

June 23, 2011

***Via Hand Delivery***

Mr. Jose W. Fernandez  
Assistant Secretary of State for Economic, Energy, and Business Affairs  
U.S. Department of State  
2201 C Street NW  
Washington, DC 20520

**Re: Joint Comments on the U.S. OECD National Contact Point Specific Instance Procedures Handout**

Dear Assistant Secretary Fernandez:

As civil society members of a coalition of human rights, labor, and environmental organizations that have been engaged in the U.S. NCP reform process, many sitting on the Advisory Committee on International Economic Policy (ACIEP) Investment Subcommittee, we write to communicate our frustration and disappointment with the Procedures outlined for the US NCP office.

Based on our work with the Guidelines update, the U.S. and other national NCP procedures, and as representatives of impacted communities filing Specific Instances, we are disappointed with the released U.S. NCP Procedures for Specific Instances under the OECD MNE Guidelines.<sup>1</sup> We believe the updates do not represent significant progress and believe there was a lack of consideration given to the extensive comments our organizations have provided. The procedures remain vague and lack necessary guarantees of visibility, accessibility, transparency and accountability that the OECD Guidelines recognize as “core criteria.”<sup>2</sup>

We applaud two advances, namely the inclusion of timelines and further direction regarding complaints that implicate parallel proceedings. Additionally, the indication given regarding a multi-stakeholder Advisory Board is a positive development, though we believe the scope and procedures of this board must be clarified. We recommend the Assistant Secretary consider the latest Specific Instances Procedures a draft that should be available for continued public comment and consultation. Alternatively, other mechanisms leading towards progressive harmonization of best practice among national NCPs should be considered.

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<sup>1</sup> U.S. Department of State, *U.S. NCP Procedures for Specific Instances under the OECD MNE Guidelines* (2011), available at <http://www.state.gov/e/eeb/ifd/oia/usncp/166661.htm>, distributed at the June 20, 2011 meeting with Jose Fernandez.

<sup>2</sup> OECD Guidelines for Multinational Enterprises 68, 75 (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

There remain hurdles to effective implementation in all four "core areas" recognized under the Guidelines: visibility, accessibility, transparency and accountability. A majority of provisions lack the specificity required to provide potential requesters or the NCP with guidance on how to access or implement the mechanism. The new procedures also include troubling provisions on confidentiality, a mediation fee provision that may be so costly as to be a bar to the filing of cases, a presumption and possible outright bar on final determinations on Guideline compliance, and a presumption against monitoring reports on MNE compliance and party agreements. Essential elements, such as complaint requirements, eligibility thresholds, the NCP reporting structure, and the rules and procedures for the creation of an Advisory Board, are not included.

To ensure a fair, independent, and effective mechanism, the U.S. NCP policy should require the creation of an independent Advisory Board with authority to review the NCP's functioning and ensure that the NCP follows its own procedures.

We remained deeply concerned that the U.S. approach towards the Guidelines and the NCP office continues to create hurdles for local communities filing Specific Instances. We offer considered recommendations that have proven successful in other national contexts, and call on the Obama Administration to become a leader in ensuring that multinational enterprises practice business responsibly and that peoples around the world have a means to address human rights and environmental issues affecting their communities.

As the revised procedures currently stand, it is impossible for those who wish to use the mechanism to understand whether their complaint will be accepted, how it will be treated, and why. Such vague and ambiguous procedures render the NCP of little use. Our detailed recommendations regarding how the NCP procedures should be amended to address these deficiencies are summarized as follows:

Regarding **visibility** and **accessibility**, the U.S. NCP policy should:

- Require wide distribution of clear rules of procedure and an easy-to-understand guide to filing complaints regarding specific instances;
- Provide the budget for addressing complaints; and
- Require outreach to and consultation with the public to make the U.S. NCP more visible.

Regarding **transparency**, the U.S. NCP policy should:

- Require all major steps in the U.S. NCP process to be published on a public website and communicated to the parties involved; and
- Have a default position of transparency, not secrecy but allow parties to request confidentiality and non-disclosure.

Regarding accountability, the U.S. NCP policy should show increased indicia of independence, fairness, and effectiveness. Regarding **independence**, the U.S. NCP policy

should:

- Expressly require reporting to both the Bureau of Economic, Energy, and Business Affairs (“EEB”) and the Bureau of Democracy, Human Rights, and Labor (“DRL”);
- Require the creation of an independent multi-stakeholder Advisory Board; and
- Prohibit staff from working on complaints when they have a conflict-of-interest.

Regarding **fairness**, the U.S. NCP policy should:

- Enable the Advisory Board to ensure that the NCP follows its own procedures for dealing with complaints.

Regarding **effectiveness**, the U.S. NCP policy should:

- Require that staff that may be involved in aspects of the mediation process have a minimum threshold of training in dispute-resolution;
- Require findings by the NCP regarding the MNE’s compliance with the OECD Guidelines and recommendations for how these violations should be addressed; and
- Permit sufficient budgetary resources for the NCP to carry out its mission.

Our detailed comments provided in the attached annex are designed to address the weaknesses in the current U.S. NCP system and to provide suggestions for bringing the U.S. NCP in line with these best practice principles.

We believe that these changes to the U.S. NCP will facilitate better outcomes for all parties involved and will help the U.S. NCP operate in accordance with the “core criteria of visibility, accessibility, transparency and accountability” which the OECD Guidelines require of all NCPs.<sup>3</sup>

We appreciate the opportunity to provide input on the U.S. National Contact Point and we look forward to continuing engagement with the State Department.

Sincerely,

Natalie Bridgeman Fields  
Accountability Counsel

Atossa Soltani  
Amazon Watch

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<sup>3</sup> OECD Guidelines for Multinational Enterprises 68, 75 (2011), *available at* <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

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