

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 for U.S. National Action Plan on Responsible Business Conduct
regarding Project-Level Grievance Mechanisms**

Dear Secretary Kerry:

We write to offer this joint submission¹ for the U.S. National Action Plan on Responsible Business Conduct (“NAP”) and assist the U.S. government in its efforts to implement the UN Guiding Principles on Business and Human Rights (“Guiding Principles”) and the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”). As organizations that help communities harmed by business-related human rights² abuses to bring complaints through non-judicial grievance mechanisms³, we stress that the Guiding Principles and the OECD Guidelines articulate the critical role of these mechanisms in ensuring accountability for such abuses.⁴

In this submission, we provide comments and recommendations regarding project-level grievance mechanisms (“PLGMs”), also referred to as operational-level grievance mechanisms, which relate closely to our work on accountability in development finance.⁵ Although PLGMs may offer another option to aggrieved parties for seeking redress outside a formal court system, we strongly urge the U.S. government to exercise caution before endorsing or advocating for these mechanisms.

¹ This letter supplements Accountability Counsel’s first NAP submission on January 15, 2015, which emphasized the gaps in the U.S. government’s implementation of the Guiding Principles and the OECD Guidelines with regard to access to remedy through non-judicial grievance mechanisms.

² We refer to rights in this submission as shorthand for both environmental and human rights, both of which are protected under the Guiding Principles and OECD Guidelines.

³ 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 UN Guiding Principles on Business and Human Rights, art. 3, para. 25 (commentary) [hereinafter “Guiding Principles”].

⁴ Guiding Principles, at art. 3, paras. 25 and 27; OECD Guidelines for Multinational Enterprises (2011), pt. II, sec. I, para. 1 and pt. IV, para. 46 (commentary) [hereinafter “OECD Guidelines”].

⁵ Since January 2015, Accountability Counsel, the Center for International Environmental Law, and Friends of the Earth (undersigned) have participated in NAP consultations and have engaged with various stakeholders on the need to improve access to remedy through non-judicial means. Based on these interactions, there appears to be a growing interest within the public and private sectors in the use of PLGMs.

PLGMs are systems designed and operated by project management within a company or government agency (*e.g.*, in the case of borrowing or project host countries) to address concerns of individuals, communities, and/or workers who are negatively affected by foreign direct investment and development projects.⁶ Therefore, the actors who manage the mechanism and determine outcomes are the same as those who potentially perpetrated the harm. Nonetheless, an increasing number of international financial institutions, companies, and government agencies are relying on PLGMs. Many of these mechanisms suffer from the following fundamental flaws:⁷

- **Inappropriate for human rights abuses:** These mechanisms have neither the expertise nor the authority to adequately deal with cases of human rights abuses, violations of international human rights and humanitarian law, or serious crimes such as torture, rape, and extrajudicial killings.
- **Lack of independence and trust:** In-house mechanisms allow perpetrators with a conflict-of-interest to internally investigate claims, determine culpability, exonerate, waive victims' rights, determine outcomes, and keep those outcomes confidential to avoid public and shareholder scrutiny. As a result, project-affected people have little reason to trust the process or have confidence that their grievances will be resolved fairly or transparently.
- **No oversight or accountability:** These mechanisms are void of third-party oversight to monitor the grievance process and ensure that outcomes are enforced. PLGMs provide a means to control any negative repercussions from in-house investigations of rights violations in order to maintain secrecy, thereby avoiding legal and financial consequences and thwarting the possibility of learning lessons at higher levels of management and throughout the organization.
- **Barriers to other forms of judicial and non-judicial remedy:** The complete control of information, legal waivers, and confidentiality clauses associated with a one-sided grievance process severely limits the victims' ability to raise awareness of their plight, escalate their claims, or seek redress through other means. Furthermore, victims may not have access to legal counsel or advisors when making decisions about waivers and other agreements throughout the grievance process.
- **No protection against reprisals:** PLGMs may fall short in terms of ensuring freedom from reprisals by the government, company, or community. Even when provisions on reprisal prevention exist, there is no process to address the threat or execution of

⁶ See Katherine McDonnell (EarthRights International), "Community-Designed Grievance Mechanisms: A Proposal to Ensure Effective Remedies for Corporate Human Rights Abuses at the Operational Level," June 10, 2014, available at <http://www.earthrights.org/blog/community-designed-grievance-mechanisms-proposal-ensure-effective-remedies-corporate-human>; International Finance Corporation ("IFC"), "Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms," Sept. 2009, 4, available at

<http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18> [hereinafter "IFC Addressing Grievances"].

⁷ Rights and Accountability in Development, "Principles without Justice: The Corporate Takeover of Human Rights," Mar. 2015, available at <http://www.raid-uk.org/sites/default/files/principles-justice-summary.pdf>.

reprisals when they occur, leaving vulnerable people even more at risk for their safety and wellbeing.

- **Lack of community participation:** These mechanisms rarely involve communities or potential mechanism users in the design, implementation, or monitoring and evaluation of outcomes. As a result, the PLGM may lack local buy-in and trust, and may fail to account for critical cultural and project-specific factors that should shape and drive the grievance process.

We strongly discourage this method of redress without appropriate precautions. However, despite the troubling aspects of PLGMs, we recognize that the U.S. government—either directly through its own agencies or indirectly through its support of international financial institutions such as the World Bank—may rely on PLGMs to resolve business-related human rights disputes. At a minimum, grievance mechanisms should be built on the “effectiveness criteria”⁸ set forth in the Guiding Principles, which the U.S. government has endorsed. These include: legitimacy, accessibility, predictability, equitability and fairness, transparency, rights compatibility, a source of continuous learning, and based on engagement and dialogue. All grievance mechanisms should embody these principles and serve as a means for ensuring accountability and redress. In fact, as the Commentary to the Guiding Principles duly recognizes, “[p]oorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.”⁹ Thus, the following should define the structure and operations of PLGMs:

1. Legitimacy

PLGMs are only an effective means of resolving disputes if they engender the trust of affected people and intended users.¹⁰ To achieve this, grievance mechanisms must be able to function independently of influence from the company’s or agency’s management and project implementation units, whose actions are often the source of grievances. For example, all or part of a PLGM may be housed outside project management, such as in a local or community institution, nongovernmental organization, or think-tank, in order to promote independence.¹¹ Grievance mechanisms must also have sufficient authority to handle grievances and make redress decisions objectively, such as through an independent third party.

The U.S. government should ensure that PLGMs have the adequate resources to staff the full grievance process and deliver redress. This may involve a requirement that the public or private sector entity invest in insurance or contribute to a grievance redress fund to guarantee at the project’s onset that the implementing entity is prepared to provide redress, through compensation or other means, in case abuses occur.

⁸ Guiding Principles, at para. 31(a)-(h).

⁹ Guiding Principles, at para. 31 (commentary).

¹⁰ See Guiding Principles, at para. 31(a).

¹¹ See IFC Office of the Compliance Advisor/Ombudsman (“CAO”), “Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects,” June 2008, available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf> [hereinafter “CAO Advisory Note”].

2. Accessibility

In order to serve as a reliable forum for providing access to remedy, a PLGM must make itself well known to potential users and provide adequate assistance to help users overcome any barriers to access, including “language, literacy, costs, physical location and fears of reprisal.”¹² Towards this end, the company or government agency implementing the project should ensure that affected communities and stakeholders have access to a PLGM, including a requirement that project management inform communities of the existence of the PLGM and its functions.

We recommend requiring the company or government agency to provide informational materials and services in all primary languages spoken by project-affected people. All documents generated by the company or agency in a particular case, including any contracts or agreements, should be translated into the primary language(s) of PLGM users. PLGM outreach activities should also be conducted in the local language(s). Any documents explaining the purpose of the PLGM, its functions, and the rights of project-affected people, should be made available in all primary languages spoken by project-affected people. Wherever project-affected people are illiterate, the company or agency should be required to conduct verbal outreach efforts in the local language(s) regarding the purpose and functioning of the PLGM and how individuals can access its services.

Furthermore, the Guiding Principles state that ensuring the accessibility of a PLGM includes providing adequate assistance for those who may face particular barriers, such as fear of reprisal for filing a grievance.¹³ To help ensure that those fearing reprisals feel safe using PLGMs, processes should include requirements on the protection of PLGM users. We recommend that PLGMs be required to respect all requests for confidentiality *by the user* and explore possibilities of protection that go beyond safeguarding users’ identities. In situations in which the PLGM cannot move forward with a complaint and maintain the requested confidentiality, it should be required to notify the users and determine how to proceed in consultation with them. The company or agency should also be required to inform affected people in all outreach materials and at the start of a grievance process that they may request confidentiality. We also recommend that PLGMs establish procedures for addressing instances of reprisal, including, for example, accepting reports of reprisals, documenting and responding to these instances, and appealing to national or international institutions.

In addition, PLGMs should not impede access to remedy through other mechanisms, whether non-judicial or judicial, or require project-affected people to use the PLGM before pursuing other avenues for remedy.¹⁴ The company or agency should inform project-affected people of the range of options through which they can seek resolution for their grievances, and how they can escalate them if necessary.

¹² Guiding Principles, at para. 31(b) and commentary.

¹³ Guiding Principles, at para. 31(b) and commentary.

¹⁴ IFC Addressing Grievances, at 15; CAO Advisory Note, at 13.

3. Predictability

PLGMs are most effective when they provide clear and known procedures that are applicable to all grievances and set reasonable timeframes for each phase of the grievance process.¹⁵ The U.S. government should require the company or agency implementing the project to: (1) assign explicit timeframes for each phase of the process during the design of the PLGM; (2) communicate those timeframes clearly to affected communities and stakeholders; and (3) respect those timeframes in the implementation of the PLGM.

4. Equitability

One of the constant dangers in relying on PLGMs as a source of remedy is the inherent risk that such mechanisms will display bias in favor of the company's or government agency's management and project implementation units. Whether public or private sector, management typically plays a leading role in designing, developing and financing the PLGM, and may ultimately control the PLGM through a direct reporting line. In addition, affected communities are often not well informed of their rights or options for recourse, and are severely disadvantaged in their access to resources and information compared to those against whom they may be bringing grievances. For all of these reasons, affected communities must have access to sufficient information and advice to use the PLGM on fair and informed terms.

In order to ensure that PLGM users receive non-biased information and advice, and to increase the likelihood that they will trust the information and advice provided, community members must also be allowed access to independent legal counsel or other advisors throughout the PLGM process. The U.S. government should explicitly require the company or agency implementing the project to inform people of their right to consult with counsel or advisors of their choosing, allow them to do so, and permit their counsel or advisors presence at any time during the grievance process.

5. Transparency

Transparency can be key to building and maintaining community and stakeholder confidence in a PLGM. This includes keeping parties to a grievance process informed about its progress and reporting to the broader public regarding its activities. We recommend that the U.S. government require that PLGMs maintain a publicly available case register, including an online version on the implementing company's or agency's website, in addition to any other culturally appropriate means of disseminating this information. The case register should state all grievances received and responses provided. For grievances in which a user requests confidentiality, materials should be appropriately redacted as necessary to protect the user's identity. In such cases, the PLGM should indicate publicly that it has restricted disclosure of information in response to such a request.

Additionally, in order to build and maintain public confidence in PLGMs, it is important they avoid blanket confidentiality provisions that bind all users. Although respecting requests

¹⁵ Guiding Principles, at para. 31(c).

for confidentiality can be crucial to protecting PLGM users from any reprisal or fear thereof, when blanket confidentiality is imposed as a standard protocol, it blocks the public from monitoring the effectiveness of the PLGM without necessarily serving as a strong security or privacy justification. We therefore urge the U.S. government to explicitly prohibit PLGMs from instituting blanket confidentiality requirements as a prerequisite for user participation in the grievance process.

6. Source of Continuous Learning

Beyond their role in resolving individual grievances, effective PLGMs can serve a valuable role by providing feedback for the project cycle and project operations in general.¹⁶ A well functioning PLGM can serve as an early warning system regarding larger, systemic problems and indicate necessary changes to company operations or management systems.¹⁷ It is critical that the U.S. government require provisions related to the monitoring and evaluation of the performance of PLGMs, as well as guidance on the importance of extracting lessons from them to inform ongoing and future project operations.

As part of this process, we recommend that the PLGM regularly inform stakeholders—including to PLGM users and community members—about the mechanism’s functions in order to clarify stakeholder expectations, gather feedback from stakeholders, and explain how the business or agency intends to incorporate their feedback into the mechanism’s processes and overall operations. By receiving feedback from stakeholders, the company or agency can extract lessons from PLGMs in order to improve and ensure project sustainability.

7. Rights Compatibility

PLGMs can only be considered effective where the outcomes and remedies they provide accord with internationally recognized rights.¹⁸ Any PLGM should provide detail about how it can achieve this fundamental objective. We recommend explicitly requiring that the PLGM’s outcomes align with applicable rights under national and international law. All monitoring and review efforts should also include monitoring of the rights compatibility of PLGM outcomes.

8. Based on Engagement and Dialogue

As mentioned above, the company or government agency implementing the project must engage and consult with PLGM users and affected communities in the design, performance, and monitoring and evaluation of PLGMs to ensure that mechanisms meet the needs of potential users and that there is a “shared interest in ensuring [their] success.”¹⁹ The participation of affected communities is imperative to the development of a culturally appropriate PLGM that meets their needs, expectations, and concerns.²⁰

¹⁶ Guiding Principles, at para. 31(g).

¹⁷ CAO Advisory Note, at 11.

¹⁸ Guiding Principles, at para. 31(f).

¹⁹ Guiding Principles, at para. 31(h) and commentary.

²⁰ Some experts believe that imposing a company-designed system could be even worse than having an ad-hoc system. *See* CAO Advisory Note, at 2.

Because PLGMs are intended for use by affected community members, any monitoring and evaluation of those PLGMs should incorporate the direct feedback of those user groups. We recommend that affected communities be provided clearly communicated, regular, and periodic opportunities to submit feedback on the PLGM’s performance.

Furthermore, we advise that the U.S. government support provisions for regularly collecting and reviewing information on PLGM functioning through an independent third-party auditor with relevant experience. Monitoring activities should pay particular attention to common risks, such as failure to make independent, un-biased decisions, or a lack of fairness and equitability in grievance proceedings involving affected people with no other options for redress. To promote the collection of accurate information and candid responses, monitoring activities should be conducted independently from the company’s or agency’s management and implementation units and include unannounced visits to the project site, ideally more than once per year. Conversations should be held with affected people without the company’s or agency’s representatives present.²¹

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²¹ Monitoring visits that are not conducted in an independent manner can be counter-productive and contribute to false impressions of project sites. For example, based on Accountability Counsel’s experience working with communities in tea plantations in Assam, India, the absence of strong provisions for independent information gathering can result in auditors collecting false and misleading information about working and living conditions and failing to uncover serious human rights violations during site visits.

Should the U.S. government choose to support PLGMs, we recommend that the NAP process include the development of a comprehensive, inter-agency policy on PLGMs based on these criteria. The government should also implement the following specific recommendations: (1) the U.S. Department of the Treasury should require U.S. representatives at international financial institutions to only approve policies related to PLGMs that include these criteria; (2) federal export promotion and development agencies²² should only rely on PLGMs that follow these criteria; and (3) the U.S. National Contact Point for the OECD Guidelines should evaluate the adequacy of PLGMs based on these criteria when these mechanisms are in use.

In representing the interests and values of the American people, the U.S. government must be a leader in protecting human rights and advancing individual freedom, particularly of the most vulnerable and disenfranchised. If the government chooses to rely on them as a method to access non-judicial remedy, it should do so with caution and substantial due diligence, including with meaningful input from communities and intended PLGM users.

We appreciate this opportunity to provide recommendations and look forward to future participation in the development of the NAP. Please do not hesitate to contact us with any questions.

Sincerely,

/s/

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/s/

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/s/

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²² Such as the U.S. Overseas Private Investment Corporation, the Export-Import Bank of the United States, and the Millennium Challenge Corporation, among others.