

Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

January 12, 2015

The Honorable Mr. Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

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

Dear President Obama:

We write to provide input on the U.S. Government's efforts to develop a National Action Plan to promote responsible business conduct abroad.

The Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute at Columbia University, believes that outward investment offers important opportunities to accelerate sustainable development in host countries. For this to occur, ensuring that business operations are responsible and respect human rights is critical. We thus applaud the U.S. Government's decision to develop a National Action Plan consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

We believe that the U.S. Government has an important role to play in ensuring that its outward investors respect human rights in their operations abroad, and the National Action Plan process provides a particularly useful opportunity to reflect on how the United States can remain a leader in this area. This includes assessing the range of regulatory and voluntary measures that will help U.S. companies act responsibly and consistently with the UN Guiding Principles, regardless of the host country operating environment. Based on our ongoing work on international investment, as well as our recent conference focused on home country efforts to regulate foreign investment for sustainable development,¹ we would like to take this opportunity to discuss two sectors for which these types of "home country measures" would be particularly effective: extractive industries and large-scale agriculture. We urge the government to seriously explore how the National Action Plan will address U.S. business conduct in these two areas.

1. The NAP can help ensure that the United States remains a leader when it comes to monitoring extractive industries investments.

Extractive industries investments have great transformative potential in low- and middle-income countries, yet they also can serve as sources of corruption, human rights abuses, and environmental degradation. Home country efforts can help in shaping such investments to be mutually beneficial and rights-respecting.

The United States showed great leadership in enacting Sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 1504 requires U.S.-listed extractive industry companies to disclose payments to governments on a per-project basis, while Section 1502 creates assessment and reporting requirements for any companies issuing U.S. securities whose products may contain "conflict minerals" (gold, tin, tungsten, or tantalum) from the Democratic Republic of Congo or neighboring countries.

These reporting requirements were widely heralded by stakeholders concerned about transparency in the extractive industries and the links between mineral sourcing and human rights abuses. They helped inspire other governments to also establish extractives reporting requirements, including a European Commission Directive in

¹ For more information on the conference, including the background paper, please visit <http://ccsi.columbia.edu/2014/11/12/raising-the-bar-home-country-efforts-to-regulate-foreign-investment-for-sustainable-development/>.

2013 that requires country-by-country and project-based reporting on payments to governments made by large extractive and logging companies, and a European Commission draft regulation proposed in March 2014 that would create an E.U.-system of self-certification for importers of conflict minerals. (The European Union is being urged to amend this proposal to ensure that it is harmonized with U.S. rules on conflict minerals due diligence and reporting.) In December 2014, Canada also enacted extractives transparency legislation, which requires oil, gas, and mining companies to disclose payments to governments.

While the United States' initial actions to promote stronger due diligence and greater transparency related to extractive industries investments were groundbreaking, it is unclear how effective these rules will be, and how the United States plans to implement and enforce them. For example, only 1,300 companies filed the required conflict minerals disclosures form by the first deadline, although the U.S. Securities and Exchange Commission (SEC) had estimated that closer to 6,000 companies would be doing so.² The government should ensure that it will fully enforce this requirement and address any non-compliance.

In addition, since a federal court struck down in July 2013 the SEC's first payment disclosure rule developed in compliance with Section 1504, the SEC has failed to promulgate a new rule. This significant delay is concerning, and the United States has now been passed by developments in both the European Union and Canada.

We thus urge the U.S. Government to use the development of the National Action Plan to help ensure that the United States remains a leader when it comes to promoting better due diligence, greater transparency, increased monitoring, and more responsible business conduct related to extractive industries investments. This could include developing concrete targets and timelines for implementing and enforcing existing home country measures, such as Dodd-Frank Sections 1502 and 1504, as well as exploring other supplementary measures that could be taken, such as ensuring access to remedy for individuals whose human rights have been violated, or exploring how international investment agreements could be used to incentivize compliance with human rights norms, including by excluding human rights violators from investment protection.

2. The NAP process should consider the role of the U.S. Government in monitoring and regulating large-scale agricultural investments abroad.

In the past decade, investors have become increasingly interested in investing in agriculture in low- and middle-income countries, particularly through large-scale land acquisitions. These acquisitions are generally purchases of or long-term leases for large tracts of land. Although there is a lot of misinformation and gaps in understanding regarding the global scale of this phenomenon, a number of international institutions, researchers, and advocacy groups have sought to shed light on the situation. Current estimates assert that U.S. investors are leading this rush to acquire land abroad.³

Agricultural investment is quite important, and, in some contexts, large-scale land acquisitions might be the most appropriate agricultural investment model. However, many large-scale land acquisitions do not incorporate best practices in terms of responsible business conduct, and indeed contribute to negative human rights impacts on local communities and other stakeholders. These negative impacts can include, for example, forced evictions or dispossession from resources on which communities depend for their livelihoods. Such acquisitions have been described as "land grabs," which the International Land Coalition defines as land acquisitions or concessions that have at least one of the following factors: "(i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are

² "Conflict Minerals: Perspectives on Initial Filings and Preparations for 2015," *Beveridge & Diamond, P.C.*, September 3, 2014.

³ See, for example, the Land Matrix, which has documented over 1,000 deals covering a total of 38,244,655 hectares of land. Using this data set, the United States is the top investor country, with more than 7 million hectares of land under concluded deals. This is twice as much land as the second greatest investor country, Malaysia, which has 3.5 million hectares of land under concluded deals. Because of the opacity surrounding these types of land deals, however, the Land Matrix can only provide, at best, a rough estimate based on incomplete information. For more information, see <http://www.landmatrix.org/en/get-the-idea/web-transnational-deals/>.

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gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.”⁴

Although some international efforts have been made to provide guidance on responsible agricultural investment – most recently with the Committee on World Food Security’s Principles for Responsible Investment in Agriculture and Food Systems, which were adopted in October 2014 – there remains a great gap to fill in ensuring that outward investment in agriculture is conducted responsibly, transparently, and with respect for the human rights of workers, local communities, and other stakeholders.

Given the large number of U.S. investors involved in large-scale land acquisitions relative to investors from other countries, and the high potential for significant human rights abuses when such investments are not conducted responsibly, we urge the U.S. Government to use the NAP process to consider what actions the U.S. Government could and should take to encourage responsible business conduct related to large-scale agricultural investments. This could include monitoring, reporting, or transparency measures similar to the existing measures covering extractive industries investments. Furthermore, as suggested above in respect of extractive investments, other government actions could include steps to ensure victims’ access to remedy or to exclude human rights violators from investment agreement protections.

Conclusion

We are extremely pleased that the U.S. Government is developing a National Action Plan to promote responsible business conduct abroad, and commend the Administration’s leadership in doing so. We encourage the government to use this process to explore how the United States can remain a leader in promoting responsible business conduct, and to consider specifically how the NAP can and should cover U.S. outward investment in the extractive industries and related to large-scale agricultural projects.

Thank you for your consideration of these comments. Should you have any questions, we would be happy to discuss this further.

Sincerely,



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⁴ Tirana Declaration, available at <http://www.landcoalition.org/fr/node/1109>.