



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

July 18, 2017

Mr. Michael K. Addo
Chairperson of the Working Group on the issue of
human rights and transnational corporations and
other business enterprises

Mr. Addo:

Thank you for your letter dated May 5, 2017, regarding access to remedy in relation to business-related human rights abuses. The U.S. Government reaffirms our support for the UN Working Group on the issue of human rights and transnational corporations and other business enterprises and we appreciate the opportunity to comment. Please note that this document does not contain legal conclusions and is not an exhaustive representation of applicable policies, laws, or regulations. Instead, we have provided general or selected information that we hope the Working Group might find useful.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Mack", written in a cursive style.

Jason R. Mack
U.S. Deputy Permanent
Representative to the UN Human
Rights Council

SUBJECT: US Response to OHCHR Questionnaire on BHR Access to Remedy

Domestic Law

The United States strongly supports accountability for human rights abuses, as evidenced by its domestic legal and regulatory regime, as well as its deep and ongoing engagement with governments, businesses, and NGOs. U.S. federal and state law, both criminal and civil, provides remedies for a wide range of human rights abuses.

As a State Party to the International Covenant on Civil and Political Rights, the United States has an obligation under Article 2 to ensure *inter alia* that any person in the United States whose rights or freedoms, as recognized under the Covenant, are violated has “an effective remedy,” as well as the right to have that remedy determined by a competent judicial, administrative, legislative or other competent authority as provided by law. The United States has emphasized that the obligations under Article 2 generally apply to human rights violations entailing state action, whether governmental acts or actions by private individuals or entities acting for or on behalf of governmental authorities.¹

The initial U.S. report to the Human Rights Committee, as well as subsequent periodic reports, address in great detail the kinds of remedies available to give effect to its obligation to provide an effective remedy under Article 2 as well as in circumstances not covered by Article 2 or related to any rights recognized by the Covenant. The details concerning the remedies available under U.S. law, both with respect to human rights violations as well as abusive or discriminatory conduct by private entities and non-state actors, are too exhaustive to repeat in this response.

Certain relevant federal laws may also reach non-government activity. For example, protections against discrimination in federal laws reach significant areas of non-government activity, including civil rights laws that prohibit racial or ethnic (national origin) discrimination in the sale or rental of private property, employment at private businesses with 15 or more employees, admission to private schools that receive federal funding, and access to public facilities like hotels and restaurants. In addition, many state and local anti-discrimination laws cover

¹ We note that absent a specific provision that clearly and specifically imposes an obligation on States Parties to prevent or regulate particular kinds of misconduct by private parties or non-state actors (such as under ICCPR Article 8 to prohibit slavery), Article 2 creates no general obligation to do so.

discriminatory practices by private employers, landlords, creditors, and educational institutions.

Many U.S. laws are also of relevance, depending on the specific abuse allegations. For example, the Trafficking Victims Prevention Act of 2000 is a federal law that addresses trafficking in persons, and contains provisions related to forced labor that can affect business.

Finally, civil liability is an important element of legal accountability,² and domestic tort law provides a powerful tool for accountability. U.S. law provides clear remedies for torts committed domestically, and mechanisms such as legal aid and class certification enhance accessibility of such remedies.

Recent Steps With Respect to Conduct Abroad

As set out in the UN Guiding Principles, countries are responsible for taking appropriate steps to establish means by which those allegedly affected by human rights abuses may seek effective remedies.³ However, not all countries have such mechanisms in place. In the United States, the U.S. government assists in providing access to a grievance mechanism and the potential for remedy through its active U.S. National Contact Point (NCP) for the Specific Instance process of the Organization for Economic Cooperation and Development (OECD), as well as through the World Bank's Stolen Asset Recovery Initiative. The U.S. government also seeks to strengthen judicial systems in other countries through its foreign assistance programs; to build consensus internationally for strong remedy mechanisms through its participation in the UN, the OECD, the International Labor Organization, and other multinational organizations and fora; and to advance its agenda on remedy through consultations at home with relevant stakeholders.

Specific to the U.S. National Contact Point, as part of our commitments under the OECD, the U.S. government established an NCP for the OECD Guidelines for Multinational Enterprises (MNEs). The U.S. NCP addresses issues arising in relation to implementation of the Guidelines with regard to the business conduct of MNEs operating in or headquartered in the United States. It assists affected parties in their efforts to reach a satisfactory and consensual resolution of issues they have

² A U.S. amicus brief filed on June 27, 2017, in *Jesner v. Arab Bank*, No. 16-499, before the Supreme Court may be of interest (available at <https://www.justice.gov/osg/brief/jesner-v-arab-bank-plc>).

³ Access to remedy encompasses judicial, administrative, legislative, and many other appropriate means of redress. As such, the United States notes that not all harms are necessarily redressable via individually enforceable judicial remedies in its domestic courts.

raised under the Guidelines. The U.S. NCP takes up issues that are amenable to a consensual resolution under the Guidelines and, where appropriate, makes recommendations for how the enterprise might make its business practice more consistent with the Guidelines. The U.S. NCP also works to further the effectiveness of the Guidelines by undertaking awareness-raising and promotional activities, including an outreach program aimed at business, NGOs, labor, academia, international organizations, and the general public.

The Department of State and the Federal Mediation and Conciliation Service (FMCS), an independent U.S. federal agency, have a Memorandum of Understanding in which FMCS makes available its mediators to the Department of State, in support of the U.S. NCP's efforts to resolve issues related to the OECD Guidelines for MNEs. FMCS brings unparalleled government expertise in support of the U.S. NCP's efforts on complex dispute resolution matters, advancing the Administration's objectives of encouraging sound business practices by American corporations. The mission of the FMCS is to preserve and promote labor-management peace and cooperation. FMCS provides mediation and conflict resolution services to industry, government agencies, and communities on labor and other public policy matters.

In the United States' 2016 National Action Plan on Responsible Business Conduct, the U.S. NCP committed to undergoing a peer review in the fall of 2017, contingent on OECD Secretariat availability. The U.S. NCP published a [2017 outreach plan](#), which includes outreach to stakeholders outside of the United States. By the end of 2017, the U.S. NCP will implement procedures to reduce barriers for stakeholders who would like to engage in the U.S. NCP process but do not speak and/or read English.

Furthermore, with respect to conduct abroad, the Overseas Private Investment Corporation (OPIC) established an Office of Accountability (OA) in order to address concerns, complaints, or conflicts about social or environmental issues that may arise around OPIC-sponsored projects. The OA works with parties to a conflict to help resolve the conflict, and can conduct investigations about how OPIC has applied its relevant policies to the OPIC-supported project. These services provide an opportunity to independently review and address the concerns of project-affected communities, project sponsors, and project workers.

Finally, as part of the recent 2016 National Action Plan on Responsible Business Conduct, the United States announced that it will host stakeholder outreach and explore with one or more U.S. advisory committee(s) how the U.S. government

can work with U.S. companies to help address concerns about the perceived lack of accessible and effective remedy available to those who feel they have been negatively impacted by U.S. business conduct abroad. As part of this consultation, the United States will solicit advice on how it best could support access to remedy, including the potential development of tools or guidance related to non-government-based mechanisms that would assist U.S. businesses that wish to improve their own individual and collaborative efforts to address this challenge.

Additional Information: Access to Justice

The United States also plays a strong role in access to justice. For example, the Department of Justice's (DOJ) Office for Access to Justice (ATJ) works to address inequalities in the justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ's staff works within DOJ, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers. Among its many activities, ATJ staffs the federal interagency effort called the Legal Aid Interagency Roundtable (LAIR):

- In 2012, more than a dozen federal agencies came together under the leadership of the White House Domestic Policy Council and DOJ to launch LAIR. The purpose was to raise federal agencies' awareness of how civil legal aid can help advance a wide range of federal objectives including employment, family stability, housing, consumer protection, and public safety. LAIR-participating agencies have worked with civil legal aid partners, including non-profit organizations, law schools, and the private bar, to leverage resources to strengthen federal programs by incorporating legal aid; develop policy recommendations that improve access to justice; facilitate strategic partnerships to achieve enforcement and outreach objectives; and advance evidence-based research, data collection, and analysis.
- LAIR was formally established in a 2015 Presidential Memorandum, and its list of federal partners has grown to include 22 agencies. LAIR's activities are supported by two working groups: the Working Group on Self-Represented Parties in Administrative Hearings, led by ATJ and the Administrative Conference of the United States; and the Working Group on Access to Justice Indicators and Data Collection, led by ATJ and DOJ's Bureau of Justice Statistics. In November 2016, LAIR issued its [first annual](#)

[report](#), which documented how LAIR has worked over the past few years to inspire innovative interagency collaborations to more effectively support underserved individuals.

In addition, Congress long ago enacted the “federal in forma pauperis statute . . . to ensure that indigent litigants have meaningful access to the federal courts.” See Neitzke v. Williams, 490 U.S. 319, 324 (1989). In the past 45 years, Congress has enacted an increasing number of fee-shifting statutes, such as the Civil Rights Attorneys Fees Awards Act in 1976 and the Equal Access to Justice Act in 1980. These acts enable prevailing parties in certain kinds of cases to recoup all or part of their attorneys’ fees and expenses from the losing parties.

Again, we support the efforts of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises and thank you for the opportunity to comment.