

**Report of the Investment Subcommittee of the Advisory  
Committee on International Economic Policy  
Regarding  
Implementation of the  
OECD Guidelines for Multinational Enterprises**

**Presented to:  
The Department of State**

**January 12, 2011**

## **INTRODUCTION**

The Investment Subcommittee (“the Subcommittee”) of the Advisory Committee on International Economic Policy (“ACIEP”) submits this report in response to the request of the Department of State (“State Department”). The State Department asked the Subcommittee to conduct a review of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (“the Guidelines”), the voluntary principles and standards for responsible business conduct promulgated by governments to multinational enterprises operating in or from adhering countries. In particular, the State Department asked the Subcommittee to focus on the processes by which the State Department promotes the Guidelines and responds to concerns and complaints brought under the Guidelines.

The Report is divided into the following sections:

- Mandate and working methods of the Subcommittee
- Recommendations of the Subcommittee
- Written submissions of the Subcommittee members

The Subcommittee members urge the Administration to reflect on these recommendations, as well as on other input from citizens as it reviews the Guidelines.

## MANDATE AND WORKING METHODS OF THE SUBCOMMITTEE

The State Department asked the Subcommittee to conduct a review of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (“the Guidelines”) and the U.S. government procedures to implement the Guidelines. As detailed by the ACIEP and Jose Fernandez, Assistant Secretary of State for Economic, Energy and Business Affairs, the State Department was particularly interested in the Subcommittee’s observations and views on four general topics: (i) structure and oversight of the U.S. National Contact Point (“U.S. NCP”); (ii) promotion of the Guidelines; (iii) establishing a proactive agenda for the U.S. NCP; and (iv) the handling of specific instances. It should be noted that the Subcommittee was free to examine other procedural issues of its choosing. The substantive content of the Guidelines was outside the mandate of the Subcommittee’s review, as those issues are being separately reviewed by other bodies.

Every member of the ACIEP was eligible to become a member of the Subcommittee. The co-chairs also welcomed expressions of interest in membership from a broad range of stakeholders interested and involved in issues falling within the scope of the Guidelines. In addition, certain individuals were invited to act as observers.<sup>1</sup> Both the Subcommittee members and observers make up a diverse group of individuals, with representation from business, labor, environmental NGOs and the legal profession.

The Subcommittee used its best efforts to focus on the issues of primary interest to the State Department. As a general matter, the Subcommittee convened and deliberated on its own during two hour bi-weekly meetings held during the last four months of 2010. When it was considered useful, the Subcommittee invited representatives from the State Department to provide briefings on specific issues. On one notable occasion, the Subcommittee received a briefing on a “specific instance” from the parties who were involved in the matter. At that briefing, the party who submitted the written request, the party who represented the MNE which was the subject of the request, and a State Department representative all shared their firsthand experience with the specific instance process.

The Subcommittee is co-chaired by Thea Lee, Deputy Chief of Staff of the AFL-CIO, and Alan Larson, Senior International Policy Advisor at Covington & Burling LLP. The co-

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<sup>1</sup> It is the policy of the Obama Administration that persons who are currently registered as lobbyists under the Lobbying Disclosure Act are prohibited from joining federal advisory committees and their sub-groups. To comply with this policy but not lose the wealth of experience that these individuals had, the State Department and the Subcommittee agreed that registered lobbyists should be permitted to act as observers. In their capacity as observers, these individuals attended meetings, offered valuable information and insight, but ultimately were not involved in the writing of the Report.

chairs wish to thank members of the Subcommittee for their hard work and constructive spirit. A considerable degree of common ground was found on the topics under discussion. However, where there were sharp differences on issues, we did not seek to force consensus or soft pedal the differences that existed. Consequently, we have included in the annexes the statements of groups or individuals who wished to express their own views in their own words.

## RECOMMENDATIONS OF THE SUBCOMMITTEE

This section will lay out the recommendations of the Subcommittee in the four general topical areas of interest to the State Department: (i) structure and oversight of the U.S. National Contact Point (“U.S. NCP”); (ii) promotion of the Guidelines; (iii) establishing a proactive agenda for the U.S. NCP; and (iv) the handling of specific instances.

### STRUCTURE AND OVERSIGHT OF THE U.S. NATIONAL CONTACT POINT

Pursuant to the Guidelines, the role of the National Contact Point (“NCP”) is to promote understanding, as well as to encourage observance of the Guidelines. In this capacity, the NCP also receives requests for assistance with respect to specific instances in which it is alleged that a Multinational Enterprise (“MNE”) has engaged in conduct that is inconsistent with the Guidelines. The OECD has expressed the view that “[b]ecause of the central role it plays, the effectiveness of the NCP is a crucial factor in determining how influential the Guidelines are in each national context.” It is the expectation of the OECD that NCPs will “function in a visible, accessible, transparent and accountable manner. These four criteria should guide the NCPs in carrying out their activities.” The Subcommittee agrees with the OECD that the NCP should function in a visible, accessible, transparent and accountable manner.

The Subcommittee agrees that it could be useful to review on a periodic basis the work of the NCP. This review could include the procedures of the NCP, the promotion of the Guidelines, and other technical or procedural issues with which the NCP requests guidance. Input from a broad range of stakeholders, including business, unions, non-governmental organizations, and academics should be incorporated into any review process. Individual submissions regarding the mandate and operations of this review can be found in the “Written Submissions of the Subcommittee Members” section of this Report.

### PROMOTION OF THE GUIDELINES

The Subcommittee believes that promotion of the Guidelines needs to be done both within the Government and with external stakeholders.

The U.S. NCP should make available information on the Guidelines to other agencies as relevant. Specifically, the NCP should educate business-facing agencies (e.g., the Department of Commerce, the Small Business Administration, the Export Import Bank, and the Overseas Private Investment Corporation) on the content of the Guidelines and encourage these agencies to promote the Guidelines. The NCP should engage in similar efforts to promote and educate on the Guidelines with embassy staff who are engaged in business promotion or interfacing with U.S. and foreign corporations. The NCP should work to ensure that these agencies, as well as embassy staff, are trained in the Guidelines and able to provide information on the Guidelines to U.S. businesses operating overseas. Similarly, embassy staff working on any issue covered under the Guidelines -- including, but not limited to, labor, environment, anti-bribery, consumer interests, and competition -- should also be made aware of the Guidelines and the U.S. NCP procedures for specific instances.

The Subcommittee also believes that the U.S. NCP should ensure that information about the Guidelines and about the work of the NCP is publicly available to all stakeholders, both through the State Department website and through other materials and trainings. This should include information both on the content of the Guidelines and on the procedures for raising specific instances with the NCP. The NCP should seek to maximize access to all parties by providing the information in a variety of languages and formats.

The Subcommittee believes it is critical for the U.S. NCP to participate in outreach meetings, workshops and seminars with companies, business associations (including those with a corporate social responsibility mandate) and civil society organizations.

The Subcommittee recognizes that the NCP could benefit from the experience that various international financial institutions (including, for example, the World Bank, the Overseas Private Investment Corporation, the International Finance Corporation, the European Bank for Reconstruction and Development) have with multi-stakeholder engagement and their own independent accountability mechanisms. Some of these institutions have their own programs for educating business and civil society regarding their social and environmental guidelines and requirements. The NCP should consider participating with relevant institutions in partnered workshops, outreach efforts to communities, and annual meetings.

The NCP also should encourage business associations and civil society organizations to disseminate information about the Guidelines and their importance through their informational channels. Special effort should be made to promote the Guidelines with small businesses, including by working with the Small Business Administration and business associations representing small business.

#### ESTABLISHING A PROACTIVE AGENDA FOR THE U.S. NCP

The Subcommittee believes that promotion of the Guidelines is inextricably intertwined with establishing a proactive agenda for the U.S. NCP. There are various matters in which the NCP could and should become more actively involved.

The Subcommittee believes that it would be mutually beneficial for the U.S. NCP to initiate a proactive agenda by convening regular meetings, at least annually, with a wide range of stakeholders, including companies, environmental and human rights NGOs, labor unions, consumer associations, business and trade associations, and socially responsible investment firms. Instead of reacting to existing issues, this type of proactive engagement could assist in identifying emerging challenges, facilitating anticipatory issue management, and ultimately addressing potential issues before negative impacts occur.

The Subcommittee agrees with the Guidelines' acknowledgment that many enterprises have developed "internal programmes, guidance and management systems that underpin their commitment to good corporate citizenships, good practices and good business and employee conduct." However, the Subcommittee is concerned that there are remaining challenges in promoting behavior that is consistent with the Guidelines in both OECD and non-OECD countries. The Subcommittee believes that one of the reasons for these remaining challenges may be that some countries have failed to implement and enforce national legislation consistent with

the Guidelines, and this creates an uneven playing field. The Subcommittee recommends that the NCP encourage other agencies to provide policy guidance and audit training to these countries. The ultimate goal of this governance education would be to improve the standards of business conduct in these countries.

#### THE HANDLING OF SPECIFIC INSTANCES

The Subcommittee agrees that all parties involved in the specific instance process could benefit from the establishment of a target time frame of twelve months for the complaint process (where a mutually satisfactory mediation process is not ongoing). This timeframe would include benchmarks for: acknowledgment of receipt of complaint; notification of the MNE named in the complaint; and each formal stage of the specific instance process (i) the initial assessment and decision whether to offer good offices, (ii) assistance to the parties in their efforts to resolve the issues raised, and (iii) conclusion of the proceedings including the issuance of a Final Statement (where appropriate). The Subcommittee accepts that these are target benchmarks and circumstances may necessitate flexibility in the timeframe. Examples of these limited situations may include when the parties confirm that productive negotiations are on-going or agree that further deliberation is in the interests of the issues raised under the Guidelines.

The Subcommittee recommends that the NCP, upon receipt of the complaint, should identify the steps it intends to take in order to make an initial assessment of whether the issues raised merit further examination.

The Subcommittee approvingly notes that the Implementation Procedures obligate the NCP to follow certain steps in instances where the NCP determines that the issues raised merit further examination and, as a result, offers its good offices to help the parties resolve the issues. These steps are to be followed in consultation with the parties, and, where relevant, include the following:

- “Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts;
- Consult the National Contact Point in the other country or countries concerned;
- Seek the guidance of the Investment Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;
- Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.”

The Subcommittee notes that the Implementation Procedures to the Guidelines state that, where the parties are unable to resolve the issues through the specific instance process, the NCP will “issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.” In these instances, the Subcommittee believes that the Final Statement should name the parties concerned and outline the issues involved; the recommendations of the NCP, where

appropriate; and, if possible, reflection on why the issues were unable to be resolved through the specific instance process.

The Subcommittee also notes that it is the stated policy of the U.S. NCP to issue such a statement in situations where the parties decline the good offices of the NCP. The Subcommittee endorses this approach.

The Subcommittee also notes that the Implementation Procedures to the Guidelines instruct the NCP, after consultation with the parties, to make the results of its procedures publicly available “unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.” The Subcommittee endorses this approach in instances where the parties involved reach agreement on the issues raised. The Subcommittee believes that, similar to the approach described above, the Final Statement in these instances should name the parties concerned as well as outline the issues involved and the recommendations of the NCP, where appropriate.

The Subcommittee recognizes that there may be situations in which it may be beneficial for the NCP, with the agreement of the parties, to engage in follow-up to ensure the resolution of the issues involved. The Subcommittee believes that a target time frame for such follow-up would be helpful.

The Subcommittee believes that, both as a general matter and in the context of specific instances, publicly available information regarding the work of the U.S. NCP is vital to the interests of transparency and accountability as stated by the OECD. Fully recognizing the importance of confidentiality in the effective implementation of the Guidelines, the Subcommittee agrees that this public disclosure must conform with the confidentiality provisions of the Guidelines.

The Subcommittee understands that the U.S. NCP, on past occasions, has referred parties to the Federal Mediation and Conciliation Service (“FMCS”). The Subcommittee believes the NCP should make it more widely known that the FMCS is available at the parties’ request. It should also ensure that both parties have agreed to the methods, processes, and time frame for the mediation beforehand.

Individual views regarding the handling of specific instances can be found in the “Written Submissions of the Subcommittee Members” section of this Report.



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## OECD Guidelines for Multinational Enterprises

### Mark Kantor Recommendations

The U.S. National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises is in the wrong location. The proper location cannot be determined unless and until the U.S. decides whether the function of the NCP process is (i) to serve as a neutral mediator of private sector labor-management disputes (“good offices”) or (ii) to serve as an independent investigator of those disputes (“final statements should include factual determinations and assess whether a company’s actions have violated the Guidelines”). The two functions are incompatible with each other and an effort to split the difference by combining aspects of both functions will continue to result in lack of utilization of the NCP process so long as it remains voluntary.

If the U.S. Government does not choose between these two functions, any efforts to address the issues put to this Subcommittee will not result in more effective utilization of the Guidelines. That result cannot benefit either labor or business interests.

Regardless of which of those functions is appropriate, the U.S. Department of State lacks the expertise and resources to do an adequate job. State Department officers, no matter how well intentioned, have little or no training in mediation skills, labor-management relations, labor law, labor organizing, collective bargaining, or workplace practices and rules. Moreover, the State Department lacks the ability, technical and economic resources, and expertise to engage in any independent fact-finding of private sector labor-management disputes beyond simply looking at the one-sided information provided by the disputing parties or the information available from parallel proceedings conducted by an authority with expertise (e.g., the NLRB or the Federal Mediation & Conciliation Service).

In effect, the State Department has “people with good hearts, training in public diplomacy and a conference room.” That is nice, but it is insufficient to achieve effective dispute resolution of private sector labor-management disputes. Moreover, if both parties mutually wish to reach a solution, the lack of expertise, resources and the proper skill set means that the Department is unlikely to be the place the disputing parties come to for assistance.

### **Two Contradictory Functions**

The discussions have identified two visions of the function of the NCP. In one vision, the NCP offers its “good offices” to host conversations between two disputing parties, reviewing submissions by the parties and perhaps engaging in “shuttle diplomacy” between the parties.

That is a classic mediation function. The other function is best described in one of the submissions by some members of this Subcommittee – the “final statements should include factual determinations and assess whether a company’s actions have violated the Guidelines.” That is a classic investigatory and determination function.

The mediation function requires confidentiality to be successful. Standard V of the Model Standards of Conduct for Mediators, jointly promulgated by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution, makes clear the fundamental role that confidentiality plays in mediation by a neutral.

#### **STANDARD V CONFIDENTIALITY**

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

This reliance on confidentiality is not at all controversial among mediators and users of mediation. If the Subcommittee wishes, I am glad to provide additional citations to innumerable texts.

The NCP process, however, calls for a Final Statement, in which the NCP may reach conclusions and express opinions. In practice, the U.S. NCP has not done so, but it is clear that the business representatives on this Subcommittee are concerned that the NCP retains the ability to do so. The lack of certainty regarding confidentiality severely undermines the attractiveness of the NCP program as a “good offices” device. Labor and some NGO representatives on this Subcommittee affirmatively seek public conclusions and opinions. Moreover, those groups also seek participation in the NCP process by third parties (“representatives of business, civil society, and labor”). Those positions are directly inconsistent with a successful structure for mediation.

It is extremely rare for a mediator to make his or her opinions publicly available. In doing so, the mediator would in any event never disclose any information received in confidence and would never disclose anything without express consent. Third parties such as labor or business NGOs would play no role in the mediation except as mutually agreed between the disputing parties.

If a disputing party is concerned that confidentiality may not be respected, then that party simply will not provide the mediator any information not already in the public record. In practical terms, the party will also not offer to the mediator any indications about possible compromises not already signaled to the opposing party. A party will also not show any appreciation to the mediator of the weaknesses of that party's positions or the strengths of the opposing party's positions absent rigorous confidentiality.

Speaking based on my own personal experience as a mediator, the risk of a loss of confidentiality dooms a mediation. For mediation ("good offices") to be voluntarily utilized and then successfully employed, confidentiality is crucial.

The other possible function for the NCP is investigatory, with the NCP undertaking a fact-finding process that does not rely solely on submissions by the parties and information in the public record. Once that fact-finding process is concluded, the NCP would then make conclusions and recommendations, to be embodied in a final statement made public and enforced by a variety of possible tools. That function requires expertise, resources and a skills set suitable for investigating a labor-management dispute. It also requires transparency.

That investigatory approach is incompatible with the mediation function, which depends on confidentiality. It is also unlikely to be voluntarily accepted by any party who has less than full confidence in either (a) the Department's expertise, resources and skills set for investigating these disputes and/or (b) the strengths of its own positions in the dispute. The farther the NCP goes down the road of being an investigatory forum, the less likely it is to be triggered voluntarily.

I am aware of one other international process that seeks to combine mediation procedures with a public final report, the Conciliation provisions in Chapter III of the ICSID Convention dealing with investor-State disputes. Conciliation calls for a neutral tribunal to hear from the parties, seek to mediate the dispute and, if there is no resolution, issue a Final Report. The ICSID Convention was adopted in 1965. In the succeeding 45 years, there has been only 1 conciliation report ever issued. The unwillingness of parties to employ this hybrid system speaks volumes about the lack of attractiveness to anyone of a voluntary process that hopes to combine a form of mediation with a form of investigation and public reports.

### **Lack of Proper Skills**

Regardless of which of the above two functions is appropriate, the U.S. Department of State lacks the expertise and resources to do an adequate job. Turning to the mediation function, mediators require training and expertise – having public diplomacy skills is not even close to

sufficient. See, illustratively, the credentialing process of the International Mediation Institute (<http://www.imimmediation.org>).

Indeed, many US states require formal training and certification before an individual can act as a mediator for personal disputes and disputes referred to mediation by the state courts. Mediators in U.S. Federal court are also only permitted to serve if they have satisfied specified mediation training. That is additionally and especially true for labor-management mediation. Moreover, having experience with one solitary mediation is not the same thing as having credible experience; to be a useful mediator requires exposure to a number of mediations to develop the skills set taught in the formal education and training programs. Given the voluntary nature of mediation, it is hard to imagine either labor or management seeking or benefiting very much from “good offices” by a person or organization lacking the proper training and experience.

The investigatory function also requires expertise and skills not found at the Department of State. First, expertise. To properly investigate a labor-management dispute requires an understanding of the legal and practical framework for that dispute; labor-management relations in the private sector, labor law, labor organizing, collective bargaining, and workplace practices and rules. Department officers do not have this expertise and there is nowhere inside the Department where an officer can obtain training and experience in such issues. Taking a course or two is not again sufficient – practical hands-on experience such as is found at the NLRB, the Federal Mediation & Conciliation Service, the Department of Labor and the Department of Justice is required.

Second, resources. Proper investigation requires not only trained personnel, it requires a number of trained personnel. It requires travel expenditures. It requires education and training programs. It requires software, computers and technicians to organize the evidence. And etc. and etc. and etc. There is no budget within the Department for such resources and no reasonable prospect that the Department will obtain those resources.

Third, fact-finding tools and expertise. In addition to labor-management expertise, a proper investigation must look to information beyond self-serving information provided by the parties and information taken from the record compiled by organizations with the proper expertise (NLRB, FMCS, etc.). That requires both training in fact-finding investigation and the ability to compel formally or informally access to information not volunteered by the disputing parties. The NLRB, DOL and DOJ for example, employ numerous investigators backed by substantial resources.

Turning the NCP program into a useful investigatory tool requires turning the program from a strictly voluntary program into a formally or informally mandatory program (subpoena power, sanctions for non-disclosure such as denial of access to Eximbank or OPIC programs, or similar tools). Whether or not that results in fewer voluntary referrals of disputes to the NCP, it certainly means that the investigators need training, tools and resources not found in the State Department and current law.

For these reasons, I recommend the State Department not invest further resources in the NCP program. The U.S. Government should instead focus on choosing between the competing visions of the function of the program. Then, the Government should decide where to locate the



program and how to provide the kind of resources, expertise, experience, tools and skills set necessary for the chosen function.

I hope this is useful.

Mark Kantor

December 8, 2010

**Submission to the Investment Subcommittee of the Advisory  
Committee on International Economic Policy (ACIEP)**

**Submission Date: January 12, 2011**

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## **I. Introduction**

The OECD Declaration on International Investment and Multinational Enterprises is a balanced framework to improve the international investment climate and encourage the positive contributions foreign investors make to economic, social and environmental development. The Declaration is one of the most important OECD instruments for U.S. companies because it establishes standards for national treatment, conflicting requirements and international investment incentives and disincentives.

The OECD Guidelines for Multinational Enterprises are part of the OECD Declaration on International Investment, establishing a clear and logical connection between international foreign direct investment by multinational enterprises and the recommendations to companies on responsible business conduct in their overseas operations.

The United States Council for International Business and the U.S. Chamber of Commerce both sit on the Investment Subcommittee of the Advisory Committee on International Economic Policy (ACIEP). Both organizations have also participated in the bi-monthly meetings to review and make recommendations with respect to the processes the State Department uses to implement and promote the OECD Guidelines.

Outlined in the pages which follow are our thoughts and recommendations with regards to six key issues areas as they pertain to the processes by which the State Department promotes the Guidelines and responds to concerns and complaints under the Guidelines.

## **A. Transparency & Confidentiality**

Transparency is welcome and necessary in government proceedings in nearly all instances as it provides accountability and it encourages participation in a democratically governed society. However, given the voluntary nature of the NCP process and to ensure its integrity, confidentiality of the proceedings, discussions, and all other relevant communications between the parties and the NCP should be paramount. Failing to ensure such confidentiality will not only be just cause for a party to abandon the procedure, it will send a negative signal to the business community as a whole, both here and abroad, as to the value of the NCP process.

To the degree that two interested parties are interested in voluntarily consenting to use the government to help work through grievances based on a voluntary set of guidelines, the NCP process needs to err on the side of confidentiality. Without confidentiality, the incentive to participate and submit to the voluntary proceeding is compromised. If business is unwilling to participate in the process then efforts to make the NCP process more transparent will only serve to also make the NCP process that much more ineffective, rendering it useless.

That said, we could accept a general public log by which the NCP confirms that it has received a complaint by referencing the date it was received. Such a log would keep the complaining party and the target of the complaint confidential. A system for classifying complaints in broad terms could also be developed that would identify only in the broadest terms the nature of the complaint, such as whether that the complaint is labor or environment related. In addition to recognizing receipt of the complaint the log could also list such a generic classification. Finally the log could provide in very general terms the status of the complaint, for example: pending, expired, or resolved. Pending would indicate it is active in some manner, expired would indicate that it is no longer active (withdrawn, dismissed, refusal of other party to join), and resolved would indicate that there was at some level a successful mediation.

Any material part of the complaint or proceedings needs to remain confidential as should any correspondence by the NCP unless both parties agree to have matters related to the case made public.

## B. Parallel Proceedings

The subject of “Parallel proceedings” has been discussed on several occasions by the OECD Working Party on Investment.

“Parallel proceedings” refer to specific instances of business conduct that may be inconsistent with the OECD Guidelines **and** is also the subject of other proceedings such as criminal, regulatory, alternative dispute settlement such as arbitration, etc. At issue is whether, and under what circumstances, business conduct, which is the subject of a proceeding other than that proscribed by the Guidelines, be taken up by a national contact point (NCP) with a view toward mediation by the NCP. On this issue of parallel proceedings, the OECD Guidelines and Commentary state:

- “The Guidelines are not a substitute for nor should they be considered to override law and regulation. { ... }, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.” (Paragraph 2 of the commentary to the Guidelines).
- “In this context the NCP will take into account: the relevance of applicable law and procedures; how similar issues have been, or are being treated in other domestic or international proceedings. (Paragraph 14 of the Commentary on Procedures).
- “Conflicts with host country laws, regulations, rules and policies may make effective implementation of the Guidelines in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.”(Paragraph 20 of the commentary).

While this information may be helpful to NCPs and companies in deciding whether to participate in an NCP “specific instance” procedure—initial review, mediation, final report, it falls short of establishing clear lines as to when and whether the NCP should do so. Indeed, current OECD guidance is for the NCP to retain flexibility to determine if it can “add value” to the process of an alternative procedure. This flexibility does not prohibit the NCP from taking up the same case under review by another governmental body.

For greater clarity and certainty, to avoid duplication of effort, to eliminate the perception that one party may have “two bites at the apple” and to reduce the burden on taxpayers who fund the NCP, it is critical that there be clear lines as to when the NCP may take up a “complaint” into its procedure.

We recommend that where business conduct is being addressed by another governmental body and /or by other bodies such as consensual arbitration, the NCP **only** take the case into its procedures where there is credible evidence that the business conduct being presented to the NCP is **materially and substantively different** from that being reviewed by the other forum/body, with the burden of proof resting with the NCP to demonstrate the difference.

This rule would not preclude both parties, by mutual consent, from consulting with the NCP on the meaning and procedures of the Guidelines. However it would eliminate duplication of effort on the part of government agencies addressing business conduct by two different government bodies and create a more balanced view that no party has “a second bite at the apple”.

### **C. Final Statements & Recommendations**

#### ***When the NCP's mediation fails or a company refuses to engage in the process:***

Currently the OECD Guidelines state that when the NCP fails to mediate, a report is issued but it must respect the confidentiality of both parties involved. Confidentiality is imperative to the mediation process and it must be ensured by the NCP that the report remains in the sole custody of the parties involved and the NCP.

In addition we strongly believe that the NCP should not provide recommendations or a final statement following a company's refusal to participate in the mediation process. These recommendations could be used by other parties in parallel proceedings to support the opposing case and also pass judgment, which the NCP does not have the authority to do. Finally in order to provide recommendations the NCP would need to engage in fact finding and the NCP is not properly equipped with financing, people or skill sets to proceed with this scope of work.

#### ***When the Issue is settled outside of the NCP or withdrawn:***

Under no circumstances should a final report be released when the case is settled outside the NCP other than to note that the case was settled outside the context of the NCP process. This would be a breach of neutrality and confidentiality of the NCP and not incentivize other companies to participate in the VOLUNTARY process.

Although the Guidelines provide for issuance of a final statement, they do not speak to instances where the specific instance has been withdrawn. In other words, they do not prohibit filing a final statement where a specific instance has been withdrawn even if the final statement just states that the complaint was withdrawn. Upon filing a final statement in which the case has been withdrawn this would AGAIN be violating the confidentiality of the NCP. In addition this would place the company under scrutiny from senior leadership and shareholders although the case could have been fabricated or misinterpreted by other parties involved.



#### D. Investment Nexus:

As stated in the preface to the OECD Guidelines for Multinational Enterprises: “*The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.*” This statement explicitly sets out the clear and established link between the Guidelines and international investment, and thus the investment nexus.

We therefore support the existing investment nexus, which can be summarized as follows:

- Any transaction covered by the Guidelines specific instance procedure must include an “**investment nexus**”, i.e. an operation equivalent to investment. That means that **purely trade cases** are clearly outside the scope of the Guidelines.
- There is no 'one-size fits all' approach in determining when a transaction is **equivalent to investment** and each specific instance will be treated by NCPs on its own merits, but the NCP must be able to demonstrate where the investment nexus exists.

We would not support any proposal to eliminate or limit the investment nexus as this would undermine the balance established in the Declaration on International Investment.

## II. Proactive Agenda for Identifying and Addressing Challenges Faced by Many Firms in Similar Circumstances in the Interest of Avoiding Problems

One of the issues the State Department has identified as being of particular interest regarding the OECD Guidelines for Multinational Enterprises is the promotion of the Guidelines and specifically how the NCP develops a “Proactive Agenda for identifying and addressing challenges faced by many firms... in the interest of avoiding problems.” Additional areas include reaching out to stakeholders, individual firms and other institutions.

Concept/Principle 10 of the Guidelines states that, “Governments adhering to the *Guidelines* will promote them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*.”.

Unfortunately, within US industry, knowledge of the Guidelines is limited to those that have used the good offices of the NCP to resolve issues related to implementation of the Guidelines. This does not imply that MNEs are not aware of many international initiatives. The Universal Declaration of Human Rights; the ILO Declaration on Fundamental Principles and Rights at Work and the Core conventions; UN Global Compact; Global Reporting Initiative; Fair Labor Association workplace code of conduct; Social Accountability International SA8000; and ISO 14001 are a few examples of widely known standards, principles, or guidelines. The key difference is that many of these initiatives are designed to bring various parties together to try to resolve common challenges, while the OECD Guidelines have historically focused solely on the complaint process.

There is an opportunity for the US NCP to meet the objective of promoting the Guidelines by assuming a more positive, proactive agenda. The following are some recommended activities that the US NCP (and perhaps in conjunction with other countries’ NCPs) should embrace to meet this objective:

1. **Recommendation** - Work with a wide range of stakeholders (companies, environmental and human rights NGOs, labor unions, consumer associations, business and trade associations, socially responsible investment firms, etc.) to identify emerging challenges and facilitate anticipatory issue management.

**Commentary** – Many MNEs utilize stakeholder engagement to understand societal expectations. However, most are still reactive to an existing issue versus attempting to address potential issues before negative impacts can occur. An annual review and discussion of emerging issues with stakeholders would enable MNEs to be proactive. This type of communication would not only promote the Guidelines but illustrate where it adds value from the perspective of multiple stakeholders.

2. **Recommendation** - Assist MNEs investing in non-OECD countries where national laws and regulations are in conflict with the Guidelines.

**Commentary** – The OECD has established procedures to prevent conflicting requirements from being imposed on MNEs by member states. However, MNEs sometimes find conflict between non-OECD countries’ national policy and the Guidelines (e.g., Freedom of Association). MNEs are sometimes asked to find parallel means to meet the expectations of the Guidelines (which might mean legal non-compliance) or to lobby host governments to

make changes. We believe that the US NCP can play an effective role in state to state discussions aimed at resolving these conflicts.

3. **Recommendation** - Work with non-OECD governments that stakeholders have identified need assistance in implementing laws and regulations that support the Guidelines.  
**Commentary** – The Guidelines acknowledge that many enterprises have developed “internal programmes, guidance and management systems that underpin their commitment to good corporate citizenships, good practices and good business and employee conduct.” However, these efforts in combination with due diligence activities have had limited success in non-OECD countries. The primary reason is the lack of implementation and enforcement by host country governments resulting in an uneven playing field. We believe the US NCP could encourage other US government departments to provide policy guidance and audit training in the countries and areas stakeholders have identified.
  
4. **Recommendation** - Develop initiatives that involve multi-stakeholder participation in non-OECD countries with the goal of ensuring the Guidelines are met.  
**Commentary** – The ILO Better Work Program has been one of the most effective initiatives in achieving adherence to internationally accepted labor requirements. The single feature that drove success was the multi-stakeholder participation of MNEs, NGOs, host governments, local industry and the ILO. We believe this model could be reapplied by the US NCP in conjunction with the OECD and non-OECD host governments and multiple stakeholders.

One related question is the cost for a proactive agenda. The new position of a full-time NCP does provide increased resources. In addition the NCP can tap into the resources in non-OECD US Ambassadors’ offices. Trade associations and individual firms are willing to sponsor meetings. Alternately, webinars can be an effective way to reach a large audience without travel. We also believe that there are existing or planned initiatives in other US government departments (e.g., Dept. of Labor, State Dept, and US AID) that can provide funding for these Guidelines initiatives.

**In summary, we believe that proactive activities like those above would bring value to all stakeholders especially MNEs while promoting the Guidelines.**

### **III. Review of the NCP Process and Advisory Committee**

We believe that it could be useful on a periodic basis to pull together a cross-section of stakeholders to review the U.S. process involving the NCP. This review should be limited to only the NCP process, avoiding any possibilities to debate the merits of specific cases. Such a review should only be conducted with the benefit of a time series of data and the review must be carefully conducted as to avoid process deliberations becoming a proxy battle for disagreements on actual outcomes from specific cases. It can be too easily forgotten that the OECD Guidelines and the NCP are entirely a voluntary code and process. Where matters with regard to violations of national law are at question there are other far more appropriate venues which are designed to render judgment and determine restitution. The NCP is not such a process.

The current review being conducted by the ACIEP Subcommittee serves as the ad hoc model we would endorse and is appropriately functioning as a forum for periodic review, removing the need to create any additional advisory body. We would oppose the creation of any standing, dedicated advisory body due to the fact that there is not a demonstrated need, nor sufficient program of work to justify such a body. Our concern is that such a standing, dedicated advisory body to the NCP would over time have the propensity to move beyond the evaluation of the NCP process to the examination of specific cases themselves. Given the voluntary nature of the OECD Guidelines, both parties have to avail themselves of the NCP's good offices; a bright line must be drawn between any advisory body (standing or for that matter ad hoc) and individual cases. This bright line would be breached with the creation of a standing, dedicated advisory body to the NCP.

Further, the advisory body might be tempted to not only render soft judgments on cases, but on the office of the NCP itself. Any concerns by a party directly involved in a case that the NCP is not adequately doing its job in offering its good offices as a mediator in a completely voluntary process should be taken up by that party with the NCP's superiors in the State Department at the time a concern arises.

We would recommend that the State Department in the future make use of the ACIEP Subcommittee, as it is currently doing, to conduct periodic reviews of the NCP process while providing safeguards to ensure that any review is limited to the NCP process.

**Recommendations on Reforming the US National Contact Point  
Submitted to the  
Advisory Committee on International Economic Policy (ACIEP)  
Subcommittee on Investment**

**January 12, 2011**

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## I. Introduction

This submission represents a collaborative effort among a diverse set of members of the ACIEP Subcommittee on Investment, including labor union representatives, human rights defenders, environmental advocates, an independent expert on international grievance mechanisms, lawyers, and a socially responsible investment professional. Given the considerable and unusual consensus reached by this broad group representing numerous constituencies on the scope and type of reforms that are necessary, we jointly put forth this single set of recommendations.

The OECD Guidelines for Multinational Enterprises (Guidelines) are of interest to all our organizations and we believe that reform of the US National Contact Point (NCP) could be a major step in advancing corporate social responsibility. The Guidelines are the only multilateral instrument dealing with certain crucial social and environmental issues with a provision for dispute resolution through direct involvement by national governments. Stakeholders in other countries have engaged with their National Contact Points to resolve problems and mediate disputes, suggesting tremendous potential for the U.S. NCP if reforms are instituted. Where violations occur in contexts with weak, corrupt, or poorly functioning judicial systems, the NCP can be the only tool available to people harmed by Guidelines violations. We welcome the State Department's commitment to evaluating and reforming the U.S. NCP, particularly the process for evaluating "specific instances" raised by members of global civil society.

These comments are based on a careful reading of the *OECD Guidelines for Multinational Enterprises* and the Guidelines' "Procedural Guidance," as well as a thorough review of the structure and procedures of National Contact Points in other countries. The comments are also informed by our collective experience with the design, implementation and practice of international financial institution accountability mechanisms throughout the world and other quasi-legal mechanisms in multi-stakeholder initiatives.

These recommendations are also grounded in civil society experience with the U.S. NCP over the past decade. These experiences are laid out in Human Rights Watch's written testimony to the State Department, which relies on research by Lance Compa of Cornell University. Compa reports that 21 cases were brought before the U.S. NCP from 2000 to 2008. Of these, the NCP has issued a final statement in only one case, and does not appear to have successfully participated in resolving any disputes.<sup>1</sup> The single final statement released by the NCP simply clarified that the relevant dispute had been resolved through other means.

Both Compa's research and other submissions made by civil society organizations from the U.S. and abroad during the State Department's public comment period regarding U.S. NCP reform document the frustration of organizations and communities that have attempted to bring specific instances to the attention of the U.S. NCP. In one case, a representative of the United Farm Workers (UFW) told Compa that, "We mailed the complaint and got nothing back from the NCP.... We called and didn't get a call back. We e-mailed and got no response. It was a black

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<sup>1</sup>"Written Comment Concerning the Administration's Review of the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises," submitted by Arvind Ganesan, Human Rights Watch. Submitted to the Department of State on November 3, 2010.

hole.” After three years of no contact with the UFW, the NCP continued to list this case as “ongoing.” These experiences, especially contrasted with the successful experiences that public interest advocates have had with NCPs in other countries, indicate that serious institutional changes are required if the U.S. NCP is to live up to the potential that this mechanism presents for resolving international disputes.

We believe these recommendations, if implemented, will help guarantee that the U.S. NCP is operating in accordance with the “core criteria” of visibility, accessibility, transparency and accountability that are detailed in the Guidelines.<sup>2</sup>

In recognition of the State Department’s request for clear, specific input, this document goes into significant detail on recommendations for bringing the U.S. NCP’s structure and specific instance processes in line with international best practices. However, the following reforms are particularly key:

- **Transparency:** The U.S. NCP should ensure that transparency, one of the core criteria for NCPs, underpins all the NCP’s activities. All major steps in the U.S. NCP process should be published on a public website and communicated to the parties involved. The Guidelines require issuance of a publicly available final statement describing the outcome of the process and any recommendations or agreed-upon remediation.
- **Clear procedures:** The U.S. NCP should create and publicly post detailed rules of procedure that enable a process for all sides to a specific instance to voice their views to the U.S. NCP. The procedures should set a timeframe for cases so that the U.S. NCP process is predictable, and should set clear criteria for accepting specific instances.
- **Clarified policy on parallel proceedings:** The existence of parallel legal or quasi-legal proceedings should not of itself preclude the U.S. NCP from accepting a specific instance. Rather, a specific instance should be suspended – not rejected – to the extent that a party shows that it could cause serious prejudice to existing binding proceedings. Any such decision should be disclosed to the Review Board and should be reviewed in the light of any changes to the status of the parallel proceeding.
- **Broad applicability:** The U.S. NCP should establish that the Guidelines apply to value chains and other business partners. This is in line with the likely outcome of the current update of the Guidelines, as well as other NCPs’ interpretations of the current language.
- **New structures and procedures to ensure accountability:** The U.S. NCP should be structured to avoid potential conflicts of interest, ensure stakeholder participation, and guarantee independence. To this end, a Review Board should be created to provide oversight of monitoring of the NCP’s effectiveness. Regular opportunities for participation, review, supervision, and guidance from civil society, business, and other government representatives should be instituted.

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<sup>2</sup>OECD Guidelines for Multinational Enterprises 33, 56-57 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.



## II. U.S. NCP Structure

The experience of civil society over the last decade, as outlined in Section II above and in submissions made during the public comment period, indicates clearly that there is widespread agreement that the NCP is not accountable to stakeholders or fair in its processes. In order to change both this perception and the underlying issues, structural changes are necessary.

### A. Oversight

#### **Review Board**

In order to ensure that the U.S. NCP functions independently and in accordance with its rules of procedure, a Review Board should be created.

As Professor John Ruggie observes, the “housing of some NCPs . . . within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest.”<sup>3</sup> As a “solution,” Ruggie has noted examples of NCPs creating “multi-stakeholder advisory groups” or restructuring NCPs so that they are governed by multi-stakeholder groups “independent of . . . the Government.”<sup>4</sup> In the U.S. context, while locating the NCP externally may not be practical, the structure of the NCP should include a multi-stakeholder oversight body with the mandate to oversee and monitor the effectiveness of the NCP. This oversight body will be referred to as the “Review Board.”

The Review Board would serve as the oversight body to review the U.S. NCP’s fulfillment of all elements of its mandate, including promulgation of the guidelines and their related procedures, and the handling of the various stages of the specific instance process. This would include complaints about the U.S. NCP’s non-compliance with its own established rules of procedure and timelines. Any oversight body created should be representative of the various stakeholders, have appropriate weight and standing and, while not impinging on the work of the NCP, be able to take a view as to the administration of specific cases where appropriate. Any oversight body that falls short of this will be in danger of becoming nothing more than a “talking shop”, considering matters in the abstract without any bearing on reality.

#### Members

The Review Board could be made up of a government representative from the State Department’s Office of the Legal Advisor, as well as external stakeholder representatives from business, labor, and public interest advocacy groups. We recommend a quadripartite board, with equal representation from labor, public interest advocates, government bureaus, and business.

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<sup>3</sup>John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 26 (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>4</sup>*Id.*

The Review Board could also call on representatives of other Government departments and agencies, as well as experts in the subject areas covered by the Guidelines, or on procedural issues, as necessary.

### Responsibilities

The role of the Review Board could cover oversight and guidance and include the following responsibilities:

1. oversee and monitor the effectiveness of the operation of the National Contact Point including ensuring that it follows published procedures for dealing with specific instances;
2. review any complaint made by a party to a specific instance regarding the alleged failure of the NCP to follow procedure and respond to the party within 30 days;<sup>5</sup>
3. review the need for further procedures, contribute to their development as required, and agree to any changes in procedure;
4. consider requests from the NCP for guidance on technical or procedural issues.
5. review all rejected or suspended complaints, including those rejected or suspended because of parallel proceedings;
6. receive all major reports and, if requested by either party to a claim, review Final Statements and respond to the National Contact Point regarding any follow-up issues;
  - a. If a review of an initial assessment or a Final Statement is requested by either party, the Review Board could: (1) ask the NCP for additional information supporting findings of fact or recommendations, (2) request that recommendations be elaborated upon or further justified, or (3) take no action. The Review Board would not have an appellate role, as it cannot overrule a decision—it could only ask for further information or justification.
7. consider any requests for clarifications or proposed changes to the Guidelines that are being brought before the OECD Investment Committee;
8. participate in evaluations of the NCP; and
9. assist and advise the NCP in relation to promotion of the Guidelines.

### Meetings

The Review Board could meet quarterly or otherwise at times that the Chair would consider to be appropriate, or at the request of the NCP.

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<sup>5</sup>For an example of other NCP oversight bodies with the power to review, see the United Kingdom NCP. United Kingdom National Contact Point, Opportunity to Review, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures>.

### Decision-making

Board members would be requested to work in a collegial manner in relation to decision-making. The Chair of the Review Board would draw conclusions based upon the discussions held.

### **Inter-Agency Committee**

In addition to the Review Board, the larger, existing NCP Inter-Agency Committee should be formalized as a multi-agency advisory body. The Inter-Agency Committee should be composed of representatives from the Bureau of Democracy, Human Rights, and Labor, Environmental Protection Agency, and the Departments of Labor, Justice, Treasury, and Commerce. The Inter-Agency Committee should receive prompt notification when a complaint is received in its area of expertise, copies of all Final Statements, and notification of findings of non-compliance with the OECD Guidelines.

### *B. Transparency*

The U.S. NCP should strive for transparency, a core criterion of the Guidelines, while respecting confidentiality provisions, as required. To this end, the NCP should make the following available on a public website:

- a roster of all complaints received;
- a record of all decisions or reports issued – including eligibility determinations, initial assessment reports, mediation summaries, Final Statements, and monitoring reports;
- a record of all requests for Review by parties;
- requests for timeline extensions;
- all decisions and reports made by the Review Board.

The decision-makers in the NCP process should be publicly disclosed – including the “secretariat” of the NCP within the Department of State, and also any external mediators or experts assigned (from a roster or otherwise) to conduct fact-finding or dispute resolution.

While the NCP may maintain confidentiality of business secrets, this should not be a justification for failing to uphold transparency in the review of specific instances. Given the voluntary nature of the process and the lack of sanctions, appropriate transparency practices are crucial. For example, publicly announcing the fact that a specific instance has been filed, including the names of the parties, and publicly stating whether or not the parties have met deadlines and complied with recommendations is one of the limited tools available to the NCP to encourage both parties to participate in the process in good faith. Despite fears expressed by some in the business community, it has been demonstrated not only by the procedures of other NCPs, but also by instances of intervention via other multi-stakeholder initiatives, that transparency in such cases is not a deterrent to engagement.

In particular, publicly posted final statements are vital to the transparency and accountability of the specific instance review process. The U.S. NCP must issue recommendations when appropriate to promote MNE compliance with the OECD Guidelines.

### C. Resources

Professor Ruggie also notes that “NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation.”<sup>6</sup> He cites this as one of the reasons that NCPs have failed to meet the “minimum principles”<sup>7</sup> required “to be credible and effective.”<sup>8</sup>

In light of this, it is important that the U.S. NCP be allocated sufficient resources to carry out its mission, including: a fixed budget sufficient to cover regular expenses; a revolving fund accessible to the NCP to use to conduct fact-finding, hire external experts and mediators, and conduct field visits as necessary; and a dedicated staff of preferably two or more people.<sup>9</sup>

### D. Independence

The housing of the NCP within the EEB, a government department tasked with promoting business, trade and investment, raises a possible conflict of interest.<sup>10</sup> An oversight body is one measure that can be taken to address this conflict. However, the NCP must take other steps to safeguard impartiality.

In order to ensure independence of the mechanism, NCP staff should be given no additional duties beyond administration of the NCP. They should be appointed based on their training and knowledge of dispute resolution and should be expected to comport with the highest standards of objectivity, ethics and professionalism.

The NCP should ensure that its staff has no conflict-of-interest in regard to the issues raised in complaints. For example, those responsible for providing government-sponsored corporate benefits should have no role at all in the NCP. At the individual level, where a staff member working on a specific complaint has an identifiable personal or financial interest in an MNE that is the subject of a complaint, disclosure and, where appropriate, recusal should be required.

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<sup>6</sup> John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 26 (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 24.

<sup>9</sup>See e.g., Netherlands National Contact Point, *Organization*, <http://www.oecdguidelines.nl/ncp/organisation/> (last visited Oct. 11, 2010) (3 full-time staff members); United Kingdom National Contact Point, Contact UK NCP, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/contact-us> (2 permanent members).

<sup>10</sup>See John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 26 (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

### III. Specific Instance Procedures

The specific instance procedure is the unique element that sets the Guidelines apart from other global codes for corporate behavior. Ensuring that this procedure functions in a fair, accountable, transparent, and visible fashion, in accordance with the above-mentioned OECD criteria,<sup>11</sup> is the most important potential outcome of this review of the U.S. NCP.

In assessing NCPs, Professor Ruggie notes that one common limitation is that “[t]here are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported.”<sup>12</sup> He states that mechanisms, such as the NCPs’, “must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome.”<sup>13</sup>

#### A. General Recommendations

##### 1. Target Time Frame

The U.S. NCP should put in place a target time frame for the complaint process, for example, 12 months.<sup>14</sup> Exceptions should be allowed for when the complaining party confirms that productive negotiations are on-going or when all parties agree that it is in the interests of the issues raised under the Guidelines. All deviations from the indicative timeframe should be disclosed to the Review Board.

The overall timeframe should include benchmarks for each stage of the process, for example:

- acknowledgement of receipt of complaint within 5 days;
- notification of the multinational enterprise (MNE) named in the complaint within 10 days, including a request for a preliminary response from the MNE within 30 days;
- an initial assessment report within 90 days;
- mediation lasting no more than 8 months unless both parties agree to an extension;

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<sup>11</sup> OECD Guidelines for Multinational Enterprises 33, 56-57 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>12</sup> John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 26 (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>13</sup> *Id.* at 24.

<sup>14</sup> For an example of another NCP with a 12-month time frame, see United Kingdom National Contact Point, *UK National Contact Point (NCP) Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* at 2.2, available at <http://www.bis.gov.uk/files/file53070.pdf>.

- in the event that parties refuse mediation or mediation fails then a determination phase in which the NCP assesses whether the Guidelines have been breached should be completed within 90 days;
- issuance of a Final Statement within 12 months of initial receipt of the complaint; and
- monitoring reports every 6 months by all parties to the specific instance until all parties are satisfied that there is no further need.

## *2. Receipt of the Complaint*

Upon registering a complaint, the U.S. NCP should notify the MNE named in the complaint promptly, such as within 10 days, and request that the MNE send a preliminary response within a reasonable period, such as 30 days. The Review Board and the Inter-Agency Committee should also receive notice of any complaint registered.

## *3. Initial Assessment of the Complaint*

The U.S. NCP must make an initial assessment of whether the issues raised in a complaint merit further examination and then, as required by the Guidelines, “respond to the party or parties having raised the issue.”<sup>15</sup> We recommend that the assessment be made and the response issued in the form of an initial assessment report within 90 days of the filing of the complaint.

During the initial assessment stage, the NCP should meet with the parties involved to discuss the issues raised.<sup>16</sup> After conducting meetings with both parties, the NCP should make a determination as to whether the parties are amenable to mediation and include this in the initial assessment report.

The NCP should file an initial assessment report that:

- specifies which aspects of the complaint have been rejected and which will be taken forward under the NCP procedure;
- provides its reasoning for the decision;<sup>17</sup>
- states whether the parties are amenable to mediation;
- specifies the arrangements through which the NCP will offer its good offices.

We recommend that this report be made publicly available on the NCP website and be copied to the Review Board.

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<sup>15</sup> OECD Guidelines for Multinational Enterprises, pg. 59, para. 15 (2008).

<sup>16</sup> Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer “good offices” in an effort to contribute informally to the resolution of issues.” OECD Guidelines for Multinational Enterprises, pg. 59, para. 16 (2008).

<sup>17</sup> “If the NCP decides that the issue does not merit further consideration, it will give reasons for its decision.” OECD Guidelines for Multinational Enterprises, pg. 59, para. 15 (2008).

#### *4. Mediation*

The U.S. NCP should provide a neutral mediator as agreed by the parties and selected from a prepared roster and also should ensure that both parties have agreed to the methods, processes and time frame for the mediation beforehand. The NCP should produce a mediation report for the parties and the Review Board as well as summarize the results of any mediation and make this summary publicly available on the website.

#### *5. Evaluation and Determination*

In the event that parties refuse mediation or mediation fails then a determination phase should begin. During the Evaluation and Determination phase, the U.S. NCP should assess whether the Guidelines have been breached. This phase should be completed within 90 days.

During the NCP's evaluation of the complaint and its determination of whether or not the OECD Guidelines have been followed, the NCP:

- will identify the steps it intends to take in order to proceed with the investigation and will notify all the parties in writing;
- will inform all parties of any necessary changes to these steps;
- may collect additional information from the parties as well as from other sources including other government departments or embassies in the home and host country;
- may also draw on the advice of experts;
- will share all the information received with the parties (unless there is good cause shown otherwise);
- will conduct field visits when the evaluation will be facilitated by an in-person visit;
- will allow parties to amend or supplement an existing complaint with new facts as they arise; and
- will review all information and make its determination as to whether the Guidelines have been breached.

#### *6. Final Statement*

As required by the OECD's Procedural Guidance, the NCP shall issue a Final Statement in all eligible complaints, regardless of the outcome.<sup>18</sup> The Final Statement should include:

- details of the allegations made including the provisions of the Guidelines that are alleged to be in breach;

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<sup>18</sup> "If the parties involved fail to reach agreement on the issues raised, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for." OECD Guidelines for Multinational Enterprises, Commentaries on the Implementation Procedures of the Guidelines of the OECD Guidelines for Multinational Enterprises, pg. 59, para. 18 (2008). This is commentary on Section C, para. 3, of the Procedural Guidance (pg. 34).

- a review of the information provided;
- a summary of the mediation process, if any (including whether agreement was reached);
- findings of any evaluation and determination with a clear statement as to whether or not the Guidelines have been breached;
- reasoning and analysis used to arrive at conclusions in adequate detail; and
- recommendations for implementation of the Guidelines, if appropriate;
- steps for follow-up, including a time frame for monitoring reports.

The NCP should establish a target for issuing the Final Statements, (for example three months following the end of mediation process) and Statements should be made publicly available immediately.

While compliance with the Guidelines is voluntary for corporations, the NCP must be empowered to issue a recommendation or a final statement— even if a company refuses to participate. This is critical to the meaningful implementation of the OECD Guidelines. If the NCP does not issue final statements and other public reports on the process of a specific instance, it would act as a disincentive for companies to engage in the process, thus effectively disabling the entire process.

Where a case is settled outside the NCP process, the final statement should make reference to that settlement. Any failure to do so would adversely impact the degree of transparency necessary for other stakeholders to effectively monitor the U.S. NCP process in a meaningful way. Where reference is made to a decision or agreement reached outside the NCP process, enough information should be provided that an interested party could access any public information about that outcome.

### *7. Review of a Final Statement*

As noted above, the Review Board should have a variety of roles, including reviewing specific cases. In this role, it does not operate as a binding appeals process but can request further information or justification.

If a Review is requested by a stakeholder, the Review Board should meet to discuss whether to: (1) ask the NCP for additional information supporting findings of fact or recommendations, (2) request that recommendations be elaborated upon or further justified, or (3) take no action. The Review Board should submit the Review Report to the NCP within a reasonable time, such as 30 days, of the request for Review. The NCP should respond to the Review Report in writing within 30 days. The Review Report and NCP response should be posted on the NCP website.

If after the NCP's response to the Review Report there are no findings of violations of the Guidelines, and no recommendations, the NCP should designate the case as closed. If there are violations and/or recommendations to be implemented, the case should be left open so that monitoring can begin to assist with transparency regarding the results of the NCP process.



## 8. *Monitoring and Enforcement*

After the Final Statement is issued, the NCP should conduct semi-annual monitoring reports on the MNE's compliance with the Guidelines. The NCP should request that all parties submit updates on their progress towards achieving compliance with the Guidelines, as needed. If the monitoring reports identify continuing non-compliance with the OECD Guidelines, the NCP should refer these reports to the appropriate entities, including the Inter-Agency Committee and agencies with discretion over the awarding of public assistance to companies, such as export credit agencies.<sup>19</sup>

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<sup>19</sup> For example, the Export-Import Bank of the U.S. and the Overseas Private Investment Corporation should factor this information into their due diligence if the MNE at issue seeks their support.

## **B. Broad Applicability of the Guidelines**

For the NCP to live up to its potential, it must accept specific instances based on business relationships that reflect prevalent patterns of international commerce – in particular, value chain and other contractual relationships.

Given the direction of the discussions in the ongoing Update of the Guidelines and the likely inclusion of a new chapter on supply chains and due diligence, it is essential that the U.S. NCP makes it clear that the Guidelines apply to suppliers and other business partners. Otherwise, the Guidelines will become irrelevant as an instrument for promoting responsible business conduct in a global economy that is characterized primarily by horizontal rather than vertical (ownership) relationships. Specific instances based on these relationships must be considered for acceptance subject to the conditions currently set out in paragraph 14 of the Commentaries to the Procedural Guidance.

The Guidelines specifically state that, “Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organizational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.”<sup>20</sup>

Other NCPs’ choices are instructive here. A case filed in 2001 by the India Committee of the Netherlands with the Dutch NCP resulted in improved monitoring of several companies’ supply chains. Similarly, the UK NCP provides a strong example with the DAS Air and Afrimex cases. In its final statements in these cases, the UK required companies to take a forward-looking approach to managing the risk of human rights abuses in their supply chains.

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<sup>20</sup>OECD Guidelines for Multinational Enterprises. Preface, Paragraph 2 (2008), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

### C. Addressing Parallel Proceedings

The current NCP has identified parallel proceedings as a particularly complicated issue in which guidance would be useful. We concur that this is a key area, and note that it has significant bearing on the core criterion of accessibility. Overall, it is reasonable to assume that a party that has a grievance pertinent to the OECD Guidelines may raise that matter through various judicial and/or non-judicial mechanisms. Parties generally are not barred from seeking different sorts of redress for different parts of a complaint in different forums; this principle should apply to specific instances as well.

The NCP serves a supplementary purpose to other forums. Its role is to facilitate the resolution of issues raised under the Guidelines – which may apply even if a parallel proceeding concludes that no legal remedy exists for a party’s grievance. Because the NCP neither is bound by the limitations of nor has the powers of a judicial or administrative body, it can perform this function relatively efficiently – at little cost to the company or the complainant. NCP dispute resolution can be a cost-efficient and timely additional approach that cuts down on the expenses of lengthy litigation.

Artificially dictating a bright-line rule that cuts off access to the NCP would reflect a misapprehension of the role of the NCP and would be at odds with the Investment Committee’s guidance.<sup>21</sup> Such an approach ignores a number of critical issues and would force the NCP to abdicate one of its central functions – promotion of Guidelines-compliant conduct in specific instances. While so-called parallel proceedings indisputably may raise difficult issues for the NCP, it is widely recognized that there will often be a role for the NCP’s good offices such that the existence of proceedings in another forum on similar facts should not automatically lead to the rejection of a specific instance complaint.<sup>22</sup>

The bright-line approach would also unfairly convert the optional, non-binding specific instance process into a binding, either/or proposition for complainants. If a complainant were to prefer the NCP’s mediation services, they might lose their legal right of access to courts and other tribunals, as applicable statutes of limitations might run while the specific instance process took its course. This is clearly not the intention of the Guidelines.

The U.S. NCP specific instance review should provide a mechanism whereby disputes, where appropriate, can be resolved in a quicker, more efficient manner rather than in an alternative adversarial, lengthy and more costly forum; the retention of the current flexibility would ensure that this is still a realistic option. Surely a less costly, more efficient method of resolving disputes must be considered to be in the interests of companies that are subject to the OECD Guidelines.

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<sup>21</sup> Cf. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2006 ANNUAL MEETING OF THE NATIONAL CONTACT POINTS – REPORT BY THE CHAIR, at 16–17 (“it is often impossible to develop detailed, fixed rules about how NCPs should handle specific instances. . . . The Investment Committee . . . has noted the value of a case-by-case approach. The Committee’s approach to parallel proceedings is no exception.”).

<sup>22</sup> See, e.g., *id.*, Annex 5, available at <http://www.oecd.org/dataoecd/23/33/37439881.pdf> (discussing parallel proceedings).

We recommend that the State Department take the following steps to address this complicated issue.

#### *A. Definition*

The U.S. NCP should publish a definition of what constitutes parallel proceedings for purposes of specific instances. As the OECD Guidelines do not provide sufficient clarification on what types of other proceedings should require consideration by the NCP, the US should adopt a concrete definition of parallel proceedings that is consistent with the four core criteria for NCPs in the OECD Guidelines. The U.K. NCP's definition of parallel proceedings meets these criteria:

*Court proceedings in progress at the same time as a Specific Instance, addressing the same or closely related allegations. Proceedings can be criminal or civil in nature and can take place under the jurisdiction of the host country, another country or an international court or tribunal.*<sup>23</sup>

#### *B. No Automatic Suspension*

The fact that issues arising out of a similar fact pattern are being addressed in a separate forum should not automatically lead to a suspension of the specific instance, as different standards may apply under the Guidelines, and the NCP may be able to offer different forms of assistance in dispute resolution. Moreover, specific instances should not be *rejected* as a result of parallel proceedings, but they may be suspended if appropriate, and revisited after the reason for suspension has expired.

We believe that the U.S. NCP should follow the UK model and suspend a specific instance *only if the specific instance will cause serious prejudice* on a party in the other proceeding. It follows, then that non-binding proceedings in other forums are not parallel proceedings, as the potential for prejudice would be negligible.

#### *C. Serious Prejudice Requirement*

Any party requesting the U.S. NCP to suspend a specific instance must show that there is a parallel proceeding, and establish why it will be seriously prejudiced in the parallel proceeding if the specific instance goes forward. The NCP should then make a final determination of whether to suspend or continue with the case after hearing reasoning from both sides, and should disclose this decision to the Review Board.

#### *D. Findings for Continuing or Suspending a Specific Instance*

When a party requests suspension of a specific instance due to parallel proceedings, the U.S. NCP should make findings as to whether the specific instance will cause serious prejudice

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<sup>23</sup>Dep't for Bus. Skills & Innovation, United Kingdom, *Approach of the UK NCP to Specific Instances in Which There Are Parallel Proceedings* (Sept. 2009), available at <http://www.bis.gov.uk/files/file53069.pdf>.

to that party in the parallel proceeding. The reasons for the U.S. NCP's determination to continue the specific instance or to suspend it should be made available to its Review Board and the public.

A finding of potential prejudice of a specific instance should not lead to indefinite discontinuation of the proceedings, nor need it entail complete suspension of the specific instance. The NCP should require follow-up from the parties on the status of the parallel proceeding in order to determine whether at some point the specific instance should be reinstated. Moreover, it should continue with any aspect of the specific instance that is either not implicated in the parallel proceeding, or that the U.S. NCP has decided will not cause serious prejudice to the party in the parallel proceeding.

#### *E. Offer of Good Offices, Conciliation and Mediation*

Good offices or alternative forms of dispute resolution may assist the parties in reaching a solution before going to a trial. Therefore, even after deciding that there is cause to suspend a specific instance in deference to a parallel proceeding, the U.S. NCP should make its services available to the parties by offering to assist with conciliation or mediation simultaneous to the parallel proceeding. It may be that in many cases, it will be less costly, less adversarial, and less time consuming to resolve the dispute with the assistance of the U.S. NCP than to pursue the parallel proceeding to completion.

#### *F. Effects of Findings in Parallel Proceedings*

The conclusion of a parallel proceeding in another forum should not automatically foreclose a specific instance, unless both parties agree that all relevant issues were resolved in the other forum. As the Dutch NCP has acknowledged, the Guidelines set out the OECD member states' expectations of corporate conduct that are distinct from the enforceable obligations set out by legislation;<sup>24</sup> therefore it is likely that proceedings in a legal forum often will not specifically address the Guidelines' standards. Instead, the NCP should consider any relevant findings of fact from a concluded parallel proceeding and decide whether to take them as true for the purposes of assessing the specific instance complaint and issuing a final statement. However, it should perform its own exercise of applying the Guidelines to the facts, rather than assuming that the conclusion of a similar case in a parallel forum disposes of the matter.

Recognizing that a dispute may still exist even after similar factual and legal matters have been disposed of in a parallel proceeding, the NCP should consider whether its good offices would be useful to settle the specific instance dispute. Finally, parallel proceedings should not preclude the NCP from issuing a final statement, as the NCP should always engage in its own process of assessment under the Guidelines.

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<sup>24</sup>Netherlands National Contact Point, *Final statement of the Dutch NCP on the "Complaint (dated 15 May 2006) on the violations of Pilipinas Shell Petroleum Corporation (PSPC), pursuant to the OECD Guidelines for Multinational Enterprises* (July 14, 2009), available at [http://www.oesorichtlijnen.nl/wp-content/uploads/final\\_statement\\_shell\\_pandacan\\_14\\_july\\_2009.pdf](http://www.oesorichtlijnen.nl/wp-content/uploads/final_statement_shell_pandacan_14_july_2009.pdf)

## **IV. Promotion**

The need for adequate promotion of the Guidelines is perhaps the area where the civil society and business representatives on the ACIEP Subcommittee share the most common ground.

### *A. General Promotion*

The U.S. NCP should ensure that information about the Guidelines and about the work of the NCP is publicly available to all stakeholders, both through the State Department website and through other materials and trainings. This should include information both on the content of the Guidelines and on the procedures for raising specific instances with the NCP.

The information newly posted on the State Department website regarding the NCP procedures is a good step in this direction. As a next step, the NCP should provide greater detail in its informational brochure. It is essential that the U.S. NCP provide clear information in languages and formats that maximize access to all parties.

### *B. Role of Embassies*

Embassy staff engaged in business promotion and interfacing with U.S. and foreign corporations should be trained in the Guidelines and provide information on the Guidelines to U.S. businesses operating in the countries where they are stationed. Embassy staff working on environmental, social, and labor issues should also be made aware of the Guidelines and the U.S. NCP's procedures for specific instances, and be given materials to share with local civil society organizations.

### *C. Other Federal Agencies*

The U.S. NCP should make available information on the Guidelines and on investigations of specific companies to other agencies as relevant. Specifically, government branches that provide support to U.S. corporations operating abroad, such as OPIC and the Export-Import Bank, should be made aware of the content of the Guidelines. These agencies should also be informed of specific instances brought before the NCP and findings that a given MNE has violated the Guidelines or failed to comply with a mediated agreement. We suggest that the NCP discuss with these agencies the possibility of considering compliance with the Guidelines and cooperation with the NCP specific instances process in decisions regarding assistance.

Other countries have incorporated the Guidelines into their export credit agencies' processes and criteria in a range of ways. Belgium actively urges companies receiving support to follow the Guidelines, and educates them on the Guidelines. Austria and the Netherlands require that companies certify that they will make great efforts to comply with the Guidelines in their applications for assistance. The UK has also taken up this issue, proposing that the ongoing Review of the 2007 OECD Revised Recommendation on Common Approaches on the

Environment and Officially Supported Export Credits require export credit agencies to take account of any negative final statement of an NCP.

## **V. Guidelines Update**

As we have been engaging in this Subcommittee process, a global update of the OECD Guidelines is taking place. We recognize that our Subcommittee's mandate does not extend to the U.S. government's positions on this process as a general matter. However, a number of participants in this process are concerned that positions taken by the U.S. in the Guidelines Update could undermine some of the reforms that the Subcommittee may propose for the U.S. NCP.

As a general matter, the U.S. should not take positions in the Guidelines Update that would foreclose substantive reforms to the U.S. NCP. More specifically, we make the following recommendations:

*A. Final Statements should include factual determinations and assess whether a company's actions have violated the Guidelines.*

The U.S. NCP has been hesitant to make factual findings on specific instances and to evaluate them for violations of the Guidelines, based on a consensus that was reached during the 2000 Guidelines Update. The NCP's inability to make findings allows companies to unilaterally derail the specific instance process through a refusal to engage or provide information.

Factual findings and determinations are necessary if the NCP is to recommend courses of action for both parties and to aid in the resolution of disputes. In appropriate cases, the NCP may incorporate the factual findings from proceedings in other forums into its own analysis of a specific instance. NCPs in our peer countries, including the United Kingdom, Norway, France, and the Netherlands, have already concluded that the 2000 consensus is no longer in effect; they routinely make determinations in specific instances.

*B. NCPs should be structured in a way that minimizes the potential for conflicts of interest and ensures stakeholder participation.*

As noted above, many NCPs are situated in government bureaus that are tasked primarily with the promotion of national business interests, creating a conflict of interest that jeopardizes the NCP's role as an impartial facilitator for the resolution of disputes. Each country should be free to tackle this problem in a manner appropriate to its domestic governmental structure and context. Some minimum standards can be set, however:

- NCPs should not report solely to bureaus whose mission is to promote business.
- NCPs should be subject to participation, review, supervision, and/or guidance from representatives of business, civil society, and labor as well as government representatives, in accordance with the collaborative nature of the Guidelines.

*C. The Guidelines should apply to business relationships that reflect prevalent patterns of international commerce – in particular, value chain and other contractual relationships.*

The U.S. NCP has rejected at least one specific instance on the grounds of a lack of an “investment nexus.” In the same clarification in which the Investment Committee first mentioned the investment nexus, it also noted that relations among suppliers and business partners may give rise to situations in which the Guidelines apply.<sup>25</sup> The updated Guidelines should make clear that international business relationships extend far beyond the traditional investment context, and that both consumers and investors understand that the risks to an enterprise’s financial health and reputation can also flow from its supply chain and other contractual relationships.

*D. NCPs should strive for maximum transparency, both internally and externally, while respecting the limited need for confidentiality.*

The unavailability of information as to the NCP’s procedures, the frequency and identity of specific instance complaints, and the outcome of the NCP’s attempts to assist at dispute resolution discourage participation by labor groups and civil society and hinder the ability of stakeholders to hold the NCP accountable for its performance. The failure of the NCP to share information equally with both sides of a specific instance complaint undermines the fairness of the proceedings and, consequently, the confidence either party may have that they are an equal participant in any efforts at dispute resolution.

We believe that the Guidelines should have a presumption of disclosure; at a minimum, absent a show of good cause, NCPs should publish notice of all major steps in the process, including the outcome of its initial assessment and a final statement, as outlined in the “Specific Instances Procedures” section above.

Moreover, NCPs should not consider materials submitted by one party to a specific instance if all other parties cannot also be given the chance to consider them and respond.

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<sup>25</sup>See Statement of the Investment Committee following its April 2003 meeting, *reprinted in* OECD, 2003 Annual Report on the OECD Guidelines for Multinational Enterprises, at 12, *available at* <http://www.oecd.org/dataoecd/3/47/15941397.pdf>.