

August 10, 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 the U.S. Agency for International Development**

Dear Secretary Kerry:

We offer this joint submission for the U.S. National Action Plan on Responsible Business Conduct (U.S. NAP) in order to provide guidance to the U.S. government on implementing the UN Guiding Principles on Business and Human Rights (Guiding Principles) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), particularly with regard to the activities of the U.S. Agency for International Development (USAID). We represent organizations that work to ensure that governments and companies take action to prevent business-related human rights¹ abuses and that they are held accountable when abuses occur.

As one of the U.S. government's primary vehicles for delivering bilateral development assistance and disaster relief, USAID has a tremendous impact on the human rights of some of the most vulnerable communities on the planet. With a mission "to end extreme poverty and to promote resilient, democratic societies while advancing our security and prosperity,"² it is particularly critical that the agency's activities align with the Guiding Principles and the OECD Guidelines. We take this opportunity to highlight some of the gaps in USAID's current implementation of the Guiding Principles and the OECD Guidelines and to offer recommendations for improvement.

We appreciate USAID's current commitments to respecting and promoting human rights,³ and we value the agency's ongoing efforts to ensure that development assistance is carried out in a way that recognizes and respects the rights of indigenous peoples, with the goal of including them in the design, implementation, and evaluation of projects that may affect their lands, lives, and livelihoods. Further,

¹ We refer to human rights in this submission as shorthand for environmental, labor, and human rights, all of which are protected under the Guiding Principles and the OECD Guidelines. *See, e.g.,* United Nations General Assembly, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox, A/HRC/22/43, December 24, 2012, para. 19 (noting that the "the full enjoyment of all human rights depends on a supportive environment" and sufficient environmental protections).

² U.S. Agency for International Development (USAID), "Mission, Vision and Values," <http://www.usaid.gov/who-we-are/mission-vision-values>.

³ *See, e.g.,* USAID Strategy 2013 and USAID Policy Framework 2011-2015.

we support USAID’s development of a human rights policy that would guide its interventions, as well as the established policy on *Integrating Gender Equality and Female Empowerment in USAID’s Program Cycle* within the Automated Directives System. However, we note several areas in which a commitment to human rights can and should be strengthened in accordance with the Guiding Principles and the OECD Guidelines. For instance, beyond the aforementioned human rights policy statement and the gender equality and female empowerment provisions, there is little clarity on how human rights due diligence will actually be operationalized into more robust social and environmental standards and processes. We therefore recommend that USAID modify its policies and procedures to ensure that the concrete steps outlined in the Guiding Principles and the OECD Guidelines are fully integrated into USAID standards.

In general, we note that the best practices for human rights would require USAID to assess the impacts on and ensure respect for all human rights and not parse out specific human rights over others, as denial of one right necessarily impedes the enjoyment of other rights. Human rights should be understood to mean that fundamental freedoms are causally indivisible, interdependent, and interrelated. Simply put, all human rights—that is, civil, political, cultural, economic, and social—are part and parcel of sustainable and inclusive development.

Promotion of Human Rights (UN Guiding Principle 6)

Human Rights Policy

USAID should continue to improve upon its operational policies by explicitly committing to a human rights-based approach to development, designed to implement successful development and to assist partner countries in implementing their international human rights obligations. We recognize steps toward this approach, as evidenced in USAID’s *Strategy on Democracy, Human Rights, and Governance (DRG)*, which states: “[a] deliberate human rights lens should be applied across USAID’s portfolio to ensure that the Agency’s programs are not inadvertently contributing to marginalization or inequality. By using a human rights lens, potential beneficiaries who are most at risk of having their rights neglected or abused—such as LGBT persons, people with disabilities, indigenous peoples—will be better recognized and included in USAID programming. USAID aims to promote and protect human rights, as well as to prevent or mitigate any unforeseen negative impacts of USAID development projects on individuals and communities.”⁴

Additionally, we acknowledge the focus of USAID’s existing human rights work in three key areas: 1) protecting those most vulnerable; 2) preventing abuses wherever possible; and 3) promoting human rights principles.⁵ This language contained in USAID’s DRG strategy is aligned with the Guiding Principles, confirming how policies should make clear that the agency will respect human rights and take all necessary measures to ensure that the activities it finances or otherwise supports do not cause, contribute to, or exacerbate human rights violations. We would recommend that the policy should additionally include a prohibition on financing of any activity that contravenes host country obligations under international law. This policy should also ensure that human rights due diligence is undertaken in order to prevent human rights abuses and to promote fulfillment of human rights. For

⁴ USAID Strategy on Democracy Human Rights and Governance, June 2013, p. 22.

⁵ Ibid.

useful examples of such a policy, please see *Human Rights in German Development Policy*⁶ and *Guidelines on incorporating human rights standards and principles, including gender, in programme proposals for bilateral German Technical and Financial Cooperation*.⁷

Safeguards and Standards Consistent with Human Rights Obligations

Once more, we welcome USAID's recognition of the need to abide by international human rights law, as stated in the DRG goals:

- “Development Objective 3: Protect and promote universally recognized human rights.
- 3.1 Support mechanisms for protection, mitigation, and response to violations against human rights, in particular human rights violations affecting the most vulnerable
- 3.2 Prevent violations by strengthening human rights frameworks, institutions, and oversight
- 3.3 Promote human rights principles, in accordance with universal values and international norms.”⁸

As confirmed in USAID's Policy Framework: “[o]ur programming will empower social actors and civil societies to advocate for their internationally recognized human rights and protect vulnerable populations, including women, internally displaced persons, persons with disabilities, lesbian, gay, bisexual, and transgender individuals, and other vulnerable populations unique to the country or development context.”⁹ Again, this description of USAID's operations is in line with the creation of a policy framework that includes comprehensive policies and safeguards that ensure rights-respecting development and compliance with international environmental and human rights norms, including core labor standards. While USAID's existing policy framework provides some coverage of social issues, it should be expanded to become consistent with human rights norms. A policy framework should be developed which establishes clear standards relating to social issues, including transparency and participation, discrimination, social and environmental assessment and management, indigenous peoples, poverty reduction, forced eviction and resettlement, persons with disabilities, gender, persons with disabilities, land and resource rights, and environmental protection. These safeguards should cover all financial instruments, including non-project investments (i.e. policy-related investments).

Mitigation Hierarchy

The mitigation hierarchy employed in USAID activities should support the commitment to respect human rights and acknowledge that some impacts are unacceptable and must be prevented, rather than merely mitigated. The mitigation hierarchy should be as follows: 1) prevent human rights violations and avoid adverse impacts; 2) where an adverse impact cannot be avoided, minimize or reduce the impact; 3) where residual impacts remain, restore to the original condition or retribute; and 4) where restitution or restoration is not possible, provide other acceptable remedy.

⁶ Human Rights in German Development Policy, Federal Ministry for Economic Cooperation and Development, August 2011, https://www.bmz.de/en/publications/type_of_publication/strategies/Strategiepapier305_04_2011.pdf

⁷ Guidelines on incorporating human rights standards and principles, including gender, in programme proposals for bilateral German Technical and Financial Cooperation, 2013, http://www.giz.de/expertise/downloads/Guidelines_on_incorporating_human_rights_standards_and_principles.pdf

⁸ Ibid, p. 14.

⁹ USAID Policy Framework 2011-2015, p. 27, <http://www.usaid.gov/documents/1870/usaid-policy-framework-2011-2015>.

Due Diligence and Screening (Guiding Principles 4 and 6)

Due Diligence Requirements

There is little information on the specific criteria used by USAID's *System for Award Management* to make determinations as to partner eligibility for a public-private partnership (PPP). As a result, it is unclear what kinds of compliance or performance issues would disqualify a private sector entity from partnering with USAID and then receiving funds and support to carry out a project. It is also unclear whether USAID's compliance examination process would consider or take into account partner organizations' history of involvement in human rights disputes handled by either non-US bodies, such as an OECD National Contact Point, or whether these entities were involved in ongoing human rights disputes or investigations in foreign jurisdictions. Furthermore, it is unclear whether a private sector partner's history of cooperation with non-judicial mechanisms is a factor in approving their involvement in a PPP.

USAID must have robust due diligence requirements to identify and address human rights risks and impacts and to prevent human rights violations. This includes a process for assessing the country context and enabling an environment for rights-respecting development activities, including an analysis of the legal and regulatory environment for rights enjoyment and any constraints that this environment presents for public participation in development processes, including advocacy and criticism of governments or specific projects supported by USAID. It should also include vetting partners based on prior involvement in human rights abuses and an assessment of the partner's capacity and will to implement the project in a rights-respecting manner. Available information provided by USAID's solicitation materials do not currently provide notice regarding the need for potential partners to respect human rights or build awareness of human rights risks. In addition, a consistent refrain among private sector partners is a lack of explicitness with regards to USAID expectations.¹⁰

USAID must ensure that meaningful consultations with affected communities and other key stakeholders are held at the very beginning and then throughout the lifespan of a project, with sufficient information being provided in an accessible form and for a reasonable time in advance of in-person consultations. "Meaningful consultation" is a process that:

- Begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle, as described above;
- Provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people;
- Is undertaken in an atmosphere free of intimidation or coercion;
- Is gender inclusive, responsive, and tailored to the needs of disadvantaged & vulnerable groups;
- Enables the incorporation of all relevant views of affected people and other stakeholders into decision-making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation;

¹⁰ USAID, *Evaluating Global Development Alliances: An Analysis of USAID's Public-Private Partnerships for Global Development*, p. 15.

- Is designed to include persons with disabilities & other vulnerable populations in all consultations; and
- Includes a comprehensive discussion of human rights issues.

Additionally, we would point to the recommendations stemming from the *Final Report of USAID's AID Transparency Country Pilot Assessment*,¹¹ which highlights important findings, conclusions, and recommendations for the improvement of the availability of information on aid flows by U.S. government agencies in partner countries.

When working in countries where there is not an enabling environment for meaningful consultations with affected communities and other key stakeholders, USAID should take an active role in the consultation process, including in its design, by being present throughout consultations and by putting in place enhanced monitoring of consultations, including independent, third party monitoring, and, where necessary, requiring consultations to be organized and run by an independent group. USAID should take all necessary measures to ensure that people who are traditionally marginalized or often excluded from decision-making have the opportunity to meaningfully participate in decisions about USAID-financed activities that affect them.

Overall, comprehensive and clear due diligence requirements, which correspond to and are sufficient to address potential risks identified in USAID's assessment and prevent human rights violations, must be established.

Social and Human Rights Impact Assessments

One critical due diligence element is the assessment of social risks and impacts, including risks to the enjoyment and realization of human rights. While USAID has a policy requirement for environmental impact assessments, these requirements do not ensure that impact assessments adequately capture social impacts, including human rights.

USAID policy should require comprehensive social impact assessments (SIAs). The purpose of such assessments is to design and implement successful sustainable development projects in concert with potentially affected communities and in a manner that prevents human rights violations, avoids and minimize negative impacts, and maximizes positive impacts and their fair distribution. SIAs should utilize a process of analysis and decision-making that: 1) evaluates project design alternatives based on potential impacts; 2) evaluates mitigation measures; 3) produces mitigation plan and monitoring and supervision plan; and 4) captures this analysis in a clear, public, and transparent document, allowing for more effective and participatory implementation and monitoring.

Social impacts should be defined to include *inter alia* the following components: 1) direct, indirect, secondary, and cumulative impacts; 2) impacts on the realization or enjoyment of human rights; 3) disproportionate accrual of impacts on different groups due to their experience of marginalization, discrimination, or exclusion; and 4) inequitable access to development benefits due to a group's experience of marginalization, discrimination, or exclusion. It should also involve an analysis of accountability mechanisms in order to consider the potential for, and barriers to entry against, access

¹¹ USAID Aid Transparency Country Pilot Assessment, Final Report, May 2015, <http://www.usaid.gov/sites/default/files/documents/1870/AidTransparencyCountryPilotAssessment.pdf>.

to remedy should rights be violated, which few social impact assessments do. Finally, SIAs should be developed in consultation with human rights and civil society organizations (For more on this, see the section on “Operationalizing Access to Remedy” below).

Overall, the assessment process must be participative and iterative throughout the lifecycle of the project. A process should be established whereby affected communities verify assessment results prior to project approval. In addition, the scope of the impact assessment should extend to the activities and operations of the entire project. Doing so would ensure that, at the very least, USAID is not directly or indirectly contributing to or exacerbating human rights violations through its funding support.

Project Approval

In order to ensure that USAID-supported projects respect the rights of indigenous peoples and local communities, projects should be required to obtain the free, prior, and informed consent of indigenous peoples or the broad community support of other affected communities, as required by international human rights standards. Here again we value the direction of current USAID operations, which are working to ensure that indigenous communities become partners in the design, implementation, and evaluation of development projects. We would welcome the creation of policies at USAID that can serve to further ensure that development assistance recognizes and respects indigenous peoples worldwide.

Monitoring and Oversight (Guiding Principles 5, 6, and 7)

Participatory and Third-Party Monitoring

Reports citing interviews with private sector partners indicate that USAID does not have any specific core metrics or indicators that are required to be included in the monitoring and evaluation (M&E) processes.¹² USAID’s own evaluations of the *Global Development Alliance* model indicate that private contractors are often left without clear expectations regarding the goals and metrics for evaluating the impact and success of projects, suggesting a lack of consistent oversight and vigilance for potential human rights risks.¹³ The lack of standards or required criteria in M&E plans makes it unclear whether human rights issues are tracked and addressed consistently by either USAID or private sector partners. On a systematic level, giving M&E responsibilities to private sector partners may also suggest a lack of independent third-party oversight of the performance of private sector partners.¹⁴ USAID is likely in the best position to set out the expectations for a project and monitor the impact of private sector partners with regard to human rights, but data from evaluations suggest inconsistent involvement or an overreliance on private sector partners to monitor themselves.

Monitoring by the client—either public or private sector—creates a conflict of interest and the potential that feedback will not be accurate. In many cases, communities do not feel safe expressing opposition or concerns regarding projects due to risk of reprisals by private entities or the local

¹² USAID, *Evaluating Global Development Alliances: An Analysis of USAID’s Public-Private Partnerships for Global Development*, p. 15.

¹³ *Id.* at 5.

¹⁴ Wayan Vota, *How to Build Better Global Development Alliance Partnerships* (April 29, 2010), http://technologysalon.org/how_to_build_better_gda_partnerships/.

government. In order to have meaningful participation and collect accurate feedback, USAID must provide for participatory and third party monitoring. Ideally, local communities should conduct monitoring in order to ensure a truly participative process. This requires not only policies and procedures, but also dedication of resources for meaningful access to information. USAID should additionally conduct regular site visits and consult with affected communities. The amount of on-the-ground monitoring should be even greater for projects identified as high or substantial risk.

Operationalizing Access to Remedy (Guiding Principle 31)

Both the Guiding Principles and the OECD Guidelines stress the importance of providing access to remedy for business-related human rights abuses. The “third pillar” of the Guiding Principles requires States to ensure that when abuses do occur, those affected have access to effective remedy through both judicial and non-judicial means.¹⁵ 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.¹⁶

Given the agency’s increased emphasis on energy and infrastructure, natural resource management, and bilateral/multilateral collaboration (e.g. REDD+), there is a heightened risk that USAID’s activities and those of its implementing partners and contractors may have adverse impacts on vast segments of vulnerable populations. As such, it is necessary that USAID develop comprehensive safeguards and a corresponding approach to providing access to remedy when those safeguards are breached or when harm occurs.

Although USAID has established provisions for its liability, and the oversight and liability of its contractors¹⁷ under its ADS,¹⁸ their scope is limited, particularly with regard to human rights abuses that occur outside the United States. Furthermore, USAID has no non-judicial grievance mechanism¹⁹ dedicated to addressing community complaints and capable of providing access to effective remedy for harm resulting from the agency’s, its partners’, and its contractors’ activities. Providing access to remedy is particularly critical when facing unanticipated impacts on the ground that may be overlooked when development projects are deemed “successful”.

Given the reach of USAID’s programming and the potential impact it has on communities, the U.S. government should invest resources in the development of grievance mechanisms that cover the full scope of USAID activities and those of its partners and contractors, in accordance with the Guiding Principles and the OECD Guidelines. USAID should establish grievance mechanisms to correspond with USAID field mission activities at a national or regional level and create a mechanism at headquarters to address complaints associated with programs and projects implemented from

¹⁵ UN Office of the High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights” (Guiding Principles), art. 3, paras. 25-27, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁶ Organisation for Economic Cooperation and Development, “OECD Guidelines for Multinational Enterprises” (OECD Guidelines), preface and pt. II, sec. I, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹⁷ This includes other entities implementing the project, such as subcontractors.

¹⁸ USAID, “Automated Directives Systems Operational Policy,” chaps. 152 (Tort Claims) and 302 (USAID Direct Contracting), <http://www.usaid.gov/who-we-are/agency-policy/about-ads>.

¹⁹ 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* Guiding Principles, art. 3, para. 25 (commentary).

Washington, D.C.²⁰ At a minimum, these grievance mechanisms should be built on the “effectiveness criteria”²¹ set forth in the Guiding Principles. These include:

- *Legitimacy* in that the mechanism must engender the trust of affected people and intended users. To achieve this, grievance mechanisms must be able to function independently of influence from the agency’s management, partners, and contractors, whose actions may be the source of the grievances;
- *Accessibility* in that the mechanism is known to all stakeholder groups, provides assistance to those who may face barriers to access, and protects complainants from reprisal (and related threats) for voicing grievances;
- *Predictability* in that the mechanism sets forth clear and known procedures with indicative timeframes for each stage of the process. This also includes an established means of monitoring that these procedures and timeframes are respected;
- *Equitability/fairness* in that the mechanism ensures that all parties can engage in a process on fair and equitable terms. The process must be free from pressure from USAID’s, the partner’s, or the contractor’s management teams and allow for complainants to seek counsel or advisors at any time;
- *Transparency* in that the mechanism keeps parties to a grievance informed about its progress and provides sufficient public information about the mechanism’s performance to build confidence in its effectiveness;
- *Rights-compatibility* in that the mechanism itself and the outcomes of complaints abide by international human rights and national laws;
- *A source of continuous learning* in that the mechanism serves a valuable role to the agency by providing feedback for the project cycle, operations, and broader agency programming. It should also identify lessons for improving the mechanism and preventing future grievances and harms; and
- *Based on engagement and dialogue* in that the mechanism engages with the potential project-affected peoples.

Furthermore, USAID does not require its contractors to provide access to remedy to address grievances related to their role in carrying out USAID projects. Project-level grievance mechanisms (PLGMs)²² are one way to provide this access through a contractor. Although we discourage this method of redress without appropriate precautions, we recognize that the U.S. government may rely on PLGMs to resolve business-related human rights disputes. Should USAID choose to require its

²⁰ This is not to exclude other cost-effective arrangements. Establishing grievance mechanisms at headquarters and at national and regional levels based on field mission activities is one practical solution. The design and implementation of these mechanisms should be based on consultations with project-affected peoples, the extent of programming activities and resource constraints, due diligence findings, and other factors.

²¹ Guiding Principles, at para. 31(a)-(h).

²² PLGMs are systems designed and operated by the project implementing entity (e.g., the contractor in this case) to resolve concerns of individuals, communities, and/or workers who are negatively affected by the project. 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), <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, <http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>.

contractors to develop PLGMs, we recommend that these mechanisms abide by the aforementioned criteria, at minimum.²³ In cases where PLGMs exist, USAID-created grievance mechanisms should retain authority over all USAID, partner, and contractor activities. In addition, any USAID projects involving the development of grievance mechanisms should align with the Guiding Principles' criteria.

For more than fifty years, the U.S. government has been at the forefront of foreign aid and development assistance. With the *Democracy Human Rights, and Governance* strategy, USAID has solidified its goal to protect and respect human rights worldwide. As a result, the continuing evolution of USAID's efforts to improve economic development abroad should be consistent concrete steps toward the integration of the UN Guiding Principles and the OECD Guidelines.

We value this opportunity to offer recommendations to further the evolution of USAID policy, and we look forward to ongoing participation in the development, implementation, and review of the U.S. NAP. Should you require any additional information regarding this submission, please do not hesitate to contact us.

Sincerely,

Carla Garcia Zendejas
Director, People, Land & Resources
Center for International Environmental Law

Kindra Mohr
Policy Director
Accountability Counsel

Amol Mehra
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International Corporate Accountability Roundtable

cc: Ambassador Alfonso E. Lenhardt, USAID Acting Administrator

²³ For an in-depth analysis of PLGMs vis-à-vis the criteria of the Guiding Principles, see the joint U.S. NAP submission on April 24, 2015 from Accountability Counsel, the Center for International Environmental Law (CIEL), and Friends of the Earth, http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/4.24.2015-NAP-submission_AC-CIEL-FoE.pdf.