

**Annex to the
June 23, 2011 Civil Society to Letter re U.S. NCP**

I. Detailed Comments

The following specific comments fall into four issue areas: (A) Structure, Independence and Oversight, (B) Procedures for Handling Specific Instance Complaints, (C) Monitoring, Reporting and Enforcement, and (D) Promotion and Outreach. The comments below follow the public document released in June 2011 titled “*U.S. NCP Procedures for Specific Instances under the OECD MNE Guidelines*” (“Procedures Handout”)¹ and the U.S. NCP brochure titled “*OECD Guidelines for Multinational Enterprises and the United States National Contact Point*.”²

A. Structure, Independence and Oversight

The Procedures Handout lacks specificity as to the roles of the various departments involved in the specific instance request process. Without specific provisions specifying what the structure of the NCP is, communities will have little assurance that their request will be dealt with in a professional and independent manner and the NCP will be unclear as to who is responsible for various aspects of the complaints process.

The U.S. NCP is currently located in EEB, a unit that reports to the Under Secretary for Economic, Energy and Agricultural Affairs in the U.S. Department of State. According to the U.S. NCP website, “the NCP is assisted by the State Department’s Bureau of Democracy, Human Rights, and Labor, as well as with other agencies, including the Departments of Labor, Commerce, Justice, Treasury, the Environmental Protection Agency, and the U.S. Trade Representative.”³ There is no description of how the U.S. NCP is assisted by these federal agencies, at what point in the process they have influence, and the result of this influence.

The U.S. NCP’s policy should be explicit as to which agencies house the NCP, who the NCP reports to, what the roles of the NCP officers are, and whether the NCP will have additional staff.

In order for the U.S. NCP to better meet the principle of independence, ***the U.S. NCP should be an independent office within the Department of State and the policy should require joint reporting to EEB and DRL.*** Both Bureaus have subject matter expertise in the type of issues that relate to the Guidelines. Situation of the NCP under their joint purview would send a message that the U.S. NCP is not simply a tool of U.S. economic interests (per the mission of EEB), but is truly a mechanism capable of promotion of the multi-issue Guidelines and is

¹ 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>.

² U.S. Department of State, *OECD Guidelines for Multinational Enterprises and the United States National Contact Point* (2011), available at <http://www.state.gov/documents/organization/140823.pdf>. Seeing as though this brochure is currently still on the U.S. NCP’s website, we assume that this brochure is still in effect and is in addition to the Procedures handout released in June, 2011.

³ U.S. Department of State, *U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, <http://www.state.gov/e/eeb/ifd/oia/usncp/index.htm>.

available for assistance with dispute resolution. For practical purposes, this may be most important for budgeting, though it is also important for the mechanism's credibility and perception for stakeholders worldwide.

United Nations Special Representative for Business and Human Rights John Ruggie has identified this conflict-of-interest risk with unitary agency NCPs. As a “solution[,]” he has noted the example of the Dutch NCP, which is governed by multi-stakeholder group.⁴ In the U.S. context, while locating the NCP externally may not be practical, the structure of the NCP should at least include reporting jointly to EEB and DRL, and having dedicated U.S. NCP staff (preferably two or more) appointed by both Bureaus to work only on U.S. NCP activities.⁵

In order to ensure the independence of U.S. NCP staff, and thereby the independence of the mechanism, the NCP's policy should ensure that its staff have no conflict-of-interest with regard to the issues raised in complaints about specific instances of conduct.⁶ By assigning independent staff to the U.S. NCP (and not people otherwise in charge of promoting U.S. business interests abroad, as has been the case for the past decade), this will ensure that those responsible for providing government-sponsored corporate benefits, for example, would not have any role at all.

At the individual level, procedures should be required so that, for example, staff working on a specific instance complaint who own more than a *de minimus* amount of stock in or have family in a leadership position at an MNE that is the subject of a complaint should disclose that conflict and, where appropriate, be required to recuse themselves of work on that particular complaint. U.S. NCP policy should require that staff have at least some training in dispute-resolution. The U.S. NCP's policy should require staff to be hired based on their ability to comport with the highest standards of objectivity, ethics and professionalism.⁷

The U.S. NCP should be given budgetary resources sufficient to carry out the NCP's mission, including budget for salaries, resources to conduct fact-finding and field visits, budget

⁴ 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>.

⁵ See e.g., Netherlands National Contact Point, *Organization*, <http://www.oecdguidelines.nl/ncp/organisation/> (last visited June 21, 2011) (4 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> (last visited June 21, 2011) (3 permanent members).

⁶ Methods to avoid staff conflict-of-interest are common in judicial and non-judicial accountability mechanisms. See e.g., Netherlands National Contact Point, *Filing Complaints (procedure)*, para. 3, <http://www.oecdguidelines.nl/ncp/filing-complaints/> (“If there may be a conflict of interests or an appearance of such conflict, the NCP member concerned will waive his or her involvement in the procedure.”); European Bank for Reconstruction and Development, *Project Complaint Mechanism Rules of Procedure*, para. 51, available at <http://www.ebrd.com/downloads/integrity/pcmrules.pdf> [hereinafter EBRD PCM]; International Finance Corporation, Compliance Advisor Ombudsman, *Operational Guidelines*, para. 1.3 and 4.3, available at <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf> [hereinafter IFC CAO].

⁷ See, e.g., EBRD PCM, *supra* note 6 at para. 47; IFC CAO, *supra* note 6 at para. 1.3.

to engage external experts and mediators, and sufficient resources to conduct outreach. The parties to a complaint should not bear the costs of any outside mediator or facilitator, or there should be specific exemptions for parties unable to meet mediation expenses. The current cost-sharing formulation for outside mediation will create significant obstacles to impacted communities bringing specific instances.

With regard to oversight, ***the U.S. NCP's policy should require involvement of an Advisory Board, with equal representation from government, business, labor, and public-interest advocacy groups.***⁸ The Board should have a role in review, supervision, and guidance of the NCP.

In order to ensure equal representation, the Board should have a minimum of 12 members and could include representatives from the organizations on the Advisory Committee on International Economic Policy (ACIEP) Investment Subcommittee. We recommend that the State Department accept applications from interested parties and select Advisory Board members for renewable three-year appointments in consultation with the ACIEP Investment Subcommittee. We recommend that the Chair of the Advisory Board be elected by the members of the Board annually and the seat rotate among the four stakeholder groups. The Advisory Board should meet quarterly. In addition, the Board should meet at times that the Chair deems necessary or at the request of the NCP.

The Advisory Board should have access to all NCP decisions that terminate consideration of a specific instance and be responsible for reviewing various stages of the process, including complaints about the U.S. NCP's non-compliance with its rules of procedure. A detailed discussion of the Advisory Board's proposed role during the complaint process is discussed in Section B, below.

In addition, the Advisory Board should have access to all NCP files once a specific instance is complete, as long as such disclosure does not violate the confidentiality requested by the claimant. With that information and other information provided by external stakeholders, the Advisory Board should review the NCP's functioning on a periodic basis to ensure that the NCP follows its own procedures for dealing with complaints.⁹ On an annual basis, the Board should report findings to the NCP, the public (via the NCP website) and the Assistant Secretaries of State of EEB and DRL. The Advisory Board should provide guidance to the NCP, as requested, on technical or procedural issues. The Board should also consider any requests for clarifications or proposed changes to the OECD Guidelines for Multinational Enterprises that are brought before the OECD Investment Committee.

The currently underutilized U.S. NCP Inter-Agency Working Group (IWG) should be composed of representatives from the Environmental Protection Agency, and the Departments of

⁸ These public interest advocacy groups should include international human rights, development and environmental organizations. For examples of other oversight committees with the power to review, see the 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>.

⁹ See, e.g., EBRD PCM, *supra* note 6 at para. 69 (mandating review of the Project Compliant Mechanism every three years).

Labor, Justice, Treasury, and Commerce and the identities of these representatives should be publicly available.¹⁰ The IWG would receive copies of all Final Statements and any enforcement recommendations based on findings of non-compliance. The policies should be clear about who sits on the IWG, how they are selected, and what their role is.

B. Procedures for Handling Complaints

Requirements for Filing a Complaint

The Procedures Handout is largely silent on the requirements for filing a complaint. While the U.S. NCP's brochure issued in April 2010 includes some guidance on what must be included in a complaint, such requirements must be codified in a single policies and procedures document.¹¹ Absent clear guidance on filing requirements, the process remains too vague for affected communities to have direction on how to file a complaint.

We agree with the list of requirements in the section on "*How to Request Assistance from the NCP*" in the April 2010 brochure, but suggest that number 5 include the words "if possible." It may be the case that communities in areas where OECD-based MNEs operate do not have the ability to interpret particular chapters or parts of the Guidelines or may not have access to a copy of the Guidelines. Based on the principle of accessibility and in accordance with the requirements for filing complaints at IFI accountability mechanisms and other NCPs, we recommend that number 5 be discretionary.¹² For similar reasons, the U.S. NCP rules of procedure should note that requests and further correspondence are permitted in major world languages.¹³

Moreover, the standing requirements for who can file a claim, on what grounds a claim can be filed, and under what timeframe the claim must be submitted should be explicit in the U.S. NCP's policies. The NCP complaints process should be open to any individual, or their chosen representative, who is affected by, or likely to be affected by, the activities of the MNE.

¹⁰ Based on our informal survey of members of the current Inter-Agency Committee, it appears that they have had a very limited role in the U.S. NCP process of handling specific instances.

¹¹ U.S. Department of State, *Brochure: OECD Guidelines for Multinational Enterprises and the U.S. National Contact Point*, available at <http://www.state.gov/documents/organization/140823.pdf>.

¹² See e.g., United Kingdom National Contact Point, *UK National Contact Point (NCP) Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* at 3.2.2, available at <http://www.bis.gov.uk/files/file53070.pdf>; EBRD PCM, *supra* note 6 at para. 20 (a Complaint should include, where possible, the Relevant EBRD Policy that has allegedly been violated); The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 31, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (noting that a complaint need not follow any particular format) [hereinafter IDB]; IFC CAO, *supra* note 6 at para. 2.2.

¹³ See EBRD PCM, *supra* note 6 at para. 6 (accepting complaints in any of the working languages of the Bank including, but not limited to English, French, German, or Russian); The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 32, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (Feb. 2010) (accepting Spanish, English, Portuguese and French. Requests will be processed if received in other languages, although additional time for processing and translations may be necessary).

As environmental harms often take years to manifest, there should be no statute of limitations for a claim to be brought.

We note that the U.S. NCP should allow requestors to amend, update or supplement complaints if new relevant information becomes available subsequent to filing. The NCP should provide support to requestors about how to draft a complaint, both on their website and through direct correspondence, if appropriate.

Confidentiality

The Procedures Handout maintains the same presumption of secrecy as plagued the previous U.S. NCP policies, while failing to incorporate procedures to enforce confidentiality where it may truly matter, namely when disclosing the requester's identity to the enterprise or others may put the requester in peril.

As a general comment, the default position of the U.S. NCP should be transparency, not secrecy. The fifth section under "*Initiating a Request*" in the Procedures Handout should be re-phrased in accordance with the core principle of transparency. For example, "The U.S. NCP informs both parties that, once the specific instance proceedings begin, complete confidentiality of communications with the U.S. NCP and with each other and of sensitive business information is expected"¹⁴ should be changed to: 'To the extent the parties agree to proceed through a confidential dialogue, the U.S. NCP will respect that confidentiality.' Additionally, "any views, communications, or information provided during the proceedings shall remain confidential unless the other party agrees to its disclosure or unless this would be contrary to national law" should be changed to 'Information and communication provided during the proceedings shall be open to disclosure unless a party agrees to its confidentiality or unless disclosure would be contrary to national law.' The Procedures Handout further states "a failure to honor confidentiality expectations will be considered bad faith and may lead to the immediate termination of the U.S. NCP's involvement in a specific instance." This phrase leaves open the possibility that an MNE could violate confidentiality and thereby create the grounds for the NCP to pull out of the proceeding. This loophole should be eliminated.

While the presumption in the NCP proceedings should be transparency, it is important that the procedures do not create a barrier to requestors who have a legitimate fear of danger if their identity is disclosed. The OECD Guidelines require the NCP to take this into consideration: "NCPs may take steps to protect the identity of the parties involved where there are strong reasons to believe that the disclosure of this information would be detrimental to one or more of the parties. This could include circumstances where there may be a need to withhold the identity of a party or parties from the enterprise involved."¹⁵ Accordingly, the fifth section under "*Initiating a Request*" should state, 'while anonymous complaints are not accepted, the requestor may request confidentiality and that confidentiality will be respected by the U.S. NCP.' In the

¹⁴ 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/afd/oia/usncp/166661.htm>.

¹⁵ OECD Guidelines for Multinational Enterprises 80 (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

third section under “*Initiating a Request*” the policy should explicitly state that in the event the requestor asks for confidentiality, the NCP shall block out any name or other identification on the complaint prior to sharing it with the multinational enterprise. However, confidentiality should not be a justification for failing to post major milestones in the process on the U.S. NCP website.¹⁶ To the extent reports must be redacted in part based on confidentiality requirements, un-redacted portions or summaries must be posted.

Actions Upon Receipt of a Complaint

While the Procedures Handout includes important provisions about responding to requestors upon receipt of a request, these provisions lack clarity and do not include essential steps to protect fairness, accessibility, and transparency.

We agree with the first step under the heading “*Initiating a Request*” that the NCP “acknowledges receipt of the request by email immediately.”¹⁷ However, we request that the time-bound nature of this step (“immediately”) be included in the second step regarding acknowledging receipt of the request via trackable mail. Furthermore, in the first step the Procedure Handout states that the NCP “reviews the specific instance request,”¹⁸ but what is involved in this “review” is unclear. We urge the NCP to clarify exactly what procedures will be followed and what determinations will be made in this step.

We welcome the addition that the acknowledgement letter provided by the NCP “describes the Guidelines and explains the role of the U.S. NCP and its procedures, the role of other NCPs, if applicable, and requests a designated point of contact for further correspondence.” In line with the OECD Guidelines, we suggest the NCP also be required to provide information on the timeframe for the NCP process. Additionally, the NCP should be required to provide all of this information in the local language of the requestor, if possible, or at a minimum in the national language of the requestor.

After confirmation of receipt, the Procedures Handout states that the MNE will be offered an opportunity to provide their “view of the matter.”¹⁹ The MNE should not be given the opportunity to respond until the complaint is deemed to have met basic criteria. However, in order to ensure transparency, the U.S. NCP should publicly post the fact of the submission of the complaint on a docket on its website.²⁰

¹⁶ See, e.g., EBRD PCM, *supra* note 6 at para. 60; United Kingdom National Contact Point, *UK national contact point (NCP) procedures for dealing with complaints brought under the OECD guidelines for multinational enterprises* at 2.5, available at <http://www.bis.gov.uk/files/file53070.pdf> (Sept. 2009); IFC CAO, *supra* note 6 at para. 1.5 and 3.4.

¹⁷ 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/afd/oia/usncp/166661.htm>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See e.g., The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 31, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (Feb. 2010); IFC CAO, *supra* note 6 at para. 2.3.2; See also Netherlands National Contact Point, *Filing Complaints (procedure)* at 4.3, available at <http://www.oecdguidelines.nl/ncp/filing-complaints/>.

If the U.S. NCP determines immediately after registering the complaint that it does not meet basic criteria (which remain vague in the Procedures Handout and must be clarified), the U.S. NCP should first offer the requestor the opportunity to amend the complaint to address the reasons for ineligibility, if possible. If the requestor either does not amend the complaint or the NCP determines the problem could not be addressed by amending the complaint, the NCP shall send notice to the Advisory Board who will have five days to approve the finding on a no-objection basis. If there are no objections at the end of five days, the U.S. NCP will mark the case as closed, posting the decision and reasoning on the U.S. NCP website and notifying the parties and the Advisory Board. If there are objections to closing the case by any member of the Advisory Board, they may request that the U.S. NCP consider additional information or further explain the reasoning for the decision to close the case. A record of the Advisory Board's request and the NCP's response should be posted on the NCP website. If the reason for rejection is that the issue should be addressed by another department or agency, the NCP policy should require the NCP to forward the complaint to the relevant department or agency, and the complainant should be notified of such action.

If the U.S. NCP determines that the complaint does meet basic criteria, either after an objection from the Advisory Board or in the first instance, the Advisory Board and all relevant parties should be advised of the decision that a complaint meets basic criteria for proceeding to an initial assessment. At that point, the MNE and other relevant NCPs should be given an opportunity to respond to the issues raised in the complaint within 30 days, as provided in the Procedures Handout. The policy must clarify what the NCP does with the MNE's response, and should allow the requestor to respond to the MNE's response.

Currently, the Procedures Handout states that other U.S. government agencies will "inform the U.S. NCP" if "the issue raised is pending in any other proceeding involving their agency."²¹ Clarifications are needed within the policy to determine what the NCP does with that information and how the information affects the complaint.

In the event that the issue at hand involves multiple NCPs, the Procedures Handout states, "if it is determined that the U.S. NCP should not take the lead, the U.S. NCP informs the parties of this fact and refers them to the appropriate lead NCP."²² The process and guidelines for making this decision needs to be explicit in the policies.

Initial Assessment Period

Even though the Procedures Handout includes some new information about parallel procedures and timelines, the provisions under the "*Initial Assessment*" remain vague and provide insufficient implementation guidance. Moreover, the provisions lack central measures to ensure inclusion of the requestor in the NCP's assessment.

²¹ 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>.

²² *Id.*

Upon confirmation that the complaint meets basic criteria, the U.S. NCP should begin the “initial assessment” as described in the “*Initial Assessment*” section of the Specific Instances Procedures handout. Moreover, throughout the document, the Procedures Handout states that the NCP will determine “whether offering its good offices to assist the parties to reach a consensual resolution would contribute to a positive resolution.”²³ This language gives little guidance to the NCP or the parties involved, and such a determination should be determined based upon enumerated criteria.

The current criteria for consideration state that the U.S. NCP will consider six factors outlined in the OECD Guidelines to determine whether the issues are “*bona fide* and relevant to the implementation of the Guidelines.”²⁴ However, these six factors are vague and clarification on how the U.S. NCP interprets them should be incorporated into the policies.

While conducting the initial assessment, the U.S. NCP policy should allow a site visit. Moreover, the NCP should be *required*, as opposed to merely permitted (as stated in the Procedures Handout), to consider information supplied by the parties when making assessment determinations.

While we welcome the new provision based on the OECD Guidelines that existence of parallel proceeding cannot of itself bar the U.S. NCP’s involvement in any dispute, we urge the U.S. NCP to elaborate on the specific procedure it intends to follow in conducting a case-by-case determination when there are parallel legal proceedings. We recommend adopting the policy of the United Kingdom NCP, which will suspend a complaint “only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances.”²⁵ In cases where the U.S. NCP does feel that offering its services would prejudice parallel proceedings, the NCP should provide a clear rationale, which can be reviewed by the Advisory Board as part of a Final Statement.²⁶

The Initial Assessment Report should conclude with a determination of whether the parties to the dispute are willing to engage in mediation, and if so, the report should include designation of an external mediator from a pre-determined list of approved mediators.²⁷ Any expenses incurred through the use of an outside mediator should not be borne by the parties, as required under the Procedures Handout,²⁸ but rather by the U.S. NCP. If the parties are not mutually willing to engage in mediation, the Initial Assessment Report should so state (including the reason behind the determination) and the U.S. NCP should begin drafting a Final Statement

²³ *Id.*

²⁴ *Id.*

²⁵ United Kingdom National Contact Point, *Approach of the UK NCP to Specific Instances in Which There are Parallel Proceedings* (2009), available at <http://www.bis.gov.uk/files/file53069.pdf>.

²⁶ This position is supported by both the UK NCP and the European Bank for reconstruction. United Kingdom National Contact Point, *Approach of the UK NCP to Specific Instances in Which There are Parallel Proceedings*, (2009), available at <http://www.bis.gov.uk/files/file53069.pdf>; EBRD PCM, *supra* note 6 at para. 16.

²⁷ See e.g., EBRD PCM, *supra* note 6 at para. 48.

²⁸ 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/ifa/oia/usncp/166661.htm>.

regarding whether there are substantiated violations of the OECD Guidelines with recommendations as to how those violations should be addressed.

The U.S. NCP should use the information provided in the complaint, information from direct follow-up communications with the requestors (including in-person communications²⁹ and any subsequent response by the requestor to the response by the MNE), and the responses, if any, from the MNE and other relevant NCPs, to complete the Initial Assessment Report. At the conclusion of the three-month initial assessment period, the U.S. NCP should provide a copy of the Initial Assessment Report to the parties, with a copy to the Advisory Board. In the event that the NCP decides that the “issues raised do not merit further consideration under the Guidelines or that offering its good offices would not contribute to a positive resolution,” the NCP should be required to inform the parties and the Advisory Board of the reasoning for the decision. Then the requestor should be afforded an opportunity to amend the complaint and re-submit it. The U.S. NCP docket on its public website should note the date of completion of the Initial Assessment Report.

Mediation

The “*Mediation*” section of the Procedures Handout is an improvement in that the step is now time-bound, however, the Handout has room for improvement in the areas of time extension provisions, transparency to the public, and oversight from the Advisory Board.

If a mediator from the U.S. NCP’s pre-approved roster³⁰ has been appointed at the culmination of the initial assessment, the mediation should begin with both parties agreeing to the methods, processes and time-frame for the mediation. The parties and the mediator should complete the mediation process in no more than six months, as provided for in the Procedures Handout. The time could be extended for set periods if the U.S. NCP verifies that both the requestor and the MNE agree that productive dialogue is continuing. All extensions of time shall be noted on the U.S. NCP website.

At the conclusion of the six-month mediation period, the mediator should deliver a Mediation Report to the U.S. NCP, with copies to the parties and the Advisory Board. The Mediation Report should describe the facts of the dispute, the process used in the mediation, the position of the parties, and the agreement reached or a description of how and why the mediation concluded if no agreement was reached.

Fact-finding

Upon receipt of the Mediation Report, or upon completion of the Initial Assessment Report if there has been no mediation, the U.S. NCP should review the facts in the Mediation Report (if any), and independently verify allegations related to the MNE’s violations of the

²⁹ In our experience with other accountability mechanisms, the act of meeting with requestors in person can be the single most important step in the process. Obtaining recognition that they have a legitimate grievance is often one of the main reasons for seeking redress.

³⁰ The concept of a roster of experts is used by the World Bank Group’s Compliance Advisor/Ombudsman, the EBRD’s Project Complaint Mechanism, and the Inter-American Development Bank’s Independent Consultation and Investigation Mechanism, among others.

OECD Guidelines. Fact-finding could include site visits, interviews, document review, or any other relevant methods.

Issuance of a Final Statement

We are pleased that the Procedures Handout includes new provisions for the issuance of Final Statements within one year after the receipt of the complaint, in line with the OECD Guidelines.³¹ In addition to the existing requirements, the Final Statements must include:

- A finding of whether there is non-compliance with the OECD Guidelines, including the investigation method used, facts found, and reasoning behind conclusions; and
- Recommendations for how compliance with the OECD Guidelines should be achieved.

The U.S. NCP should submit the Final Statement to the parties and the Advisory Board.

Review of a Final Statement

The Procedures Handout, while creating some specific provisions for the creation of the Final Statement, lack necessary review and oversight opportunities for the parties involved and the Advisory Board.

The policy should require the U.S. NCP to allow both parties the opportunity to respond to the Final Statement within 30 days and request a review by the Advisory Board, if needed. The Final Statement, along with any requests for review, should then be posted on the U.S. NCP website at the end of the 30-day period.

To the extent there are no requests for review after 30 days, no findings of violations of the Guidelines, and no recommendations, the policy should make clear that the U.S. NCP's posting of the Final Statement designates the case as closed. If there are violations and/or recommendations to be implemented, the case should be left open so that monitoring begins.

The Advisory Board should have access to all NCP decisions that terminate consideration of a specific instance. ***If at any point in the process the parties believe that the U.S. NCP has failed to follow its own rules of procedure, the Advisory Board should permit the parties to request review.*** If a review is requested by either party to a specific instance, within 30 days, the Advisory Board should: (1) give a reasoned decision to take no action; (2) ask the NCP for additional information supporting findings of fact or recommendations; and/ or (3) request that recommendations be elaborated upon or further justified. The Advisory Board should be able to engage independent experts for advice as needed.

³¹ The requirement for issuance of a Final Statement is found in the Procedural Guidance of the OECD Guidelines at page 70, para. 3, available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

The U.S. NCP should respond to the Advisory Report in writing within 30 days. The response should be immediately posted on the U.S. NCP website. If after the U.S. NCP's response to the Review Report there are no findings of violations of the Guidelines, and no recommendations, the U.S. 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 begins.

C. Monitoring, Reporting and Enforcement

The Procedures Handout states, "monitoring will be entirely within the discretion of the U.S. NCP and will only be done on an exceptional basis."³² In order for the mechanism to serve its function, monitoring and follow-up should be the norm rather than the exception.³³

If the Final Statement identifies continuing non-compliance with the OECD Guidelines, the U.S. NCP should be required under the policy to refer the Final Statement to appropriate entities, including agencies with enforcement power, such as the Department of Justice (for issues pertaining to violations of law), and also the Export-Import Bank of the U.S. and the Overseas Private Investment Corporation (to factor into their due diligence if the MNE at issue seeks their support).

For cases that remain open after issuance of the Final Statements, the U.S. NCP's policy should require Monitoring for both compliance determinations and problem solving agreements reached between the parties. There should be bi-annual Monitoring Reports on the MNE's ongoing compliance with the Guidelines and the NCP's recommendations regarding compliance, as well as Monitoring Reports on progress of any agreements reached between the parties. Monitoring Reports should be based on any progress reports submitted by the MNE and the requestor, as well as independent factual verification through appropriate means.³⁴ Monitoring Reports should be published on the U.S. NCP website and given to the parties and the Review Board. Bi-annual Monitoring Reports should be mandatorily issued and published until the U.S. NCP determines that all compliance issues with the OECD Guidelines are resolved and/or recommendations have been implemented, at which point, the case should be designated as closed.

D. Promotion and Outreach

³² 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/afd/oia/usncp/166661.htm>.

³³ See, e.g., EBRD PCM, *supra* note 6 at para. 44 ("The PCM Officer will issue Compliance Review Monitoring Reports at least biannually or until the PCM Officer determines that the implementation issues are concluded. In the preparation of each report, the PCM Officer will consult with the Relevant Parties as appropriate."); IDB, *supra* note 12 at paras. 72, 52.

³⁴ *Accord* United Kingdom National Contact Point Brochure, available at <http://www.bis.gov.uk/files/file53566.pdf> ("Where the Final Statement includes recommendations, it will specify a date by which both parties are asked to update the UK NCP on the multinational enterprise's progress towards meeting these recommendations. The UK NCP will then publish a further statement reflecting the parties' responses."); EBRD PCM, *supra* note 6 at para. 44 ("The PCM Officer will issue Compliance Review Monitoring Reports at least biannually or until the PCM Officer determines that the implementation issues are concluded. In the preparation of each report, the PCM Officer will consult with the Relevant Parties as appropriate.").

In order to meet the core criteria of accessibility and effectiveness, the NCP's policy should have specific requirements for outreach and education about the mechanism. Such provisions are currently a significant void in the NCP's policies.

The U.S. NCP should ensure that information about the OECD Guidelines, and about the U.S. NCP's role in addressing issues arising under the Guidelines, is publicly available. The U.S. NCP's policies should require the NCP to provide greater detail in the informational brochure currently on its website, and should make this brochure available at outreach events around the world. The brochure should also be distributed through NGO and union networks in the developing world and through U.S. business networks. The U.S. NCP should also maintain an up-to-date website with all relevant information about current and past cases, including a registry of all complaints submitted. It is essential that the U.S. NCP maintain open communications lines and provide clear information in languages and formats that maximize access to all parties.

In an effort to take a proactive role, the U.S. NCP should consider partnering with IFI accountability mechanisms when they conduct joint workshops around the world. The U.S. NCP should set specific goals regarding outreach (for example, attendance at 2 major international multi-stakeholder events per year and 4 major domestic events). Separately, the U.S. NCP should hold regular consultations, at least annually, with stakeholder groups including worker organizations, NGOs, and business representatives. Stakeholders should be given the opportunity to comment on the U.S. NCP process and on its promotional activities.

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.³⁵

³⁵ OECD Guidelines for Multinational Enterprises 68, 75 (2011), *available at* <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.