment in land-intensive activities may contribute to the national emergency.
- In light of the well documented connections between labor abuses and land rights violations, which have been recognized by the ILO, deny access to the Generalized System of Preferences to countries in which land grabs and other land rights abuses are prevalent.
- Incorporate land rights due diligence into evaluation rubrics for state assistance and trade promotion, including by reflecting the failure to conduct due diligence in political risk insurance premiums and other terms of financial assistance.
- Gather and publish best practices on land rights due diligence in difficult contexts.
- Train designated embassy staff to provide assistance to investors on proper land rights due diligence in key countries.

4. Enact import controls to prevent importation of products sources from illegally acquired land.

The U.S. Government should review its options to prevent the importation of products that originate on land that was acquired illegally or in connection with abusive resettlement practices, especially in the context of plantation agriculture. These measures could include:

- Enforcing the Lacey Act so as to prohibit importation of wood and other plants from land that was either expropriated or from which traditional users have been wrongfully excluded, and seeking an amendment to the Lacey Act to extend its coverage to common cultivars and food crops.

- Using the President's powers under IEEPA in appropriate contexts to require certification that imports were produced on land that was acquired legally.

Transparency and Access to Information

Executive Action

1. Broaden use of mandatory reporting on human rights issues.

The Responsible Investment Reporting Requirements for Burma represented an innovative use of the President's emergency economic powers. Although the Reporting Requirements are limited in scope to investment in Burma that exceed $500,000, they are rooted in the more general understanding that companies' activities may contribute to human rights and environmental abuse in ways that rise to the level of a national emergency for U.S. national security and foreign policy. The U.S. Government should consider how to broaden mandatory reporting, including through the following measures:

- Enacting, as appropriate, reporting requirements in other countries where IEEPA applies and U.S. investment may be linked to human rights impacts.

- Conditioning state assistance to companies on public human rights and land rights reporting.

2. Swiftly enact new, strong rules to implement Section 1504 of the Dodd-Frank Act that are consistent with emerging international standards.

Section 1504 of the Dodd-Frank Act directs the U.S. Securities and Exchange Commission (SEC) to promulgate rules requiring extractive companies that are publicly listed in the U.S. to report on the payments they make to the governments of the countries in which they operate. The SEC promulgated strong rules requiring public reporting with no exceptions in August 2012, but those rules were vacated in July 2013 as a result of a lawsuit by the American Petroleum Institute. Since that time, the SEC has given no indication of when it might finalize a new rule. Meanwhile, countries in other parts of the world have passed similar laws,[15] leaving the U.S. behind on international transparency promotion efforts.

The SEC should swiftly promulgate a new rule to implement Section 1504, without delay. The new rule should reflect the high standards embodied in transparency rules that Norway and the European Union have enacted, which have already begun to take effect.

Conclusion

EarthRights International commends the U.S. Government for its inclusive engagement with a wide range of stakeholders in this consultation process. As this submission shows, there are several additional steps that the government can take to further ensure that business conduct domestically and internationally is consistent with basic standards of corporate accountability and human rights protection. These include improving access to

[15] *See, e.g.*, Directive passed by the European Union: Council Directive 2013/34, 2013 (L 182) 19 (EC), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0034&from=EN; Extractive Sector Transparency Measures Act (S.C. 2014, c. 39, s. 376) (Canada); *Mandatory Disclosures*, Publish What You Pay, http://www.publishwhatyoupay.org/about/advocacy/mandatory-disclosures (referencing legislation passed by Norway in 2013).

remedy for victims of irresponsible business conduct by establishing government-sponsored accountability, dispute resolution, and grievance mechanisms; countering the use of legal doctrines that immunize companies that have violated responsible business standards; promoting due diligence; and broadening mandatory reporting requirements for businesses. Many of these steps can be taken with tools the government already has at its disposal: intervention in litigation, Letters of Interest, policy papers, proclamations of executive policy, and support for existing legislative initiatives.

We appreciate this opportunity to contribute to the development of the U.S. NAP and look forward to further engaging in this important process. Please do not hesitate to contact us if we can provide further information or elaboration on the content of this submission.

Sincerely,

Jonathan G. Kaufman
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