

Submission to the UN Human Rights Council Universal Periodic Review Regarding United States Human Rights Obligations Under the OECD National Contact Point

April 15, 2010

I. Executive Summary

1. Accountability Counsel submits this report to highlight the United States government's need to improve the Organization for Economic Cooperation and Development (OECD) National Contact Point (NCP), located in the Department of State's Office of Investment Affairs. The U.S. OECD NCP is the body responsible for "furthering the effectiveness" of the OECD Guidelines for Multinational Enterprises (OECD Guidelines). In order for the U.S. to meet its human rights obligations, as incorporated in the OECD Guidelines, this corporate accountability mechanism must be reformed so that it is more independent, fair, transparent, professional, accessible, and effective. Current deficiencies must be corrected in the NCP's structure; oversight; process of registration and initial assessment of requests; offering of good offices; issuance of final statements; monitoring, evaluation and reporting; outreach; and administration.
2. Accountability Counsel is a non-profit organization that seeks to use, strengthen, and create accountability systems for local communities and international entities to ensure that human rights and environmental standards are met in international finance and development projects. The human rights of the communities with whom we work, from Peru to Papua New Guinea to Kazakhstan, are impacted by multinational corporations headquartered in the United States. We submit this report based on our work with these communities as well as our advocacy efforts to date toward an improved U.S. OECD NCP.
3. The U.S. OECD NCP was created to meet U.S. responsibility to promote and encourage use of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and to assist with resolution of disputes that pertain to the Guidelines. The Guidelines provide a set of recommendations on good corporate behavior that all adhering governments, including the U.S., are required to promote. They cover a number of issues, including employment and industrial relations, the environment, and consumer protection.
4. In the "General policies" section of the OECD Guidelines, adhering governments are directed to ensure that multinational enterprises "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." Failure of the U.S. to provide an effective NCP means that this method for "further[ing] the effectiveness" of the OECD Guidelines, including the human rights directive, is deficient.
5. Particular human rights obligations implicated in cases that should be brought to the NCP by Accountability Counsel's clients are the: Right to Life; Right to Health; Right to be Free

from Cruel, Inhuman and Degrading Treatment or Punishment; Right to Consultation; Right to Freedom of Thought and Expression; Right to Protection from Arbitrary and Abusive Interference of Private and Home Life; Right to Just and Favorable Conditions of Work; Right to Equitable Benefit from Natural Resources; Right to a Healthy Environment; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus. Convention); American Convention on Human Rights (Pact of San José, Costa Rica); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); UN Declaration on the Rights of Indigenous Peoples; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; Convention on the Elimination of All Forms of Discrimination against Women; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and the Universal Declaration of Human Rights.

II. The Need for a Functioning U.S. OECD NCP: Examples from Berezovka and the Achuar

6. Examples from two of the communities with which Accountability Counsel works are instructive as to the need for a reformed U.S. OECD NCP. The examples also illustrate the human rights obligations at issue.

A. Berezovka, Kazakhstan

7. Since 2003, the community of Berezovka has been attempting to hold Chevron Corporation (as part of the KPO consortium) accountable for its role in the human health and environmental impacts of the Karachaganak Oil and Gas Condensate Field in western Kazakhstan. The Field is a massive 280 square kilometers and is located five kilometers from the community. As a result of the village's proximity to the Field, the community is exposed to toxic air, water and soil pollution levels that have violated Kazakh environmental legal standards numerous times and have caused 45 percent of the village to become chronically ill. As a result of speaking out about their crisis, the community has faced intimidation, harassment and threats from government officials.
8. The community's complaints to the World Bank's Compliance Advisor/ Ombudsman (CAO) resulted in a finding that the World Bank's IFC violated its own health, safety and environmental policies with regard to the project. The community has demanded that Chevron stop the continuing toxic levels at the Karachaganak Field, compensate them for their suffering, and relocate them to a safe environment.
9. Because Chevron's conduct has violated the OECD Guidelines and still Chevron refuses to constructively respond to the villagers' demands or to engage in meaningful dialogue, a reformed U.S. NCP would be an important tool for the resolution of this dispute. The human rights at issue here include: Right to Life; Right to Health; Right to be Free from Cruel, Inhuman and Degrading Treatment or Punishment; Right to Freedom of Thought and Expression; Right to Protection from Arbitrary and Abusive Interference of Private and Home Life; Right to Equitable Benefit from Natural Resources; Right to a Healthy Environment; Convention on Access to Information, Public Participation in Decision-Making

and Access to Justice in Environmental Matters (Aarhus Convention); Convention on the Rights of the Child; Convention on the Elimination of All Forms of Discrimination against Women; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and the Universal Declaration of Human Rights.

B. The Achuar, Peru

10. In 2007, a group of indigenous Achuar residents of Peru and the organization Amazon Watch sued California-based Occidental Petroleum for 30 years of oil operations that contaminated Achuar land, Occidental's refusal to clean it up, and its subsequent cover-up of the harm that the contamination caused to the Achuar people and the ecosystem on which they depend.
11. In its motion to dismiss the case from federal district court in Los Angeles, Occidental argued that Peru is the more convenient forum for the lawsuit and that the case should be dismissed. The Achuar and Amazon Watch maintain that the case belongs in California – Occidental's home state – for reasons that include barriers to real remedies under Peruvian law and corruption and delay in the Peruvian courts that would prohibit a fair trial, and because the indigenous Achuar would face discrimination in Peruvian courts. The district court's decision to dismiss the case is now on appeal to the Ninth Circuit where it awaits a ruling.
12. In the meantime, the Achuar continue to suffer from Occidental's toxic contamination of their land and to experience severe health effects as a result of this contamination. Because specific instances of Occidental's conduct toward the Achuar have violated the OECD Guidelines for Multinational Enterprises, there is a role for a fair and effective U.S. NCP in assisting in the resolution of this dispute. The human rights at issue here include: Right to Life; Right to Health; Right to be Free from Cruel, Inhuman and Degrading Treatment or Punishment; Right to Protection from Arbitrary and Abusive Interference of Private and Home Life; Right to Equitable Benefit from Natural Resources; Right to a Healthy Environment; American Convention on Human Rights (Pact of San José, Costa Rica); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); UN Declaration on the Rights of Indigenous Peoples; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and the Universal Declaration of Human Rights.

V. Recommendations

13. In order to meet human rights obligations, the United States government must reform the OECD NCP. First, the current procedures should immediately be made public. Second, the NCP should follow through on a commitment to engage in a transparent stakeholder dialogue to discuss reforms to the NCPs existing procedure. Finally, specific reforms are required out of this process to ensure that the NCP is independent, fair, transparent, professional, accessible, and effective.

14. Information Disclosure. As an adhering country to the OECD Guidelines, the U.S. has a duty to disclose information about the NCP to interested parties.¹ While the U.S. NCP is to be commended for its 2009 commitment to making information about the NCP's process public in "early 2010," to date, there is still no publicly available information regarding how the U.S. NCP handles complaints. The *U.S. National Contact Point Information Booklet*, available on the Department of State website,² does not include any information regarding transparency, rules of procedure, timelines, monitoring or reporting.
15. At a minimum, for parties to use this mechanism, information is required regarding how a request is handled through the U.S. NCP, including, where applicable, the process of registration and initial assessment of requests; offering of good offices; issuance of final statements; monitoring, evaluation and reporting; outreach; and administration and personnel issues.
16. Stakeholder Consultations. The Department of State has committed to holding stakeholder consultations regarding reform of the U.S. NCP. This commitment is commendable and should be realized as soon as possible. Consultations should include impacted communities outside the U.S., civil society groups and NGOs, business associations, trade unions, academics, multinational enterprises, and relevant government agencies.
17. The consultations should begin with disclosure of information about the current NCP, allow for comment, provide a revised draft of NCP structure and procedure, and allow a second period of comment on the proposed revision before reforms are made final.
18. Changes Required. As part of the stakeholder consultations, the NCP should consider the following changes that would bring the NCP into compliance with U.S. human rights commitments and would be consistent with international best practice:
 - *Structure and Oversight*: create of an Advisory Board with representation from stakeholder groups; empower the Advisory Board with oversight and review duties; conduct regular consultations with stakeholder groups; and provide sufficient resources for the NCP to carry out its mission, including at least one dedicated staff member.
 - *Procedures for Handling Complaints*: publish clear and transparent procedures for registering requests, clear eligibility requirements, protocol for initial responses to complaints, and clear timeframe for reaching a final conclusion, with an expectation that complaints will be resolved with a "final statement" within 12 months.
 - *Offering Good Offices*: create a transparent process for deciding when to offer good offices, including decision-making by an inter-agency committee; create guidelines regarding access to independent, consensual and non-adversarial problem-solving methods and the possibility of fact-finding; create a protocol for when to seek advice

¹ NCP Procedural Guidance at 33 ("The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.").

² See <http://www.state.gov/e/eeb/oecd/book/index.htm>.

from relevant authorities or experts; and provide capacity to conduct on-site fact-finding missions and to engage independent experts.

- *Issuance of Final Statements*: create a transparent policy regarding when the NCP will issue a final statement containing recommendations, as appropriate, on the implementation of the Guidelines; create a protocol regarding how final statements will be communicated to parties and the public; create a procedure for making a redacted public summary of the final statement regardless of the confidentiality of an agreement between parties; and create a procedure for submission of final statements to relevant regulatory, legal or ethics oversight bodies both in the U.S. and abroad.
- *Monitoring, Evaluation and Reporting*: create a protocol for monitoring and evaluating implementation of the Guidelines after issuance of a final statement; create a process for regular reporting of the results of this monitoring and evaluation to the parties and to the public; and create a procedure for submission of monitoring reports to relevant regulatory, legal or ethics oversight bodies both in the U.S. and abroad.
- *Promotion and Outreach*: ensure that all information about the Guidelines and the work of the NCP is available to all stakeholders; regularly report to the public on case outcomes; and regularly report to other federal agencies and sister OECD NCPs.

VI. Conclusion

19. The U.S. NCP, by providing a forum for resolution of disputes that pertain to the OECD Guidelines, has the potential to be a mechanism for addressing corporate human rights violations. Such a mechanism is desperately needed in this country, where litigation of these issues in the courts often takes over a decade and enormous resources, serving neither the parties nor justice.
20. In order for the U.S. NCP to live up to its potential and its mandate, key reforms are required. As outlined above, these include transparency, proper oversight, fair rules of procedure and timelines, access to independent experts, the ability to monitor and report on outcomes from the resolution of disputes to the parties, public and relevant authorities, and promotion of the mechanism. With these changes, parties will have a credible, predictable and trustworthy mechanism to use for encouraging compliance with OECD Guidelines and the human rights obligations they address.
21. Accountability Counsel urges the U.S. government to make good on commitments to take the first essential steps of providing transparency of current process and engaging in a stakeholder dialogue to begin the process of needed reforms. Our clients in the village of Berezovka, Kazakhstan, the Achuar of Peru and many others are depending on this essential reform.