

OECD Watch Submission to the 2017 Peer Review of the U.S. NCP 14 July 2017

Introduction

OECD Watch welcomes the opportunity to provide feedback into the peer review process of the U.S. National Contact Point (NCP). The intention of our submission is to help the U.S. NCP identify ways in which it can further advance the effectiveness of the OECD Guidelines for Multinational Enterprises (the Guidelines) and serve as a forum for accessing remedy for complaints related to corporate abuses. Our feedback is primarily based on consultations with our members and our own observations of the U.S. NCP's performance and operations based on the core criteria of visibility, accessibility, transparency, and accountability.

While it is important to recognize that the U.S. NCP has undergone some positive improvements over the past few years, namely due to an increase in financial and human resources devoted to the NCP, an improved website, as well as completing its first three mediated complaints, the track record of the U.S. NCP continues to remain behind the NCPs of other G7 countries and has yet to serve as an effective tool for affected communities and civil society organisations to access remedy, with many complainants being left in the same or worse position they were in before they filed their complaint, or avoiding use of the NCP system altogether.

Simple, along with a few more substantive, reforms are needed to help advance the U.S. NCP to meet the core criteria of the Guidelines' Procedural Guidance, as well as the commitments that have been made by G7 and G20 Leaders, as well as the OECD Ministerial Council, to strengthen the effectiveness of NCPs and lead by example. These reforms are outlined within this document with priority given to the following recommendations: 1) to make outcomes more meaningful for complainants and signal the importance of following the Guidelines by having the U.S. NCP make determinations of noncompliance with the Guidelines and carrying out fact-finding investigations as required, 2) provide incentive for business to participate in mediation and adhere to the Guidelines by having the U.S. Government issue material consequences, such as the loss of government

assistance or export credits for companies in breach of the Guidelines, and 3) improve the accessibility of the U.S. NCP by eliminating barriers facing complainants by reducing the NCP's confidentiality and campaigning restrictions.

U.S. NCP's performance on core criteria

Visibility and accessibility

The U.S. NCP has a comprehensive website in English detailing the OECD Guidelines, the process in which to submit a specific instance, as well as information related to the proactive agenda, achievements made by the U.S. NCP, Final Statements on specific instances, information regarding the U.S. NCP's Peer Review, and two annual reports provided to the OECD Investment Committee. The [2016 Guide to the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises](#) provides a clear and detailed overview on how the U.S. NCP handles complaints, and provides some recommendations of the Guidelines on how companies should carry out due diligence.

However, accessibility obstacles remain for potential complainants seeking to use the system. The extensive confidentiality and campaigning restrictions imposed by the U.S. NCP on complainants has resulted in many communities and civil society organisations not using the system (see more information on this issue in the section on transparency and accountability). Furthermore, there are many financial and procedural barriers that restrict communities and civil society organisations from accessing the mechanism. We recommend having information available in additional languages on the website and making an explicit commitment to support complainants that may require translation services. While the U.S. NCP has offered video teleconference mediation services for the parties involved in complaints, the possibility of having mediation held in person in the country where the alleged harm has occurred would further improve the U.S. NCP's accessibility.

Recommendation: Seek to reduce obstacles of accessibility for communities and civil society organisations seeking to use the U.S. NCP by removing financial and procedural barriers for non-English language speakers and complainants with limited resources by guaranteeing translation services if required beyond Spanish, French, and English, and offering to hold mediation in the home country, if desired by the complainants.

Recommendation: The U.S. NCP should make provisions that enable it to carry out fact-finding missions in order to help clarify facts when required.

Recommendation: As human rights defenders and other community leaders seeking to address corporate abuses have reported facing threats and harassment for filing complaints with some of the NCPs, the U.S. NCP should develop safety procedures that help assess and, to the extent possible, mitigate the risks of reprisal, for complainants using the NCP system.

Transparency and Accountability

To date, there have only been 3 completed Specific Instances that resulted in mediation out of over 45 Specific Instances filed since 2000. As such, there is a demonstrated need to provide incentive for business to undergo the mediation process. The U.S. NCP should issue determinations of whether or not a company has breached the Guidelines. At the moment, the U.S. NCP's Guide states that it "does not make a determination as to whether the enterprise that is subject to the Specific Instance has acted consistently with the Guidelines nor does the USNCP have legal authority to investigate, prosecute or adjudicate issues submitted under this process." This lenient stance has meant that fewer companies are likely to respect the Guidelines and the NCP procedures. When a company has refused mediation, the U.S. NCP should be able to conduct a fact-finding examination to determine whether a breach to the Guidelines has occurred. Furthermore, the U.S. Government should follow the good practices of the Canadian and German Governments by applying material consequences on companies that refuse mediation or breach the Guidelines. These changes will help the U.S. NCP to deliver more meaningful outcomes, while furthering the effectiveness of the Guidelines.

In comparison with other NCPs, the U.S. NCP also has the most extensive confidentiality requirements, demanding complete confidentiality as soon as a Specific Instance is submitted, including keeping the complaint itself confidential. The U.S. NCP's 2011 Procedures for Specific Instances, as well as its NCP Guide state that 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 is a strict stance in comparison with the practice of other NCPs with only five other NCPs have such a provision that Specific Instance proceedings may

be suspended. During mediation, the U.S. NCP also requires parties to sign a mediation agreement, under which the parties agree to maintain the confidentiality of all information disclosed in the course of the mediation. When mediated agreements are reached, the U.S. NCP has not committed to ensuring transparency over the mediated outcomes, but rather states in the U.S. NCP Guide that “Where possible and when agreed upon by the parties, the terms of the agreement reached in mediation will be made public in the interest of transparency and accountability.”

Furthermore, the U.S. NCP recommends that “campaigning” be suspended for the duration of the Specific Instance process, especially if mediation is offered. Only one other NCP also explicitly requests that parties to refrain or halt campaigning. While the issue of campaigning is not explicitly referred to in the Procedural Guidance, such restrictions on campaigning may serve as a deterrent for civil society organisations seeking to use the NCP mechanism.

The U.S. NCP should strive to seek a balance between the principles of transparency and confidentiality, especially maintaining transparency regarding the process of the Specific Instance, which is a core criterion in which NCPs are meant to operate. By increasing transparency in the system and its decision-making processes, the NCP system will likely be used more.

Recommendation: In order to ensure compliance with the NCP procedures and encourage U.S. multinational enterprises to abide by the Guidelines, the U.S. NCP should commit to carrying out determinations, as well as fact-finding missions, on whether or not a company has complied with the Guidelines. The U.S. Government should also equip the U.S. NCP with the ability to attach material consequences on companies that are found to have breached the Guidelines.

Recommendation: The U.S. NCP should revise its NCP Guide to remove its excessive confidentiality restrictions, especially in terms of not allowing Specific Instance complaints to be made public, as well as requirements for parties to sign non-disclosure agreements when undergoing mediation. The confidentiality rules in the Guidelines’ Procedural Guidance should be considered adequate as parties are already expected to abide by the principle of “good faith” throughout the mediation process and are already

expected to keep all content gained during mediation confidential. The U.S. NCP already has the authority to end the mediation process at any time if confidentiality of the content gained in mediation is broken. Please see the Annex for OECD Watch's position on the principles of transparency and confidentiality in Specific Instance complaints to help guide this revision.

Recommendation: The U.S. NCP should remove the restrictions against campaigning from its NCP Guide, as it serves as a barrier for many civil society organisations seeking to file complaints.

Recommendation: In order to promote transparency, as well as accountability, the U.S. NCP should publish all initial assessments on its website.

Recommendation: In order to improve accountability and assist in making sure outcomes are honored after the mediation phase, the NCP should require follow-up to take place one year after mediated agreements or Final Statements are made. These follow-up reports should be published on its website with information describing the steps that have or have not been made to resolve the situation.

The U.S. NCP's information and promotional activities

The U.S. NCP's annual reports to the OECD describes the information and promotional related activities it has undertaken in previous years, which included organizing and co-organizing 5 events in 2016, as well as participating in 14 events. However, despite stating first in its [2014- 2015 Annual Report](#) that the US would develop a promotional plan in 2016 and then committing in the [U.S. 2016 National Action Plan](#) "to continue its efforts to broaden understanding and implementation of the OECD Guidelines among business," as well as to "publish a 2017 outreach plan by early 2017," the U.S. NCP has yet to successfully carry out either commitments. Furthermore, according to the U.S. NCP's [2016 Annual Report](#), the U.S. NCP does not have dedicated funds for carrying out its own promotional activities and instead is required to seek financial resources from the government on an ad-hoc basis.

In OECD Watch's view, the principal objectives of promotional activities should be: first, to inform business enterprises of the expectations with respect to their behavior contained in the OECD Guidelines, as well as the expectation by the U.S.

Government that the standards of the Guidelines should be abided by, and second, to make stakeholders aware of this mechanism and to encourage them to make use of it. While it is positive that the U.S. NCP has begun to engage business over responsible business conduct, the U.S. NCP should also work to balance its information and promotional activities by engaging more with potential complainants about the NCP.

Recommendation: NCPs are required to make the Guidelines better known and undertake promotional activities; as such OECD Watch recommends that the U.S. Government provides the U.S. NCP a dedicated annual budget for its promotional activities so that it is better equipped to fulfil its responsibility in this area.

Recommendation: OECD Watch recommends that the U.S. NCP publish annually a promotional plan on its website, in order to increase transparency and stakeholder accessibility. Promotional activities should be focused on the two objectives mentioned above. In terms of the first objective, the NCP should promote observance by companies operating in or from the U.S. by outlining the government's expectations that they will be observed and doing more outreach to companies. The U.S. NCP should also seek to extend its promotional reach beyond the U.S., by undertaking activities abroad, especially in non-adhering countries where U.S. multinational companies operate, by continuing to reach out through Embassies, as well as also to local civil society organisations.

The U.S. NCP's institutional arrangements

The U.S. NCP is a monopartite body, housed in the Office of the U.S. NCP in the Economic and Business Affairs Bureau in the State Department. The U.S. NCP has sole decision-making authority and is composed of 3 full time staff and approximately 12 part-time staff. Since 2016, the U.S. NCP has received a dedicated budget from the U.S. Government for its operations which is a positive development; however, its promotional activities are only funded on an ad hoc basis (which is covered in more detail in the information and promotion section).

The U.S. NCP is also equipped with two advisory bodies, which includes its Interagency Working Group (IWG) and its Stakeholder Advisory Board (SAB).

According to the U.S. NCP Guide, the NCP consults regularly with subject matter experts through its IWG group, which includes government representatives from a wide range of bodies, including, but not limited to, the Department of Labor, the Export-Import Bank, the Overseas Private Investment Corporation, the Environmental Protection Agency, along with additional State Department bureaus, including the Bureau of Democracy, Human Rights and Labor, as well as with regional country desk officers and officers at U.S. missions abroad. No terms of reference is publicly available and there does not appear to be criteria set for when and how these representatives are consulted, nor the role they play apart from seeing if the issue raised is pending in other proceedings involving the U.S. Government, and/or to solicit questions and reactions to the Specific Instance.

The SAB was established in January 2012 as a subcommittee to the Advisory Committee on International Economic Policy (ACIEP) with the function to provide recommendations on the promotion and facilitation of the implementation of the OECD Guidelines, as well as encourage the use of the Specific Instances process as a means to resolve disputes and promote responsible business behaviour. The advisory body is [composed of leaders from business, labour, civil society and academia](#) (with 6 out of 15 seats being occupied by business) and meets between 3 times a year to once a month. While the [SAB does have a terms of reference](#), it is unclear what criteria exists for selecting and removing members and how the SAB is involved in providing recommendations regarding the handling of Specific Instances.

The location and current decision-making structure, as well as the NCP's very strict confidentiality and campaigning restrictions, risks giving the U.S. NCP the appearance of being partial towards the interests of business and does not promote stakeholder confidence.

Recommendation: In order for the U.S. NCP to be perceived as operating with impartiality, we recommend that the NCP be moved from its current location to the Bureau for Democracy, Human Rights and Labor, while also being restructured to give the IWG and SAB more authoritative and balanced oversight or to be restructured into a body that encompasses representatives from government, labor, civil society, academia, and business, along with an independent steering body charged with oversight. Should the IWG continue to be consulted upon, a term of reference should be drafted and made

public. The SAB's term of reference should also be updated to include criteria regarding the selection and removal of members, as well as its role in providing advice related to the handling of Specific Instances.

Reflections on the implementation and handling of specific instances

While the U.S. NCP has received at least 45 Specific Instance complaints over the last 17 years from individuals, civil society organisations, and trade unions, many of these complaints were filed prior to the revision of the OECD Guidelines in 2011. Since 2012, only 18 Specific Instance complaints have been completed by the U.S. NCP. Most notably very few complaints have resulted in successful mediation, with companies often refusing to abide by the procedures. For this reason, the U.S. NCP has a very poor track record of complaints resulting in successful mediation with a joint agreement being made. To date, only three complaints have completed the mediation procedures with only two of these reaching an agreement (one being a trade union complaint and one being an NGO complaint).

The [Specific Instance submitted by the Center for Environment and Development \(CED\) with the Network to Fight against Hunger \(RELUFA\) vs. the Herakles Farms' affiliate SG Sustainable Oils Cameroon \(SGSOC\) in Cameroon](#) is considered by the U.S. NCP to be the most successfully handled complaint submitted by NGOs to date. When submitting this case, the complainants had requested that the U.S. NCP help them to a) get the company to cease negotiating more land by using intimidation and bribery targeting chief and influential decision makers in the community, b) release a public statement on what has happened regarding the allegations of bribery and corruption, and c) to develop clear procedures for stakeholder engagement with local communities and members of civil society. While the complaint did help the complainants' get access with the company to directly raise their concerns, the only outcome of the process was that an agreement was made in which the company committed to investigate cases of alleged corruption, provide the NGOs with a confidential written response, and then meet again at an undetermined later date. No company stakeholder engagement policy was ever made public and the company never released a public statement.

Additionally, this case is further complicated by the fact that the U.S. NCP could be perceived as having acted partially, although this is not necessarily the case, given

the U.S. State Department's own role supporting Herakles Farms to obtain the land within Cameroon at the time that the complaint was filed, as now evidenced [through cables obtained by the Oakland Institute](#) in 2016 through the Freedom of Information Act. Now nearly two years after the Final Statement was published, it's unclear if the U.S. NCP will be publishing a follow up report on the implementation of the agreement or not. It remains unclear whether any form of remedy was accessed through this case, as the complainants' original objectives were not met and problems continued on the ground between local communities and the company after the agreement was reached. As a result, the outcome of this case, as well as the track-record of the U.S. NCP's handling of complaints to date, has impacted the reputation, and therefore legitimacy, of the U.S. NCP amongst civil society globally.

Recommendation: The U.S. National Action Plan for Business and Human Rights commits the U.S. Government to “build consensus internationally for strong remedy mechanisms through its participation in the UN, OECD, ILO and other multinational organisations and fora: and to advance its agenda on remedy through consultations at home with relevant stakeholders,” as such we strongly encourage the U.S. NCP to strive for more meaningful outcomes that provide access to remedy for victims of corporate breaches to the Guidelines by issuing determinations, while also recommending that the U.S. Government promote policy coherence by applying material consequences on companies who breach the Guidelines.

Conclusion

This submission advances recommendations that we have previously put forward to the U.S. NCP, as well as all NCPs, in our 2015 report [Remedy Remains Rare](#) and our 2016 [4 x10 Plan for why and how to unlock the potential of the OECD Guidelines](#). As a G7 and G20 country, our recommendations also advance previous statements made in the [2017 G20 Leaders' Declaration](#), as well as the [2017 LEMM Declaration](#), and the [2015 G7 Leader's Commitment](#) to continue strengthening its NCP to serve as an access point for remedy for victims of corporate misconduct, as well as to strengthen the NCP system and lead by example.

While OECD Watch hopes that the recommendations made in this submission are considered and acted upon, we encourage the U.S. Government to adopt a policy towards ensuring regular peer reviews for the NCP at least once every five years, along with a system in place to publically report back on how the recommendations of the peer reviews) have been implemented, in order to lead to further improvements, as well as a means to achieve functional equivalency.

Contact details

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ANNEX:

OECD Watch's Position on Transparency and Confidentiality in Specific Instances

The Procedural Guidance for the Guidelines stipulates that one of the core criteria with which NCPs must handle complaints is transparency. NCPs should ensure that the parties can engage in the specific instance process on fair and equitable terms by providing access to information relevant to the procedure. At the same time, NCPs have to be aware of the need to protect sensitive business and other stakeholder information, such as the identity of individuals involved in the case. In order to prevent and mitigate security risks that complainants (such as human rights defenders or labour leaders) may face when using the NCP system, OECD Watch encourages NCPs to have safety protocols in place.

The general rule for the initial assessment phase is transparency. OECD Watch advises NGOs to always assess the risks (e.g. reprisals from the company including threats or a lawsuit) before making allegations about a company (publicly or through an NCP complaint). Some NGOs issue a press release upon filing their complaint with the NCP and publicize the case while the NCP is conducting the initial assessment. This should be considered an acceptable strategy that can help raise awareness about the issues in the complaint and increase pressure on the

company to engage in the process to quickly and genuinely resolve the problem. Furthermore, some of the best-performing NCPs make the outcome of the initial assessment public on their website, and complainants are also free to do so.

After the case has been accepted the next phase of the process can include mediation and other exchanges between the parties, fact finding by the NCP, and the drafting of a final agreement or statement. OECD Watch's rule for this phase is transparency of process, but confidentiality of content. The Procedural Guidance is clear that NCPs should seek to keep sensitive information confidential once the initial assessment has been concluded and the case has been accepted. During the entire time that the specific instance is being handled by the NCP, complainants should not publicly disclose information, including correspondence, documentation, or opinions that are learned or exchanged during the process. Complainants should make clear their commitment not to publicize information exchanged during the processes. This will assist NCPs in encouraging both parties to be as open and transparent within the process as possible. Complainants should also make it clear to NCPs that it is not acceptable for the NCP to base decisions on information supplied by the company that has not also been made available to the complainants.

Committing not to disclose information exchanged during the process does not mean that complainants cannot conduct a public campaign against the company (based on publicly-available information) while the process is on-going. In a number of recent cases, public campaigning by complainants during an OECD Guidelines case has incentivized the company in question to prioritize resolution of the dispute through NCP-facilitated mediation, leading to a more positive outcome for the NCP process than would have occurred if the complainants had not engaged in a public campaign.¹ OECD Watch believes firmly that it is up to the complainants, not the NCP, to decide whether or not to engage in public campaigning during the process. Even if complainants decide not to pursue a high-profile public campaign, OECD Watch believes it is acceptable for complainants to communicate publicly about purely procedural aspects/events in specific instance processes. Such procedural aspects include whether or not the company responds to the allegations (though not the content of the company's response), whether meetings between the parties are being organized or have taken place (though not the content of the meetings), and if mediation has begun/ended. As long as it does not conflict with the agreed need to protect information exchanged by the parties, transparency on these objectives and the procedural elements of a case is crucial to maintain the legitimacy and effectiveness of the Guidelines.

Complainants should be aware that some NCPs have taken to the practice of requiring complainants to agree to overly strict levels of confidentiality or restrictions that prevent complainants from engaging in a campaign during the complaint procedure. This may reflect the NCP's weakness vis-à-vis a company and indicate that the case has little chance of a fair hearing. This is beyond the guidance NCPs

¹ See, for example, WWF vs SOCO, https://www.oecdwatch.org/cases/Case_307.

have received from the OECD. Should the NCP consider it legitimate for complainants to stop campaigning on a case they have lodged, then they should also require the company to stop pursuing the business operations that are the subject of the complaint. Faced with overly strict confidentiality and/or campaigning requirements from an NCP, many potential complainants have decided not to use the OECD Guidelines complaints mechanism and to pursue other avenues for seeking remedy or resolving disputes.

At the conclusion of a case, the Procedural Guidance instructs NCPs to make the results of the process publicly available in a public report or statement, taking into account the need to protect sensitive information. Outcomes should always be transparent unless it can be argued that not publicizing the outcome would be in the best interest of effective implementation of the Guidelines. In order to ensure transparency, NCPs should be required to keep a case registry and publish documents such as initial assessments, final statements and agreements. Complainants should also be free to communicate about the outcome and process of the case, keeping in mind the need to respect the confidentiality of sensitive information exchanged during the process.

In some countries and jurisdictions, the NCP operates under legislation that gives the public the right to access to all correspondence between the NCP and the parties, with the exception of those parts of documents that contain commercial secrets (this is a narrower concept than the concept of 'confidential information').