

SUMMARY REPORT

CONSULTATION ON THE U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT

Thursday, April 16, 2015
10:00 am to 5:00 pm

Georgetown University Law Center
600 New Jersey Avenue, NW

Co-hosted by the International Corporate Accountability Roundtable (ICAR), the Global Business Initiative on Human Rights (GBI), and the Harrison Institute for Public Law at Georgetown University Law Center



GLOBAL BUSINESS INITIATIVE
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BACKGROUND

On September 24, 2014, [President Obama announced plans to develop a U.S. National Action Plan \(NAP\) on responsible business conduct](#). The NAP will be consistent with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

A [subsequent White House announcement](#) stated that “[e]xpanding U.S. efforts to promote responsible business conduct is intended to cement the brand of U.S. businesses as reliable and accountable partners internationally and promote respect for human rights”. The announcement also noted that “[t]he U.S. government will work closely with stakeholders throughout the development of the National Action Plan, including U.S. businesses and civil society” and that “[t]here will be a series of open dialogues, hosted by various independent organizations, during which stakeholders will be able to exchange ideas on the National Action Plan process and content”. Moreover, “U.S. officials will attend these events and the public is welcome to participate”. The full list of consultations is available on [the White House website](#).

EVENT OVERVIEW

The [International Corporate Accountability Roundtable \(ICAR\)](#) and the [Global Business Initiative on Human Rights \(GBI\)](#) were pleased to co-host the Washington, DC consultation on the U.S. NAP on April 16, 2015. The consultation, hosted as part of the U.S. government’s series of open dialogues mentioned above, was the largest consultation to date with over 200 participants from approximately 15 different government agencies, 40 businesses, 40 civil society organizations, and 10 academic institutions. It had the following objectives:

- **Focusing on the policy and regulatory functions of the government** as the framework and foundation for conversation. In other words, starting with the “State duty to protect”, as defined under Pillar I of the UNGPs;
- **Discussing the full range of tools** that the U.S. government has at its disposal, including: policy and regulation; promotion, guidance, and education; monitoring and enforcement; transparency and reporting; judicial and non-judicial remedy; and collaboration with civil society and business on the ground;
- **Learning from what is already in place**, including having a frank dialogue on successes, shortfalls and lessons learned from the viewpoint of all stakeholders;
- **Aiming to offer pragmatic and clear inputs** on certain pre-identified, prioritized issues rather than aiming to address every aspect of the U.S. government’s role regarding responsible business conduct; and
- **Establishing deeper relationships** between civil society representatives, business leaders, and government officials from diverse agencies who will be responsible for carrying the U.S. NAP forward.

PLEASE NOTE THE FOLLOWING:

The entire meeting was CLOSED TO THE PRESS.

The entire meeting was conducted under [THE CHATHAM HOUSE RULE](#).

OPENING PLENARY

Welcome Remarks

On September 24, 2014, President Obama announced that his administration would lead the development of a National Action Plan (NAP) on Responsible Business Conduct, in line with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

This consultation, which was co-hosted by ICAR and GBI and took place at the Georgetown University Law Center, was the fourth in the series of multi-stakeholder consultations held as part of the U.S. NAP process. The overall aim of the consultation was to build on past discussions and to address the various means by which the U.S. government may ensure responsible business conduct, both at home and abroad. The consultation was the largest multi-stakeholder event to date on the topic of responsible business conduct in the United States.

To inform the consultation and the U.S. NAP process overall, ICAR conducted a [“national baseline assessment” of current U.S. implementation of Pillar I of the UNGPs](#), including existing legal and regulatory gaps, and developed [a set of 110 recommendations](#) for the content of the NAP based on identified gaps. The baseline assessment and corresponding recommendations are intended to be a starting point for discussions and debate on what the eventual content of the NAP might be. The recommendations, along with a framing document on the topics covered during the consultation’s breakout sessions, are included in the Appendices to this report.

Consultation Overview

Following the welcome remarks, the consultation overview began with a discussion among attendees of what a NAP is and why the U.S. government has committed to developing one on the topic of responsible business conduct in particular.

In general, NAPs are not a new concept. They have been developed for a number of policy areas, including women’s rights, government transparency, and renewable energy. However, the application of the NAP concept to the area of business and human rights, and responsible business conduct more broadly, is relatively new. In September 2013, the United Kingdom was the first government to release a NAP on this topic, followed by the Netherlands, Denmark, Finland, and Lithuania most recently. Italy and Spain have also released draft NAPs, and a number of other European NAPs are currently being developed. Outside of Europe and the United States, Global South countries are also engaging in the NAP process, including Chile, Colombia, Malaysia, Myanmar, Mozambique, and Tanzania.

The three other U.S. NAP consultations to date – which took place in New York, California, and Oklahoma – focused on a number of priority areas, including land and labor rights in the context of agricultural investments, financial sector due diligence, labor rights challenges in the manufacturing supply chain, and privacy and freedom of expression in the IT sector. This consultation in Washington, DC was the most widely attended consultation to date. Participants were encouraged to focus not only on legal and policy gaps that continue to exist in the United States, but to also take a step further and identify concrete actions that the U.S. government may take to move the responsible business conduct agenda forward and to facilitate meaningful impact on the ground.

The U.S. government has set up six interagency working groups to inform the development of its NAP, focusing on the issues concerning transparency and anti-corruption, investment and trade, labor rights, procurement, human rights, and land tenure and agricultural investment. More information on the U.S.

NAP, including its purposes and goals, key issues to be addressed, and scope, can be found on the [Department of State's "Frequently Asked Questions" webpage](#). Stakeholders who would like to input written submissions are encouraged to do so using the e-mail address NAP-RBC@state.gov. Submissions will continue to be accepted on a rolling basis.

Opening Plenary and Keynote: Key Themes

The keynote speech was delivered by Christopher Smart, Senior Director for International Economic Affairs, National Security Council, The White House. The panel was moderated by Mark Hodge, Executive Director, GBI, with lead discussants Arvind Ganesan, Director, Business and Human Rights Division, Human Rights Watch; Tam Nguyen, Global Head of Sustainability, Bechtel Corporation; Bennett Freeman, Senior Vice President for Social Research and Policy, Calvert Investments; Ariel Meyerstein, Vice President for Labor Affairs, Corporate Responsibility and Corporate Governance, USCIB; and Cathy Feingold, Director of International Affairs, AFL-CIO.

The discussion in the opening session focused on conceptualizing the NAP process, identifying the ideas and issues stakeholders would like to see prioritized as part of the U.S. approach, and drawing out policy recommendations for future implementation.

Maximizing Opportunities Inherent in the NAP Process

Panelists stressed the importance of the NAP process as an opportunity to further the ongoing institutionalization of business and human rights issues in law and in practice. The NAP process was also framed as an opportunity to take stock of existing business and human rights initiatives and to optimize them. Many policies and practices are already in place to require and incentivize respect for human rights in the context of business. Moving forward, the NAP should explore opportunities presented by these existing initiatives and seek to contribute to the maximization of their potential.

The panel encouraged continued improvement of inter-agency coordination and the use of the NAP as a vehicle for continuing policy innovation. The establishment of the six interagency working groups to inform the development of the NAP was considered by the panelists to be a positive step that lays a foundation for cross-governmental coordination and policy coherence, which should be maintained even after the NAP is released.

The need for businesses to embrace the NAP process was also stressed, as it is in the interests of U.S. companies to respect human rights, and an increasing number of industry-specific standards are already available. Companies that already have programs in place can use the NAP process to maximize their effectiveness. The NAP process was also viewed as helpful for maintaining the strong reputation of U.S. companies operating abroad and ensuring that competitive advantages accrue to U.S. companies that adopt socially responsible methods of doing business.

Defining the Content of the NAP

The scope of the NAP's content was debated throughout the opening plenary. Some advocated for a plan that addresses both domestic and international issues in order to enhance the credibility of U.S. global leadership on business and human rights issues. Others suggested due diligence be prioritized in certain areas abroad based on the severity of human rights impacts and gaps in government responses. Panelists highlighted the importance of the U.S. government's commitment to working within the OECD Guidelines and the UN Guiding Principles in formulating the NAP, as well as to ensuring feedback is gathered and integrated from all stakeholders as part of an ongoing dialogue. It was also highlighted that the NAP should address areas where the government should commit to not obstructing or undermining responsible business practice, such as in the areas of privacy and surveillance.

Recognizing Challenges and Balance Stakeholder Expectations

Considerable progress was deemed likely if best practices can be institutionalized, but the challenge of coordinating an ambitious, comprehensive plan that includes clear and measurable benchmarks was raised. Some panelists preferred a bold narrative, to convey the seriousness with which the United States is approaching this issue; others noted the importance of confidentiality to businesses, as well as the need to leave space for companies to experiment without undue risk exposure. Civil society was encouraged to take a practical approach in regards to both voluntary and regulatory approaches. Going forward, all stakeholders should focus primarily on what works, which may be voluntary in some instances and regulatory in others, rather than taking an ideologically rigid stance.

Translating Stakeholder Input into Action

Panelists were asked what concrete steps should be taken as part of this initiative to ensure principles become practical realities. Responses included strengthening OECD National Contact Points; clarifying SEC rules for corporate accountability and finalizing the requirement that businesses disclose CEO-to-worker pay ratios; reforming the public procurement process, which some suggested was especially important given the relative importance of the purchasing power of the U.S. federal government; and extending existing reporting requirements attached to sanctions regimes due to expire. More generally, panelists emphasized the importance of better aggregating and sharing reported information on human rights with companies and the public; protecting civil society actors from retaliation; and incentivizing companies, including by rewarding top performers and avoiding negative labeling.

BREAKOUT SESSION 1:

OVERSEAS INVESTMENT

The session was moderated by Rachel Davis, Managing Director, Shift, with lead discussants Rob McGarrah, Counsel, Office of Investment, AFL-CIO; Niko Lusiani, Director, Human Rights in Economic Policy, Center for Economic and Social Rights; Genevieve Taft, Global Manager of Workplace Accountability, The Coca-Cola Company; and Michael Tracton, Director, Office of Investment Affairs, U.S. Department of State.

Context and Scope

This session focused on ways in which the U.S. government can protect human rights and create an environment for responsible business conduct in the context of overseas investment activities. Discussions addressed a broad range of topics, including the design and implementation of human rights, social and environmental provisions in free trade agreements; the incorporation of human rights considerations into eligibility criteria for export credit and investment insurance; reporting requirements and oversight regarding private investment overseas (including in high-risk contexts); participation in multilateral trade and investment institutions; and grievance mechanisms in the context of overseas investment.

The following Guiding Principles were perceived to be of specific relevance to overseas investment in relation to the State duty to protect, as set out in the UNGPs:

- Guiding Principle 4, which includes a requirement for human rights due diligence where States support business, encompassing export credit and investment guarantees.
- Guiding Principle 8, which notes the importance of interagency coordination and cooperation and how the State meets its own obligations and communicates its expectations of business.¹
- Guiding Principle 9, which relates to preserving a State's domestic policy space when it enters into agreements with other states and with businesses. Accordingly, this principle covers trade agreements, bilateral investment treaties, and access to remedy for those affected.
- Guiding Principle 10, which relates to policy coherence where States act internationally (i.e. through participation in multilateral settings.) This principle creates a need to establish clarity as to the actions that can be realistically expected of a U.S. bank in terms of and use of leverage.

The scope of the U.S. NAP includes the OECD Guidelines for Multinational Enterprises, which are part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises. The Declaration is "a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress. All parts of the Declaration are subject to periodical reviews."² This further reinforces the close link between international investment frameworks led by States – including the U.S. government – and corporate conduct.

Many participants in the session picked up on the question of whether the NAP should focus solely on domestic policy or overseas policy, and it was noted there are no NAPs that consider only overseas practice or only supply chain issues.

KEY THEMES

Corporate Reporting, Tracking and Guidance

Significant consensus amongst both business and civil society organizations on the importance of integrating reporting requirements on overseas investments into the NAP was noted. The Burma Reporting Requirements are perceived by participants to have resulted in both internal and external benefits for companies. Some saw an opportunity to extend the application of this approach to other high-risk human rights contexts, as well as to also encourage the use of such requirements in “lower risk” contexts. Participants felt that the NAP might benefit from setting a clear reporting standard that applies to both companies’ own operations and their global value chains. A single standard for both core operations and supply chain reporting would be most companies’ preference.

The development of research tools, developed and implemented across government agencies to guide business decisions and encourage positive but not overly burdensome reporting requirements, would help ensure the creation of a positive operating model to which companies could adhere. The importance of transparency in all areas was raised, including disclosure requirements on both listed and unlisted companies, starting with index funds.

Role of the U.S. Government in Supporting/Enabling Overseas Investment

The importance of the government’s role in the provision of information and guidance to actors on the ground and those operating within high-risk contexts was noted as a priority area for the U.S. NAP to address. The NAP should cover the provision of ‘red flag’ information; detailed information that informs due diligence; and the role of embassies abroad, and should encompass not only the role of government in supporting business, but also human rights defenders in high-risk areas.

Participants suggested that the scope of considerations pertaining to overseas investment in the NAP should extend to circumstances in which the government directly supports business through its own financial institutions. In addressing the effectiveness of the human rights due diligence processes implemented, and grievance mechanisms established, by these institutions, there is great potential to deepen understanding around leverage and its application. Cooperation with other financial institutions might be possible to identify and address the most severe human rights risks.

Examples were provided of positive areas where the U.S. government is already playing a role in promoting the importance of U.S. companies’ respecting of human rights, including where research and tools on due diligence provided by the U.S. government had influenced investment decisions and approaches by business.

The Question of Bilateral Investment Treaties, Trade Agreements and Arbitration

Topics requiring further research and multi-stakeholder dialogue include addressing the link between bilateral investment treaties, trade agreements, arbitration, and human rights protection. Many noted that governments (including the U.S. government) should protect the policy space to safeguard rights. This has informed model BIT review, but questions were raised about further reviews and the transparency of proceedings. The U.S. government should assess BITs and address adverse impacts, and should note such impact assessment may result in the need for renegotiation of provisions within a BIT. The importance of transparency in trade agreement negotiations and the enforcement of labor and human rights provisions was mentioned as critical.

The Importance of Multilateral Engagement and Leadership in Multilateral Fora

The importance of multilateral engagement was raised, including the role of the U.S. voice in the OECD and the advantages of applying expectations to financial institutions and financial investment services around human rights, and at the UN in discussions around financing for development. The intersections between economic and foreign policy space – and its effect on the ability of companies to operate, sell, and export abroad – was noted.

The State Department was observed to enhance human rights considerations within overseas investment in several key ways, including by acting as a source of information, promoting good governance, recognizing good performance, participating in multi-stakeholder fora, and engaging with OECD and other international guidelines. It was noted that the U.S. leads the OECD Working Party on Responsible Business Conduct on how the UNGPs apply to the full range of products and services, which addresses both the domestic context and international advocacy role of the government. Finally, the need for and benefits of cross-agency cooperation in terms of both scaling up and speeding up progress were acknowledged.

Linking Responsible Overseas Investment and Tax

Concerning tax regulation, it was noted that business decisions are affected by tax regimes in host countries, with multi-national corporations (MNC)s able to avoid national tax liabilities at significant material cost to government. Due diligence requirements incorporated into the NAP could expressly require companies to review their tax arrangements, extending this to also providers of tax advice. The NAP could also set criteria to prevent companies from negotiating ‘tax holidays, and could incorporate/ propose strict regulation addressing purchasers of debt for ‘vulture funds.’

BREAKOUT SESSION 2:

AID AND DEVELOPMENT

The panel was moderated by Motoko Aizawa, Managing Director, Institute for Human Rights and Business (IHRB) USA with lead discussants Chris Jochnick, (former) Director of Private Sector, Oxfam America; Frank Fannon, BHP Billiton; Bama Athreya, Specialist, Labor and Employment Rights, U.S. Agency for International Development (USAID).

Context and Scope

This session focused on ways in which the U.S. government should protect human rights and create an environment for responsible business conduct in the context of its aid and development activities. Discussion topics included contracting requirements; existing practice and capacity building; responsible business expectations and requirements in the context of Public Private Partnerships (PPPs); and the development of interventions to address local governance gaps in countries in which U.S. corporations operate or from which they source. Participants and panelists were asked to focus on what should be included in the U.S. NAP in relation to aid and development, as well as on establishing the intersection between aid and responsible business conduct.

It was noted that this was the first time the U.S. NAP consultation process had included a session specifically focused on aid and development. This was deemed to be positive, but it was noted that some discussions on this topic sit against the backdrop of predominant public opinion that the U.S. spends a significant amount of money on aid and development.³

KEY THEMES

Linking Sustainable Development, Responsible Business and Human Rights

The role of responsible business in increasing positive impacts on poverty reduction and subsequently on enhancing human rights was explored. Observations were made about how: irresponsible and corrupt practices can undermine public confidence; poor education affects potential workforce members; defective governance erodes loyalties and trust; and social exclusion affects social unrest. Each of these factors was identified as having potentially negative impacts on corporate operations and on enterprises' social license to operate.

It was observed that there is a need for more and better-informed discussion about human rights and development. A general lack of understanding amongst not only the general public but within the business community around development was perceived. Accordingly, it was suggested that a more nuanced understanding of the UNGPs in relation to aid and development will take time to achieve. It was noted that provisions for capacity building within the NAP could focus on enhancing the governments' ability to implement Pillar 1 duties under the UNGPs. Additionally, existing efforts such as the Myanmar labor capacity building program could be built upon, including through capacity building for NGOs, business, and government.

Subcontractors and Procurement in the Context of Aid

Procurement in the context of foreign aid was regarded as presenting a clear opportunity to achieve positive human rights outcomes and better private sector performance. It was suggested that the government can establish leverage when contracting with third parties to deliver on aid projects. However, greater accountability measures for contractors are needed, including, for example, by: ensuring that contractors have a human rights policy and undertake due diligence; encouraging them to join multi-stakeholder initiatives; and implementing grievance procedures. It was suggested that there should also be greater transparency in the selection of contractors and in contracting processes, including through a review of the contractor's past human rights performance.

Performance and vetting standards were perceived to be crucial, but should be balanced by reference to the consideration that cumbersome regulations and standards can result in request for proposal (RfP) processes becoming overly complex and difficult in practice. It was noted that USAID has an anti-trafficking policy and a Code of Conduct. The Code of Conduct binds all government employees and incorporates provisions addressing non-procurement of commercial sex and trafficked goods and services. It was felt by some that USAID could expand on these existing processes to explicitly encompass a wide spectrum of human rights issues, in particular children's rights.⁴ Additional provisions can be created in order to continue to protecting human rights.

Building on Existing Practice and Building Capacity

The discussion reflected that some in the private sector are already doing a lot overseas, including by supporting aid, the rule of law, and human rights programs. However, more could be done to coordinate these efforts and to work effectively with government, USAID, and other bodies. Opportunities to leverage private funds for poverty reduction in relation to specific projects and to support collaboration between all parties was deemed to be critical for meaningful progress.

A strong desire from business to co-fund and co-program with the U.S. government was expressed during the session. Although there was a willingness to work on these issues, corporations may need the U.S. government to assist in identifying with whom they should be working and how best to engage. Businesses need to know who in government they can approach to explore opportunities to undertake this type of work.

Public Private Partnerships (PPPs)

Many expressed that, while safeguards exist in the anti-trafficking policy and the Code of Conduct for engaging in PPPs, the application of such safeguards is inconsistent. Some felt that more evidence is needed of the standards and risk assessments being applied, and that a much stronger commitment to human rights should be integrated into existing and new partnerships.

As with procurement of contractors, PPPs should aim for more transparency and stronger accountability and consultative processes, including local business and civil society in the negotiation process. Although PPPs are, in theory, focused on development, the potential for counterproductive impacts on local populations in the face of market creation by large global players should not be underestimated. The idea of conditional aid and development provision based on adherence to the UNGPs was explored. In general, PPPs were seen as a potential vehicle for strengthening implementation of the UNGPs. A two-pronged approach was suggested, through which the benefits of upholding human rights (which could be incorporated into memoranda of understanding (MOUs)) could be elaborated, and the expectation of upholding human rights should be created.

Focusing on Land Rights

There has been a more concerted effort to recognize the risks that people will lose their land rights and become disenfranchised. The New Alliance for Food Security and Nutrition (NAFSN) guidelines may provide a short-term solution in this context. However, there has been an effort by the NAFSN to develop actual safeguards to deal with land-related issues. As such, a 'state of play' analysis of existing safeguards relevant to the NAP should be undertaken, and the resulting gap analysis used to insert provisions into the NAP.

Ensuring Policy Coherence

Many noted that aid has an important policy role. It does not operate in a vacuum, but is part of a wider policy response and involves multiple agencies. The U.S. government's current position is not necessarily mirrored across all parties, and development assistance is perceived as highly politicized. The U.S. NAP was seen as presenting a real opportunity for the White House to provide genuine leadership by incorporating the UNGPs into aid policy and facilitating aid for the purpose of enhancing human rights. The introduction of Financing for Development (FFD) was also deemed to be an important policy initiative. Discussions have largely taken place in the context of future development goals, and not in the context of a NAP, and movement in the FFD sector should also be considered.

Finally, concerns were expressed about the operations of the World Bank and other investment facilities in terms of how coordination could be improved between all bodies with an impact on the human rights outcomes of aid and development efforts.

BREAKOUT SESSION 3:

PUBLIC PROCUREMENT

The session was moderated by Michael Posner, Co-Director, Center for Business & Human Rights, NYU Stern School of Business, with lead discussants Judy Gearhart, Executive Director, International Labor Rights Forum (ILRF); Robert Stumberg, Director, Harrison Institute for Public Law, Professor of Law, Georgetown Law; Jay Celorie, Human Rights Manager, HP; and Mathew Blum, Associate Administrator, Office of Federal Procurement Policy, Office of Management and Budget, Executive Office of the President of the United States.

Context and Scope

The panel of procurement experts discussed ways in which the U.S. government protects human rights and creates an environment for responsible business conduct in the context of its public procurement – including through: government risk assessment and priority setting; the expansion of requirements beyond core labor rights to all human rights; lessons from anti-trafficking regulations and rules; government capacity to monitor and enforce requirements; and incentives and punitive actions related to compliance and non-compliance.

Government Duty and Ability to Respect Human Rights in Procurement

The leverage that the U.S. federal government brings to public procurement and the legal obligations it faces in its human rights commitments as the single largest global purchaser and signatory to many key treaties was the starting point for discussion by the panel. Federal government procurement spending represents between \$350-400 billion every year, and this figure doubles with U.S. state and local purchasing. The UNGPs stress the particular importance of procurement policies that protect human rights.

At present, there are many gaps in U.S. law and executive orders addressing public procurement. Current federal regulations focus on forced labor and trafficking, leaving other types of abuses unaddressed. However, International Labour Organisation (ILO) standards cover illegal child labor and the denial of fundamental freedoms, and other trade agreements, development agencies, and programs cover safety issues, risk of death, and illegal wages and hours. One participant stressed that there is ample legal authority for government policy to develop more fully in these areas without the need for legislative action, but that it is necessary that the Executive take decisive and targeted action. While the prospect of reforming the entire federal procurement regime may be daunting, it was suggested that government leaders could focus their energy on high-risk sectors, which encompass roughly 11.6% of federal procurement spending.

Four essential steps for public procurement reform were identified:

1. Expanding the scope of human rights coverage to extend beyond trafficking and forced labor;
2. Assessing risk by sector;
3. Embedding due diligence in selection and award processes; and
4. Monitoring and enforcing public procurement contracts independently and ensuring convenient contract remedies are available.

Each of these elements feeds back into the others, with transparency as a central focus. On a practical level, it was suggested that the implementation of human rights standards into procurement could mirror environmental sustainability standards, particularly the Electronic Product Environmental Assessment Tool (EPEAT).

Incentivizing Business to Respect Human Rights in Procurement

It was noted that while some Federal Acquisition Regulation (FAR) requirements are very straightforward, many are not clear, making it difficult for businesses to follow them properly. In reforming public procurement policy, the government could define the process they want and require it be incorporated in the contract. The California Transparency and Supply Chains Act and the SEC Conflict Minerals Rule were cited as successful models of that approach.

It was stressed that businesses need due diligence processes that are adaptable, and supply chain disclosure requirements should be streamlined to avoid unnecessary burdens. The OECD Guidelines were offered as a model in this regard because businesses are given six months to mitigate a problem found in their supply chains. It was also suggested that the government should create incentives for good actors that are already making a difference in the communities in which they operate. There is currently no incentive for innovation in this area, leaving good actors to shoulder significant risk. One participant recommended that the government also raise awareness around the UNGPs and other business and human rights concerns more generally.

Specific Suggestions for Public Procurement Reform

The conversation turned to specific suggestions for public procurement reform in the NAP process. It was recommended that the federal government establish a system of responsible supply chain management, creating minimum bars for selection criteria rather than awarding points. Audits conducted by corporations not only tend to miss glaring issues in their factories, but commonly no action is taken in response to identified issues. Another participant emphasized that if points are awarded, agencies must consider to what extent they evaluate social policies and how they can do so objectively.

Three areas of opportunity were highlighted:

1. Establishing a system of accountability and monitoring;
2. Strengthening selection and awards criteria; and
3. Requiring transparency and disclosure throughout the process.

The need to know the names and addresses of all factories in a supply chain was underlined, as well as the need to consult with labor organizations rather than just business representatives. Transparency in supply chains was stressed as an opportunity to help workers at the bottom of a supply chain know where to go when a problem arises and how to reach out to people at the top. Access to remedy was also deemed crucial – enabling communities to know their rights rather than simply focusing on preventing future abuses.

Participants suggested that public procurement rules must be as clear and consistently applied as possible, which can be difficult in practice. It was further emphasized that contracting officers in government are not experts in labor laws or human rights; therefore, rules must be written to provide practical guidance and help officers understand disclosures so they can take affirmative action in response. Private contractors are similarly inexperienced in these areas, and it was suggested that there be more of an effort to teach subcontractors how to achieve compliance rather than put all responsibility on primary contractors. One participant stressed that it is often easier to work industry by industry to find and highlight best practices therein rather than take a “one size fits all” approach. However, another participant countered that standards must be raised across all industries, rather than singling out certain sectors.

Trafficking in Federal Contracting

Participants expressed concern about exploitative recruitment systems in the electronics industry. The Department of State's partnership with Verité was discussed, including the forthcoming report that will map areas where potential for trafficking is highest and then be cross-referenced with federal procurement data so agencies can be more sensitive to where they are spending. This report will incorporate a broad definition of recruiting fees to cover the waterfront of exploitative recruitment practices.

Current Best Practices in Federal Policy

A question was raised regarding best practices in public procurement spending already implemented by the federal government that might serve as models for human rights protection. The Electronic Product Environmental Assessment Tool (EPEAT) was again lauded as having an extraordinary impact on the electronics industry, having evolved from a voluntary program to a regulation, and as part of the FAR, in less than ten years. The new Green Buy program within the Department of Energy was also highlighted as a way to incentivize manufacturers innovating best practices. It was noted that many of the practices to be incentivized are already considered in deciding whether a company is a responsible contractor under the FAR. While there are many potential models in the environmental arena, a participant urged that it is time for the government to focus on the social element of sustainability.

Concluding Themes

The NAP process should focus on expanding the scope of human rights protections within public procurement. As part of this process, the federal government should identify sectors where the harm is most apparent. One participant disagreed, suggesting that all harms should be treated equally and that considering only the core labor rights would be a violation of international obligations. However, multiple participants concluded that simple solutions are out there even without the need for legislative action, but stressed that reforms must be targeted, tracked, and systematized in order to provide effective protection for human rights standards in federal government procurement.

ANTI-CORRUPTION AND FINANCIAL TRANSPARENCY

The panel was moderated by Anita Ramasastry, Director, Graduate Program in Sustainable International Development, Professor of Law, University of Washington School of Law with lead discussants Stefanie Ostfeld, Senior Policy Advisor, Global Witness; Heather Lowe, Director of Government Affairs, Global Financial Integrity (GFI); Carol Doran Klein, Vice President for Taxation, USCIB; Dan Bross, Senior Director, Global Corporate Citizenship, Microsoft; Tommy Iverson, Senior Policy Advisor, Office of Terrorist Financing and Financial Crimes, U.S. Department of Treasury; and Kathryn Nickerson, Senior Council, Office of Chief Council for International Commerce, U.S. Department of Commerce.

Context and Scope

This session focused on the ways in which the U.S. government addresses anti-corruption and financial transparency in relation to responsible business conduct. It addressed the link between corporate governance and human rights due diligence, mandatory and/or voluntary financial transparency, anti-corruption and rule of law programs in host countries, and lessons from U.S. Foreign Corrupt Practices Act of 1977 (FCPA) implementation for the wider responsible business agenda⁵. At the outset of the discussion, connections between anti-corruption, transparency, and human rights were stressed in relation to the responsibility of business, as well as not having a negative impact on economic rights as well as having a State duty to protect economic rights.

KEY THEMES

Understanding the State of Play Including Gaps

The strong foundation provided by the work of the interagency working group on anti-corruption was noted, together with efforts on anti-corruption progressed through the FCPA, and by the OECD and G20 in relation to financial arrangements that undercut economic rights (the BEPs process), and on closing tax loopholes which currently incentivize financial arrangements that might undercut economic rights. Due to this rich background, formulation of how the NAP treats anti-corruption should be based on a clear understanding of the “state of play analysis” of existing U.S. policy and practice. Some participants felt that additional steps should not be taken until existing efforts had been finalised and were being operationalized. The example discussed was implementation of §1502 of Dodd-Frank⁶ and completion of §1504.

In discussing existing gaps in regulation, an enhanced focus on the demand side of bribery was suggested in response. The discussion raised that the OECD Anti-Bribery Convention requires corporate liability and establishes meaningful penalties for corporations, which many OECD countries had not previously enacted (e.g., foreign bribery).

Leadership and Reinforcing Collaboration with Industry and Other Governments

The role of leadership and the need for a clear focus on the importance of tackling corruption was flagged by all, and it was suggested that a new government leadership role be established to focus solely on anti-corruption. The ongoing focus on budgeting practices in other countries through the Open Government Partnership (OGP) was encouraged, with the aim of building capacity, enhancing mutual commitment, and increasing accountability. Further, a desire to improve government engagement with industry was expressed. One speaker noted that the key to sustainable progress in this area would be

changing the behaviour not only of States, but also of business. Corporations have a core role to play in ensuring not only their own compliance, but in requiring compliance by entities in their supply chains, business relationships, and third party intermediaries.

Tax Transparency

Formulation of the NAP should include consideration of intergovernmental exchange of tax-related information. The need to consider different views on tax transparency and for an in-depth analysis of the true cost and privacy risks and competitive risks associated with disclosure was discussed. Blockage and lack of momentum on a number of key tax treaties pending before Congress was seen as a major issue preventing progress on tax transparency. Finally, the potential need to change accounting rules surrounding actions when tax policy may be deemed illegal or not enforceable arose, together with the need to enshrine tax concessions in statutory law.⁷

Contracting

The inclusion in the NAP of innovative recommendations on procurement was proposed. Specifically, it was suggested that procurement-related provisions in the NAP encompass how human rights considerations may be factored into the procurement elements of: discounts to suppliers; sellers to government; itemized pricing; entertainment disclosure; and a prohibition on side agreements. A representative from business stressed the importance of knowing and understanding discounts to distributors in relation to government contracts, noting that this enables government to obtain a clearer indication of the true cost of discounts, not merely those based on the distributor's figures.

Suggestions of areas to be tackled within the NAP drafting process also included recommendations on disclosure of anonymous companies and beneficial ownership,⁸ potentially encompassing a congressional requirement that all those bidding on U.S. government contracts disclose ownership publicly. Corresponding clarification of the State's due diligence requirements in this regard should also be identified as a priority in the NAP. There was a proposal to adopt a Sarbanes Oxley approach to trade invoicing to prevent trade mis-invoicing, which would require senior executives to certify the accuracy of trade documentation.

During the Q&A portion of the session, participants discussed: how legitimate concerns of corporate secrecy could be balanced with legitimate public interest to increase transparency and combat corruption; how the U.S. should regulate the use of off-shore accounts and financial institutions in regard to economic, social, and governance (ESG) elements; whether sanctions should be used to effectively prevent the flow of funds to governments engaging in large-scale human rights abuse (e.g., past sanctions placed on Sudan); that existing reporting requirements such as the Burma (Myanmar) Reporting Requirements should be improved and built upon, including as regards the government's own reporting responsibilities; that due diligence should be mandated, its benefits in terms of competitive advantage should be stressed, and government should be less reluctant to exercise its enforcement powers; and that the NAP should consider how the U.S. government can build engagement and implement commitments, regulations, and laws in relation to multi-stakeholder initiatives (MSIs).

BREAKOUT SESSION 5:

ACCESS TO REMEDY

The panel was moderated by Ragnhild Handagard, Business & Human Rights Consultant, United Nations Office of the High Commissioner for Human Rights (OHCHR), with lead discussants Katie Shay, Legal & Policy Coordinator, International Corporate Accountability Roundtable (ICAR); Trevor Gunn, Managing Director International Relations, Medtronic and Co-chair of U.S. OECD National Contact Point (NCP) Stakeholder Advisory Board; Melike Ann Yetken, Senior Advisor for Corporate Responsibility, U.S. National Contact Point for the OECD Guidelines, U.S. Department of State; and Maha Jweied, Deputy Director, Access to Justice Initiative, U.S. Department of Justice.

Context and Scope

This session addressed both judicial and non-judicial remedy mechanisms, including tort litigation in federal and state courts, criminal prosecutions, and other forms of public law enforcement against companies, and the role of the U.S. National Contact Point to the OECD.

KEY THEMES

Civil Law Remedies

A recent report by the International Corporate Accountability Roundtable (ICAR), together with the European Coalition for Corporate Justice (ECCJ) and the Corporate Responsibility (CORE) Coalition of the United Kingdom showed that States, in general, are not doing enough to eliminate barriers to civil law remedies, such as those potentially available through tort law, and in some instances have even erected new barriers to such remedies. In the context of the United States, the government must ensure that human rights laws and criminal laws apply both to businesses and to the extraterritorial conduct of U.S. persons, and that these laws be enforced.

For example, the Supreme Court ruled recently that the Torture Victims Protection Act (TVPA) applies only to the executives and employees of corporations, rather than corporations as “legal persons” themselves, and the extraterritorial application of the Alien Tort Statute (ATS) is somewhat in flux. In 2012, the Supreme Court ruled in *Kiobel v. Royal Dutch Petroleum* that claims may only go forward in federal court if they “touch and concern” the United States “with sufficient force.” There is now a circuit split as to the factual circumstances that will be considered to satisfy the *Kiobel* test, and the Court recently denied an application for certiorari in a case against Chiquita that had been dismissed on *Kiobel* grounds. Moreover, although some U.S. criminal laws apply to business activity abroad, violations of these laws by businesses are rarely prosecuted. The U.S. NAP should examine the challenges to prosecuting companies and commit to enacting reforms that would eliminate barriers in this regard.

U.S. State-Level Remedy

In addition to ensuring that U.S. laws apply to businesses and to extraterritorial conduct, and that these laws are enforced, the government should ensure that it supports access to remedies for victims of human rights violations by business through State mechanisms when appropriate opportunities for it to weigh in on future cases emerge.

U.S. states such as California and Massachusetts have recently introduced bills that, if passed, will extend the statute of limitations for certain tort claims based on allegations of human rights violations. The statute of limitations has formed one of the most significant barriers to remedy in state-level courts. The federal government could promote human rights by publicly supporting efforts such as these at the U.S. state level.

In terms of what the government is already doing, the Department of Justice (DOJ) was highlighted as having taking certain initiatives to improve access to remedy vis a vis poverty. Eighteen federal agencies are currently collaborating to analyze and incorporate legal aid into existing anti-poverty activities. The DOJ has also focused on mediation as a way to resolve claims arising out of the mortgage crisis without requiring complainants to hire a lawyer, as well as using settlements with large mortgage companies to fund legal services.

The Legal Services Corporation (LSC) is the largest funder of legal services in the United States, but the LSC is prohibited from using its funds for class actions. This forms an obvious barrier to remedy for some people. The President has proposed removing these restrictions in his budget, but some in the government are opposed to strengthening class action opportunities. There has been a recognition, including at a recent White House forum, that businesses operating within the United States lag behind others in considering their human rights impacts, particularly on poor and marginalized communities within the United States.

Non-Judicial Remedy Mechanisms

The United States is part of the OECD and as such has a NCP, which can receive complaints from NGOs and communities regarding corporate malfeasance and can offer services as part of a “specific instance” procedure. Through this procedure, parties can mediate a dispute in order to create a solution together, drawing from expertise within the government. The specific instance process is confidential. The NCP does not investigate or fact-find, but does develop a final statement at the end of the process that identifies the complaint, the response, and the outcome. Currently, the United States is considering options to improve the NCP process and has convened a Stakeholder Advisory Board (SAB) to assist with that process and to instill more trust in the NCP.

The SAB comprises a diverse group of businesses, industry groups, and civil society actors. Last year, the SAB produced a twenty-five page report that considers options to improve the NCP. The SAB report focused on both options to improve access to remedy through the NCP process, as well as options to better promote understanding and awareness of the OECD Guidelines. Because the group represents varied interests, it is not always able to reach agreement on certain issues. However, the SAB has worked hard to develop a single report setting out where opinions were shared and where they diverged, rather than to develop two separate reports. The U.S. NCP is currently going through an evolutionary process, with increasing levels of commitment and competence.

Concluding Themes

In the Q&A portion of the session, the group covered a range of topics discussing: overlaps and shared learning among experts on judicial and non-judicial remedies (ICAR and SOMO launched a project on this issue in June 2015); clarifying that, in addition to improving the NCP, the government is also looking to other ways to improve access to remedy; noting that the government has also clarified that it is as yet unclear what the remedy portion of the NAP will look like; reinforcing that, at this stage, the government is in listening mode and undertaking outreach with stakeholders, including those in emerging markets; and considering whether companies should develop grievance mechanisms. The panel in general agreed that companies should develop grievance mechanisms, but noted that these mechanisms must support and protect victims’ interests. The government may consider giving guidance on this area. The challenge confronted by the government in providing guidance to companies is that there is no “one-size-fits-all” approach. A participant suggested looking at the IPIECA’s pilot projects on this issue. There was also some discussion of human rights due diligence as a tool to prevent impacts. Other countries such as France and Switzerland are considering making human rights due diligence mandatory for companies.

The session ended with a plea to the U.S. government to place a heavy emphasis on access to remedy in its NAP.

CLOSING PLENARY

The closing plenary was moderated by Amol Mehra, Director, International Corporate Accountability Roundtable (ICAR) with lead discussants Regina Waugh, Director for Multilateral Affairs, National Security Council, The White House and Melike Ann Yetken, Senior Advisor for Corporate Responsibility, U.S. National Contact Point for the OECD Guidelines.

Scope

The closing plenary discussed next steps for gathering and integrating input for the U.S. NAP, as well as issues relating to implementation. This included discussion of participant and government expectations for and preferred approaches to creating the U.S. NAP.

KEY THEMES

A Bold, Coherent Approach

The NAP was envisioned as a broad foundational document that will unify the administration and also provide guidance to U.S. state and local governments on responsible business conduct. The hope that the NAP process will consolidate best practices relating to responsible business conduct into a single document was expressed, which will involve looking to the experiences of European governments regarding both process and substance. In response to questions regarding the domestic and international components of the NAP, it was clarified that the NAP will provide a uniform standard for implementation, covering both domestic and international activities. Finally, it was suggested that more important than creating a perfect final product is designing an implementation and review plan that will have a positive impact. The NAP is intended to be a living, iterative document that will be improved over time through discussions among federal and local governments, business, civil society, and academia.

Continuing Engagement with Stakeholders, Agencies, and Congress

There was consensus among participants that a transparent dialogue should continue as the NAP is drafted. The importance of sustaining wide participation and cultivating a network that will continue to provide input even after the publication of the NAP was noted. In response to questions regarding engaging stakeholders abroad, it was clarified that overseas engagement will be carried out via outreach to embassies and consulates, and that dialogues with the UN and OECD will continue.

Concern was raised by some regarding agencies that will not be covered by the NAP, such as the SEC and Congress, and the gaps that will therefore remain with regard to remedy. Congress was viewed as an especially important actor to bring to the table in light of the limitations on what the Executive can accomplish unilaterally and the long-term coordination necessary to implement the NAP. The suggestion was made that the Executive refrain from intervening in cases to limit access to remedy.

Balancing Resources and Expectations

Participants noted that stakeholders had made it known during the consultation that they have high expectations for the NAP process. A strong commitment to obtaining and integrating stakeholder feedback into the NAP was expressed. Continuing coordination among the thematic, interagency working groups who will utilize this feedback was encouraged. In light of the crosscutting issues that the NAP should cover, coordination across government in the development, implementation, and review of the NAP is imperative going forward.

Resource constraints will ultimately impact implementation of the NAP by particular departments and agencies, but not all aspects of implementation are resource intensive. Participants noted that setting standards and highlighting best practices can be done without an independent budget. Leveraging the capacity of existing federal advisory committees was also pointed to as a cost-effective means of pursuing NAP objectives. Finally, a hope was expressed that, by providing guidance on responsible business conduct not only to federal agencies but also U.S. state and local government actors, the NAP will have a broad reach and exert significant influence even without additional budgetary support or legislation.

APPENDIX I: AGENDA

- 10:00 am Arrivals and Registration
- 10:30 am Welcome Remarks
- 10:40 am Consultation Overview
- 10:50 am Keynote Address
- 11:00 am Opening Plenary – Dialogue on U.S. NAP Objectives, Orientation, and Process
- 12:30 pm Lunch
- 1:30 pm Break-Out Sessions
- Overseas Investment
 - Aid and Development
 - Public Procurement
 - Anti-Corruption and Financial Transparency
 - Access to Remedy
- 3:00 pm Break
- 3:30 pm Reporting Back and Reflections from Break-Out Sessions
- 4:15 pm Closing Plenary – Next Steps
- 5:00 pm Thank You and Closing Remarks

GUIDING QUESTIONS FOR BREAKOUT SESSIONS

- **Policy and regulatory context:** What are the most pressing policy and regulatory issues that need attention in relation to each topic? What are the levers that the U.S. government has at its disposal to address these issues?
- **Coherence and implementation capacity:** What improvements could be made in terms of interagency coherence in relation to each topic? What implementation capacity gaps should the NAP address?
- **Enabling and ensuring responsible business conduct, and learning from the private sector:** What currently works or does not work in terms of enabling or ensuring corporate respect for human rights and responsible business conduct? What are the pros and cons of requiring and / or incentivizing due diligence? What good practices from the private sector can the U.S. government take inspiration from in formulating its NAP commitments and implementation?
- **U.S. government influence with other States:** In what ways does or should the U.S. government work with other States (both host and home States) to address responsible business conduct and governance gaps? What can be done bilaterally with States, particularly trade partners? What can be done in multilateral settings (including but not limited to the World Bank, G7 / 20, OECD, OAS, ILO, and the United Nations)?
- **Multi-stakeholder engagement:** What opportunities exist for multi-stakeholder collaboration that furthers responsible business conduct and/or addresses governance gaps? Where is robust multi-stakeholder dialogue needed to address differences between business and civil society?

NOTES TO SUPPORT BREAKOUT SESSIONS

For each of the five break-out session topics, the organizers provided the following information to support the framing of the discussions. The content was taken largely from the Pillar I section of the *“Shadow” National Baseline Assessment*, conducted and published by ICAR in March 2015, and was supplemented by additional desk research. The section on *“Anti-Corruption and Financial Transparency”* draws on a paper drafted by Clifford Chance USA. ICAR and GBI wish to express thanks to Clifford Chance for its support.

For each breakout session topic, the following notes cover:

- Examples of relevant U.S. government action / activity;
- Examples of issues and gaps raised by civil society and other stakeholders.

Please note that the lists of examples of government action / activity are non-exhaustive and do not necessarily reflect the views of panelists. Please also note that the inclusion (or exclusion) of examples should not be read as a judgment on their merit and / or effectiveness.

FURTHER READING

- *U.S. Government Approach to Business and Human Rights*, 2013, U.S. Department of State: <http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf>
- *“Shadow” National Baseline Assessment (NBA) for Pillar I of the UN Guiding Principles on Business and Human Rights (UNGPs) for the United States*, 2015, International Corporate Accountability Roundtable: <http://accountabilityroundtable.org/wp-content/uploads/2015/03/ICAR-Shadow-U.S.-NBA-Pillar-I.pdf>
- *Key Recommendations – Pillar I*, 2015, International Corporate Accountability Roundtable (ICAR): <http://accountabilityroundtable.org/wp-content/uploads/2015/03/ICAR-U.S.-NAP-Recommendations-Pillar-1.pdf>

EXAMPLES OF RELEVANT U.S. GOVERNMENT ACTION / ACTIVITY

1. Promoting and Financing Responsible Investment Overseas

The U.S. government promotes, sets expectations for, and provides guidance to U.S. companies investing overseas. Beyond reporting and provision of information, U.S. government staff on the ground can be a source of advice and support for U.S. companies investing or sourcing abroad.

- The experiences (and potential transferable lessons) in relation to promoting responsible investment and business in Burma have gained much attention and support. These include: (a) the Burma Responsible Investment Reporting Requirements; and (b) the United States, Japan, Denmark, and ILO initiative to improve protection of labour rights and practice. The Burma Reporting Requirements are triggered when an investment exceeds \$500,000 or when any investment is made in the oil and gas sector.⁹ “Item 11. Risk Prevention and Mitigation” calls for private disclosures of “any risks and/or impacts identified, and any steps taken to minimize risk and to prevent and mitigate such impacts.”¹⁰ Section (f) of “Item 5. Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures” concerns the extent to which a corporate submitter’s policies and procedures are “applied to, required of, or otherwise communicated to related entities in Burma, including but not limited to subsidiaries, subcontractors, and other business partners.”¹¹
- The U.S. government provides risk information to U.S. firms investing overseas. This includes country-risk reports, information about specific goods, or information about risks to certain human rights (such as the *List of Goods Produced by Child Labor or Forced Labor*, produced by the Bureau of International Labor Affairs (ILAB) at the U.S. Department of Labor). Other U.S. government reports that provide relevant information include the U.S. Department of State’s Human Rights Reports and the Investment Climate Statements.
- There are policies, standards, and due diligence mechanisms in place for the Export-Import Bank of the United States and for the Overseas Private Investment Corporation (OPIC), which is responsible for export credit, investment guarantees, and development finance. However, the effectiveness of these measures and their alignment to the Equator Principles and IFC Performance Standards may need to be considered. This includes lessons from the IFC’s Office of the Complaints Advisor / Ombudsman.
- The U.S. government engages at organizations such as the UN and the OECD to promote broad awareness and implementation of standards such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises. It also engages bilaterally to promote sound regulatory and legal regimes that are conducive to firms seeking to conduct business in a socially responsible manner.

2. Preference Programs, Agreements, and Statutes

- The U.S. government has implemented six trade preference programs as a way to “promote the notion that trade... is a more effective... way of promoting broad-based sustained economic development,” the largest of which is the General System of Preferences (GSP).¹²
- The United States has entered into free trade agreements (FTAs) with twenty countries (including Oman, Cambodia, Jordan, Bahrain, and numerous Latin American countries)¹³ and includes labor provisions within these. Monitoring and enforcement is a matter of collaboration between the Office of the U.S. Trade Representative (USTR), the Department of Labor, U.S. AID and the State Department.

- The U.S. government has entered into bilateral investment treaties (BITs) with almost 50 countries (including Bangladesh, Egypt, Turkey, Poland, Ukraine, and the Democratic Republic of Congo). The U.S. Model Bilateral Investment Treaty of 2012 includes explicit sections on labor and the environment, as well as health and other societal issues.
- U.S. law prohibits companies from importing into the United States any product that is produced “wholly or in part” with forced labor. Section 1307 of the Tariff Act defines forced labor as “all work or service which is exacted from any person under the menace of penalty for which he does not offer himself voluntarily,” which includes indentured, trafficked, forced child labor, and prison labor.¹⁴

EXAMPLES OF ISSUES AND GAPS

- Under the United States’ unilateral trade preference programs, protection and promotion of fundamental human rights and strong environmental laws are not mandatory eligibility requirements to benefit from preferential market access for a country nor for a product produced by companies in that country.
- The U.S. government does not always have sufficient capacity to fully monitor and enforce labor rights provisions in FTAs.
- Investor-state dispute settlements within FTAs and BITs that are intended to protect the rights of investors could have the effect of undermining human rights and environmental regulations / protections.
- Guidance and risk information provided to support companies is not always accessible and consistent across government agencies.
- The Transatlantic Trade and Investment Partnership (TTIP) is currently in negotiation. Civil society groups have demanded greater transparency, as well as protections, specifically regarding health, worker rights, consumer safety, and the environment. Negotiations are expected to last well into 2015.¹⁵
- In the context of the Tariff Act of 1930, victims of forced labor do not have standing to bring a case under the Administrative Procedures Act to compel the Department of Homeland Security (DHS) to enforce the law.¹⁶ Further, DHS regulations could better address the standards for company investigations when it is required to make “every reasonable effort... to determine the character of the labor used” pursuant to the regulation.
- Business and human rights issues are rarely consistently nor structurally considered across the U.S. government’s trade and development positions. For example, the White House was recently criticized for hosting the first prominent, multinational U.S.-Africa Leaders Summit and announcing large-scale investments without prominently featuring human rights issues during the bulk of the Summit.
- In late 2013, the U.S. government loosened controls over military exports that could make it easier for U.S. companies to sell certain dual-use items that could be misused in a manner that impacts human rights by moving categories of equipment from control by the Department of State to the Department of Commerce, where they are under more flexible controls. Specifically, the Department of Commerce, as a *policy*, conducts interagency human rights reviews before allowing exports. Under Department of State control, *law* required such human rights reviews. Such shifts in export control run the risk of increasing the flow of equipment and other items to conflict areas, as well as challenges in enforcing arms sanctions.¹⁷

EXAMPLES OF RELEVANT U.S. GOVERNMENT ACTION / ACTIVITY

1. Development Policy and Partnerships

- Current U.S. government development-related policy is aimed at encouraging economic development by promoting “conditions enabling developing countries to achieve self-sustaining economic growth with equitable distribution of the benefits.”¹⁸ To promote these objectives, U.S. law prioritizes “sustaining growth *with equity*,” which requires that a “majority of people in developing countries... participate in a process of equitable growth” by being able to “influence decisions that shape their lives.”¹⁹
- USAID also engages in “trade capacity building.” The USAID website notes that “Trade Capacity Building activities seek to increase the number of developing and transition countries that are harnessing global economic forces to accelerate growth and increase incomes.” This goal is accomplished by working in four broad areas of capacity building: facilitating the flow of goods and services across borders; participation in trade negotiations, implementation of trade agreements, and economic responsiveness to trade opportunities.
- Since 2001, under the rubric of Global Development Alliances, USAID has engaged in approximately 1,500 public-private partnerships with over 3,500 distinct partner organizations and with an estimated value of more than \$20 billion in public and private funds. These partnerships seek to address development challenges linked to business interests.

2. Addressing Governance of Natural Resources in Developing Countries: Land and Water

- USAID leads initiatives seeking to address governance and development challenges at the interface of responsible business, human rights, the environment, and good governance.
- Outside of the United States, the federal government supports human rights in the context of land rights in developing countries primarily through USAID initiatives. Specifically, “[a]s of 2010, there were approximately thirty USAID-funded land tenure/property rights programs ongoing worldwide, with a total investment of nearly \$184 million.”²⁰
- In addition, through the “Feed the Future” initiative, the U.S. government “has pledged \$3.5 billion to promote food security over the next three years, including programs specifically addressing land tenure issues.”
- Moreover, the Millennium Challenge Corporation (MCC) “has invested approximately \$249 million in property rights and land policy reforms across 11 of its 20 Compact grants” and “[b]oth MCC and USAID programs support of legal and regulatory reforms, clarification and formalization of land and property rights, conflict resolution, capacity building of national and local institutions, and land-related outreach and education.”²¹
- USAID has endorsed the Global Principles for Responsible Agricultural Investments and developed an associated portal.
- USAID has funded numerous programs related to water and sanitation. These include programs engaging communities to avoid conflict of scarce water resources and partnerships with the private sector (e.g. the Water and Development Alliance with Coca-Cola).

3. USAID as a Procurer

- USAID makes commitments related to human rights and environmental provisions regarding sub-contracted goods and services.
- USAID's Procurement Executive Bulletin No. 2012-07 requires contracting officers to tell implementing partners that they should explain to employees when deductions must be made from their wages.²²
- USAID has an official code of conduct on human trafficking, based off the Trafficking Victims Protection Act.²³ It also requires contracting officers to tell the contractor that it must not withhold employee passports or visas without the employee's permission.²⁴

EXAMPLES OF ISSUES AND GAPS

- A Government Accountability Office (GAO) report found that USAID did not specifically monitor its anti-trafficking policies in many of its contracts, hindering its ability to detect potential abuses and implement the government's zero tolerance policy.²⁵ GAO found that USAID focused its monitoring on contractor-provided goods and services, largely neglecting to monitor labor practices, where trafficking is most prevalent.²⁶
- The same report also found that USAID officials often monitored only for quality assurance and technical specifications rather than for human rights abuses, specifically neglecting to monitor subcontractors' labor practices.²⁷ After reviewing the report, USAID required its staff to take additional training on anti-trafficking provisions and pledged to create further training on proper monitoring techniques.²⁸
- There may be opportunities for more coherent collaboration between USAID and the private sector to address lack of human rights protection within U.S. company value chains (including supply chains).

EXAMPLES OF RELEVANT U.S. GOVERNMENT ACTION / ACTIVITY

1. Executive Orders

Executive Orders (Eos) are the main mechanism by which the President of the United States manages the operations of the Executive branch. Among other things, these have been used to address workplace rights protections through public procurement. Some examples of such EOs include:

- *Executive Order 13126 – Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor:* The Department of Labor's Bureau of International Labor Affairs (ILAB) maintains a list of goods that are at-risk for being made by forced or indentured child labor. It does not ban federal procurement of said goods, but requires contractors to make a good faith effort to ensure that child labor was not used in the making of the procured goods.²⁹
- *Executive Order 13627 – Strengthening Protections Against Trafficking in Persons in Federal Contracts:*³⁰ This Executive Order prohibits government contractors from using "fraudulent or misleading recruitment practices," charging recruitment fees, and denying employees access to their identification documents, whether through confiscation, destruction, or other means.³¹ Under this Executive Order, contractors and subcontractors have to pay the cost of return transportation for any employees that they bring in from other countries.³² They also have to submit to audits and inspections and notify relevant authorities in the case of non-compliance.³³
- *Executive Order 13673 – Fair Pay and Safe Workplaces:*³⁴
 - Under Executive Order 13673, companies must disclose labor law violations from the previous three years before they can win a federal contract, according to a White House factsheet.³⁵
 - Labor Department officials will determine whether a bidder's actions "rise to the level of a lack of integrity or business ethics,"³⁶ but will weigh only the most egregious violations.
 - The order applies to contracts valued at more than \$500,000.
 - The order also is an attempt to reward contractors that have clean records, allowing them to check a single box on a bid form indicating they have no history of violations and thus bypassing further scrutiny.³⁷
- *Executive Order 11246 – Equal Employment Opportunity:*³⁸ This executive order partially incorporates provisions of the International Covenant on Civil and Political Rights by protecting against discrimination at work within U.S. territories.³⁹ It further requires that government contractors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."⁴⁰ The executive order assigns enforcement responsibility for these provisions to the Department of Labor.⁴¹ In 2014, President Obama amended this executive order to also prohibit discrimination based on sexual orientation and gender identity.⁴²

2. Acts of Congress

There are numerous Acts of Congress that pertain to responsible business conduct including:

- Under the Davis-Bacon Act (DBA), contractors and subcontractors are required to pay laborers and mechanics they employ locally prevailing wages and fringe benefits when they are employed directly at the site of work of a federally funded or assisted construction project exceeding \$2,000.⁴³
- The Walsh-Healey Public Contracts Act requires federal contractors to meet certain labor standards in an attempt to prevent the federal government from procuring items from sweatshops.⁴⁴

3. The Federal Awardee Performance and Integrity Information System (FAPIS)

- Before awarding a contract, an agency must first determine that a contractor is “responsible,” defined in regard to financial resources, ability to comply with a schedule, performance record, available resources.⁴⁵
- To determine contractor responsibility, an agency must be able to find information on contractor’s past performance. The database agencies must consult for evidence is the FAPIS.
- The FAPIS database includes prior findings of non-responsibility, suspension and debarments, and final court or agency convictions, dispositions or findings of fault or liability in connection with a federal contract.⁴⁶ Congress also included two FAPIS provisions relating to human rights:
 - A substantiated allegation in an administrative proceeding for prohibited trafficking activities;⁴⁷ and
 - A delegation of authority to the FAR Council to include “other information” for purposes of determining whether a contractor is responsible.⁴⁸

4. The Federal Acquisition Regulation (FAR)

- The Federal Acquisition Regulation (FAR) governs public procurement in the United States.
- The FAR includes a partial prohibition on discrimination at work within U.S. territories. Regarding the right to life, the FAR provides protection on U.S. territory (but does not provide for protection from life-threatening conditions while working abroad).⁴⁹
- When awarding contracts, the FAR requires most domestic contractors and subcontractors to develop a written affirmative action plan for each of its establishments.⁵⁰ The agency must assure that the contractor has the capacity in place to avoid discrimination,⁵¹ as well as provide for complaints and investigations.⁵² The FAR also requires special provisions for dangerous work or work in dangerous areas.⁵³
- “Special notice” and certification is required for contractors from countries included in the Department of Labor’s list of products and countries of origin where there is significant risk for forced child labor.⁵⁴ If the bidder’s product is on the DOL list and the contract exceeds a certain dollar value, a bidder must either:
 - Certify that it will not supply the product from a country on that list or
 - Certify that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture that product.⁵⁵
- The FAR includes zero tolerance standards prohibiting forced or indentured child labor and human trafficking as well as requiring the creation and maintenance of a compliance program, finalized in September of 2014⁵⁶ to comply with the Executive Order 13627 “Strengthening Protections against Trafficking in Persons in Federal Contracts.”⁵⁷
- The FAR includes remedies for violation of existing human rights standards such as suspension and debarment, termination and stopping work.⁵⁸ If a contractor is suspended, debarred or proposed for debarment, it may not seek federal contracts or subcontracts and agencies cannot evaluate or award it anything.⁵⁹ Grounds for suspension or debarment relating to human rights include: judgment for fraud or a criminal offense regarding a public contract, serious violation of a government contract, and commission of an unfair trade practice.⁶⁰

5. Examples of Agency-Specific Activity and Action

- **Department of Defense:** As of August 2011, U.S. Central Command requires in all DOD contracts a clause prohibiting against human trafficking, inhumane living conditions, and withholding employee passports for services or construction performed in Afghanistan.⁶¹ DOD also requires that contractors provide employees with a signed copy of their employment contract defining the terms of their employment and compensation.⁶² Contractors must further provide adequate living conditions for their employees, with a minimum of fifty square feet of personal living space per employee.⁶³
- **Department of State:**
 - Procurement Information Bulletin No/ 2012-10 requires specific contract clauses for all solicitations and contracts valued over \$150,000 requiring the non-professional labor of third-country nationals.⁶⁴
 - Any housing in temporary labor camps provided by the contractor must meet host country housing and safety standards, with a minimum of fifty square feet of living space per person.⁶⁵
 - Contractors may not destroy, conceal, or confiscate employees' identity documents or passports and must comply with any local labor laws on withholding employee documentation.⁶⁶ Contractors are further responsible for repatriation of their workers imported for contract performance.⁶⁶
 - The Department of State has also announced that it will require bidders to have membership in the International Code of Conduct for Private Security Service Providers (ICoC) Association,⁶⁸ as the United States is a signatory to the ICoC and founding member of ICoC Association.

6. Multi-Stakeholder Initiatives

- A common approach over the last twenty years of procurement policy has been to develop multi-stakeholder initiatives that respond to human rights harms in high-risk sectors, such as footwear and apparel, extractive industries, electronics, and information technology.⁶⁹
- In partnership with U.S. state and local governments, the Sweatfree Purchasing Consortium developed criteria that agencies can use to evaluate a prospective contractor's capacity to comply with human rights standards, including a contractor's capacity to disclose its supply chain, identify risks of harm to works and communities, identify applicable domestic laws and standards, implement a plan to correct past violations and prevent future ones, and provide appropriate remedies if their supply chain causes harm.⁷⁰

EXAMPLES OF ISSUES AND GAPS

- The capacity at agency procurement offices needed to implement, enforce, and monitor rules is a common concern. In the 1990s, Congress reduced the staff capacity at agency procurement offices.⁷¹ A GAO survey suggests that agencies that do the best job at enforcement have three things in common: A dedicated staff, detailed policies, and willingness and capacity to refer cases for debarment.⁷²
- Executive Orders raising standards in contracting and federal procurement are important tools in protecting human right. However, the scope of procurement standards is limited to those international human rights the United States has committed to protect by treaty or to rights protected by domestic legislation absent a treaty.⁷³
- In relation to FAR, ICAR's report, [Turning a Blind Eye](#), notes (among other things):
 - The FAR addresses only some human rights without limiting the scope of their protection, but it does not require broad business compliance with all human rights that are relevant to a business.⁷⁴

- The FAR does not currently include many essential human rights protections, instead addressing specific rights in a piecemeal fashion. As a result, the FAR is out of sync with U.S. trade policy in terms of U.S. international agreements, unilateral import prohibitions, and international development programs that cover particular human rights protections not yet covered by the FAR.⁷⁵ The FAR’s coverage does not yet incorporate the ILO’s core labor standards, which include freedom of association and the prohibitions of forced labor, child labor, and discrimination with respect to work.⁷⁶
- The FAR requires a threat of “serious harm or physical restraint” to constitute forced labor for adult workers, but requires only a “menace” of penalty to constitute forced child labor.⁷⁷ This creates a high bar for forced labor, without clear instruction on what might qualify as a threat of serious harm or physical restraint.⁷⁸ Further, the FAR’s definition of forced labor is inconsistent with U.S. trade prohibitions and preferences that rely on the ILO definition of forced labor.⁷⁹
- The Federal Acquisition Regulation (FAR) standards to evaluate contractor integrity and ethics cover a limited list of procurement-related felonies, requiring a recent conviction of a crime exceeding \$5 million.⁸⁰ But the FAR does not require bidders to disclose violations of labor standards or human rights, or acts of criminal negligence. This is true even if the bidder has repeated and serious violations.⁸¹
- The FAPIIS includes information on trafficking, but does not address any other human rights violations. The FAPIIS does not include agency or court findings that a contractor has violated another country’s domestic law that implements a human right.⁸²
- While DOD and DOS have developed policies and guidance addressing recruitment fees, they do not specify what components or amounts of recruitment fees are considered permissible.⁸³ A Government Accountability Office (GAO) report found that without a specific definition of what constitutes a recruitment fee, agency officials and contractors may not be able to effectively comply with these prescriptions.⁸⁴ Further, the report further found that the DOD and DOS frequently do not enforce these policies; some foreign workers on U.S. government contracts have reported that they paid fees in exchange for the right to work.⁸⁵

SESSION FOUR: ANTI-CORRUPTION AND FINANCIAL TRANSPARENCY

The section draws on a paper drafted by Clifford Chance USA. ICAR and GBI wish to express thanks to Clifford Chance for its support. Please note that examples of issues and gaps are embedded in the examples relevant U.S. government actions / activities.

EXAMPLES OF RELEVANT U.S. GOVERNMENT ACTION / ACTIVITY AND EXAMPLES OF ISSUES AND GAPS

1. International Commitments and Initiatives

- The U.S. government has ratified the United Nations Convention against Corruption and the Inter-American Convention against Corruption.
- The Open Government Partnership: The United States is a founding member (2011) of this partnership between governments and civil society.⁸⁶ The Open Government Partnership focuses on transparency and accountability and pushes governments to “promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.”⁸⁷
- Extractives Industry Transparency Initiative (EITI): In noted in the *U.S. Government Approach on Business and Human Rights*, EITI “provides an international standard by which countries reconcile and publish revenues paid by extractive companies and revenues received by governments for extractive activities.” The U.S. government has been a strong supporter of EITI since its founding 10 years ago, recognizing that transparency is a critical component of sound governance in countries’ oil and other extractive sectors. President Obama’s September 2011 announcement that the U.S. government would not only support, but also implement the EITI underscored the Administration’s belief that this initiative benefits countries in all regions and all levels of development. A State Department representative serves as an Alternate on the international EITI Board and the State Department supports the U.S. Department of the Interior in implementing the EITI domestically.
- The United States has begun adding anti-corruption language to investment treaties.⁸⁸ The OECD also notes that the United States’ treaties with Canada and Mexico are different from U.S. treaties with other countries in the extent of their use of such anti-corruption language.⁸⁹

2. The US Foreign Corrupt Practices Act of 1977 (FCPA)⁹⁰

- The FCPA has served as a model for other government and multilateral efforts to combat corruption, particularly through bribery of foreign public officials. This Act makes it illegal for certain classes of people and entities to bribe foreign officials in order to keep or get new business.⁹¹
- The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) interpret their FCPA enforcement jurisdiction very broadly, and both U.S. and non-U.S. companies have been fined significant amounts for alleged criminal and civil violations. These include alleged FCPA violations for bribes paid by non-U.S. subsidiaries or partners, even without the U.S. parent’s knowledge, under agency principles. Non-U.S. companies and individuals also can fall under the FCPA for conspiracy or aiding and abetting an issuer or domestic concern, or directly or indirectly engaging in any act in furtherance of a corrupt payment while in the United States.⁹²
- The Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), which share enforcement authority of the FCPA, have brought enforcement actions against companies as well as individuals.⁹³ For example, the SEC charged Avon Products Inc. with a FCPA violation in 2014; the company settled, for \$135 million, the SEC charges and charges in a simultaneous criminal case.⁹⁴

- FCPA has also encouraged authorities outside the US to cooperate in US enforcement efforts, or to intensify their own.⁹⁵ Some jurisdictions that have historically been seen as high-risk for corruption have begun high-profile enforcement efforts aimed at domestic corruption, such as China and Brazil.
- The FCPA is often cited as a precursor to subsequent international initiatives: the 1997 OECD Anti-Bribery Convention⁹⁶ and the 2005 UN Convention Against Corruption.⁹⁷

3. Reporting / Disclosure Initiatives

- **Dodd-Frank Wall Street Reform and Consumer Protection Act (2010):** This Act deals with corruption and bribery, mine safety, and conflict mineral sourcing.⁹⁸ Section 1502 requires companies to report on whether they obtain minerals from the DRC or surrounding countries, and, if so, whether those minerals finance armed groups.⁹⁹ Section 1504 requires oil, natural gas, and mineral extraction companies to disclose certain payments made to foreign governments.¹⁰⁰ Dodd-Frank §1504 is still pending final rulemaking after a D.C. District Court vacated the rule in 2013, though some point to companies' compliance with §1502 as a positive. Building on Dodd-Frank §§ 1502 and 1504, the European Union passed the Transparency Directive and the Accounting Directive, which together require listed and large non-listed extractive companies to publish their payments made to governments in the extractive and forestry industries on a country and project basis.¹⁰¹
- **The Burma Responsible Investment Reporting Requirements:** The Burma Reporting Requirements are triggered when an investment exceeds \$500,000 or when any investment is made in the oil and gas sector.¹⁰² "Item 11. Risk Prevention and Mitigation" calls for private disclosures of "any risks and/or impacts identified, and any steps taken to minimize risk and to prevent and mitigate such impacts."¹⁰³ Section (f) of "Item 5. Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures" concerns the extent to which a corporate submitter's policies and procedures are "applied to, required of, or otherwise communicated to related entities in Burma, including but not limited to subsidiaries, subcontractors, and other business partners."¹⁰⁴
- **Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) Compliance:** BSA and AML compliance require depository institutions – banks, savings associations, and credit unions – to maintain certain records and report certain currency transactions, to assist the US Government in detecting and preventing money laundering.¹⁰⁵ BSA/AML enforcement is on the rise, with highly publicized settlements for significant sums.¹⁰⁶

4. Addressing Beneficial Ownership

- The World Bank has identified the US as a preferred destination for corrupt and criminal actors to hide money using shell companies in jurisdictions that do not require identification of beneficial owners.¹⁰⁷
- The Obama Administration has committed to a National Action Plan on "Preventing the Misuse of Companies and Legal Arrangements" to push legislation that would require meaningful disclosure of beneficial ownership information when US companies are formed to law enforcement.¹⁰⁸ Based on the [G-8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements](#), the US plan calls for improving transparency of company ownership and control, and promoting effective supervision of financial institutions by establishing registries with full ownership information.
- The Consolidated and Further Continuing Appropriations Act, 2015: The Secretary of the Treasury is required to instruct the U.S. executive directors of international financial institutions (IFIs) to take certain action in connection with funds they provide to corporations and limited liability companies (LLC). Specifically, each IFI must collect, verify, and publish to the maximum extent

practicable beneficial ownership information for any corporation or LLC to which the IFI provides funds appropriated by the Act. This is not required when the IFI provides funds to publicly listed companies.¹⁰⁹

- Federal Funding Accountability and Transparency Act of 2006 (Transparency Act): The Transparency Act requires that all recipients of federal funds exceeding \$300,000¹¹⁰ disclose “the location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country.”¹¹¹ The Transparency Act applies to commercial items and to contracts performed and products produced both domestically and outside the United States.¹¹²
- Global Witness has proposed the following action items: (1) Collect information re all beneficial owners; (2) define beneficial owners as a real human being, not another company; (3) include in definition of beneficial owner individuals who control a company through unofficial or informal means; and (4) place beneficial ownership information in the public domain.¹¹³

5. Whistleblower Protection

- The Occupational Safety and Health Act (OSHA), discussed above, states that employers cannot retaliate or discriminate against employees that file an OSHA complaint, employees that enter a health or safety complaint with their employer, employees that are part of an inspection, or employees that want to access certain employer records related to safety.¹¹⁴ If this prohibited retaliation or discrimination occurs, the employee can file a complaint with OSHA.¹¹⁵ Since this Act was passed, OSHA’s whistleblower authority has been expanded and now protects workers under twenty-one federal laws.¹¹⁶
- Sergei Magnitsky Rule of Law Accountability Act of 2012 — This Act is an example of U.S. government action that sanctions whistleblower oppression abroad. The Act intends to punish Russian officials responsible for the death of Russian lawyer Sergei Magnitsky in a Moscow prison in 2009 after Magnitsky investigated fraud involving Russian tax officials by prohibiting their entrance to the United States and their use of its banking system.¹¹⁷
- Senators Cardin and Durbin have introduced S.284, the Global Magnitsky Human Rights Accountability Act, which would “ensure that human rights abusers and corrupt officials are denied entry into the United States and barred from using our financial institutions” regardless of what country they originate from. It would also “make significant acts of corruption sanctionable.”¹¹⁸

6. Other Relevant Initiatives

- The Kleptocracy Asset Recovery Initiative, announced in June 2010, targets “large-scale foreign official corruption and recovering public funds for their intended – and proper – use: for the people of our nations.”¹¹⁹ It created a Kleptocracy unit within the DOJ with a mandate to ferret out illicit assets belonging to “high-level” foreign officials and return them to victim countries.¹²⁰ Although not directly aimed at businesses, the Kleptocracy Asset Recovery Initiative targets the high-ranking officials who solicit and profit from bribes paid by businesses.¹²¹
- The United States regularly employs economic sanctions as a foreign policy tool, including when it feels that human rights violations are at issue. These sanctions necessarily bar business activity with or in target nations.¹²² United States Department of Treasury’s Office of Foreign Assets Control (OFAC) has brought actions against companies for violations of U.S. sanctions and OFAC regulations.¹²³ OFAC provides information about settlements and civil penalties on its website.¹²⁴

SESSION FIVE: ACCESS TO REMEDY

EXAMPLES OF RELEVANT U.S. GOVERNMENT ACTION / ACTIVITY

The examples listed below are generally concerned with U.S. business activities overseas. There are a litany of domestic laws and systems to address domestic human rights abuses and violations involving businesses. These are not necessarily complete in scope or fully effective. Though they are not listed here, the judicial and non-judicial mechanisms in place within in the U.S. are worthy of attention in the U.S. NAP in order to identify improvements and how U.S. domestic experiences can support capacity building abroad.

- The U.S. government has signed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
- OECD National Contact Point: As noted on the Department of State website “Governments adhering to the OECD Guidelines each have a National Contact Point (NCP), whose main functions are to: (1) promote awareness of the Guidelines to business, civil society, and the general public; and (2) work with business, civil society and the public on all matters relating to the Guidelines, including in circumstances when a party raises concerns (“[specific instance](#)”) regarding an MNE’s observance of the Guidelines. In some cases, NCPs may facilitate a voluntary mediation or conciliation process among the interested parties.”
- The U.S. government is a supporter of the Joint International Labor Organization and International Finance Corporation Better Work Standards: This initiative is specifically focused on the garment sector and aims to enhance the protection of labor rights and access to remedy within that sector.¹²⁵
- The Alien Torts Statute was weakened by the recent Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*, as claims must now “touch and concern” the United States “with sufficient force.”¹²⁶ Further litigation will determine what “touch and concern” means and thus to what extent the ATS is still an available means toward remedy for victims of corporate related human rights violations.¹²⁷
- Overseas Private Investment Corporation (OPIC) Office of Accountability: As noted on the OPIC website “The Office of Accountability is an independent office within OPIC that addresses concerns, complaints or conflicts about environmental or social issues that may arise around OPIC-supported projects. The Office provides project-affected communities, project sponsors, and project workers an opportunity to have such concerns independently reviewed and addressed.”
- The U.S. government has historically engaged in international Rule of Law reform programs around the world. These can include enhancing judicial performance, credibility and transparency; technical assistance in drafting procedural codes; and increasing the use of mediation mechanisms. Various U.S. government agencies engage in this work such as: USAID missions and bureaus; various bureaus of the State Department; the Department of Justice and the Department of Commerce.

EXAMPLES OF ISSUES AND GAPS

- Joint International Labor Organization and International Finance Corporation Better Work Standards: The UN Working Group on Business and Human Rights noted in its U.S. visit report that the U.S. Better Work program requires further strengthening in regard to access to remedy for labor rights violations, the effective exercise of freedom of association, monitoring, and transparency.¹²⁸
- Additionally, the Office of Accountability has been criticized as lacking objectivity, hindering access to remedy because of high procedural requirements, and being understaffed.¹²⁹ The Office of Accountability has not yet been fully reviewed to ensure that it is operating in accordance with the Guiding Principles.

- US Government Rule of Law programs should explicitly consider how to build local judicial and non-judicial capacity to protect and remediate victims of human rights abuse involving companies.
- The OECD National Contact Point would be more effective for rights-holders and companies if adequate budgets supported this.

ICAR's U.S. NAP Recommendations – Pillar I

The following is a list of key recommendations developed by ICAR for the U.S. government to consider in shaping its commitments in the U.S. National Action Plan (NAP) on Responsible Business Conduct. These recommendations directly draw from the protection and enforcement gaps identified by ICAR in the “Pillar I” section of its “Shadow” National Baseline Assessment (NBA) for the United States.

These recommendations are categorized as either government-wide or as falling under the purview of the Executive Office of the President, specific executive departments, independent agencies, government corporations, or Congress. ICAR has organized the recommendations this way to emphasize that the commitments outlined in the U.S. NAP should be delegated, as much as possible, to specific government entities. This will ensure greater clarity, coherence, and accountability.

Key recommendations will also accompany the forthcoming “Pillar III” section of the NBA, which will focus on access to remedy in the United States.

GOVERNMENT-WIDE RECOMMENDATIONS

Policy Coherence

1. Ensure that the scope of the content of the U.S. National Action Plan (NAP) on Responsible Business Conduct extends to both executive agencies and independent agencies.
2. Ensure that the content of the NAP contains sufficient commitments to address harmful business practices at home in addition to focusing on the negative impacts of business activities abroad.
3. Integrate business and human rights language into press releases, conferences, and strategy papers across all departments and agencies.
4. Coordinate policies across all departments and agencies regarding international frameworks and initiatives, and build common and consistent support for such initiatives. For example, standardize contract requirements for the International Code of Conduct for Private Security Providers across all agencies and departments that utilize private security providers.
5. Appoint a central coordinating office dedicated to leading U.S. business and human rights policy, including creating and implementing guidance for the practical implementation of such policy across all departments and agencies.
6. Establish an independent National Human Rights Institution (NHRI) with a mandate that includes business and human rights, including monitoring implementation of business and human rights frameworks domestically and supporting access to justice for victims of corporate-related human rights abuses.
7. Develop specific guidelines for sustainable supply chain management for all businesses, especially State-owned or -controlled enterprises or those that receive State support.
8. Develop comprehensive policy and guidance for U.S. state and local agencies to implement international business and human rights standards.

Transparency

1. Require U.S. companies to submit periodic reports to the government regarding how they address actual and potential human rights risks and impacts, and ensure that there are meaningful consequences for companies that do not fulfill such reporting requirements.
2. Require all U.S. agencies to collect, verify, and publish on a centralized website beneficial ownership information for any company that receives government funds, including, at a minimum, the full name, birth date, city of residence, and nationality of each natural person who (i) directly or indirectly exercises substantial control over a corporation or limited liability company or (ii) has a substantial interest in or receives substantial economic benefits from the assets of a corporation or limited liability company.
3. Develop a federal (tax or other) policy incentivizing incorporation of benefit corporations (i.e. corporations whose charters enshrine social responsibility).

Human Rights Due Diligence

1. Require businesses to conduct human rights due diligence, especially State-owned or controlled businesses or those receiving State support.

Marginalized Populations and Conflict-Affected Areas

1. Develop a comprehensive plan for consultation with, support for, and protection of human rights defenders and indigenous communities.
2. Increase communication among U.S. companies and U.S. government entities in conflict-affected zones. In particular, USAID, the Embassies' Economic Sections, the Department of State, and the Department of Commerce should increase coordination, at home and in the field, with U.S. businesses operating in conflict-affected States. These government entities should share information with businesses regarding the legal and bureaucratic structure of host States and requirements for U.S. companies investing in those States. In particular, these government entities should emphasize companies' human rights obligations with regard to gender, sexual violence, and discrimination, which are at heightened risk in conflict-affected zones.
3. Implement international frameworks and initiatives on the private sector role in conflict-affected areas (e.g., the Voluntary Principles on Security and Human Rights and the Kimberly Process) into law, and require companies to disclose their policies and practices in this regard.
4. Promote the Tourism Child-Protection Code of Conduct across departments and agencies.

Federal Procurement and Human Rights

1. Expand the Federal Awardee Performance and Integrity Information System (FAPIS) to include agency or court findings that a contractor has violated another country's domestic law that implements human rights.
2. Reform federal procurement standards to hold corporations accountable for non-compliance with domestic law in the country of production.
3. Employ the standard of contractor responsibility to evaluate contractors' human rights records and to exclude a contractor if it lacks necessary operational controls and safety programs to address the risk of human rights impacts.

4. Require bidders to disclose violations of labor standards and human rights or acts of criminal negligence, especially if they have repeated and serious violations.
5. Define recruitment fee, and specify what is permissible in government contracts with regard to the amount of and components of a recruitment fee.

Executive Office of the President

1. Fulfill the Administration's commitment to the collection of beneficial ownership information.
2. Expressly proclaim extraterritorial application of future executive orders impacting human rights in procurement, following the examples of Executive Orders 13423 and 13514.
3. In Executive Order 11246, define discrimination "in employment" to apply beyond hiring and firing (e.g., to wages, promotion, and benefits) under the EO's prohibition of worker discrimination on race, color, religion, sex, or national origin.

Office of the United States Trade Representative

1. Refuse to agree to include investor-State dispute settlement agreements in bilateral investment agreements (BITs) and other trade and investment agreements, as such agreements undermine the ability of foreign governments to regulate corporate activities that could harm the environment and human rights.
2. Clarify environmental provisions in free trade agreements to decrease inconsistencies and increase the ability of agencies to implement them in practice.
3. Seek to clarify the Government Procurement Agreement's Article III language to provide guidance for procuring agencies invoking public health and safety protections.
4. Explicitly reference human rights in Trade and Investment Framework Agreements.
5. Amend the U.S. Model BIT to include additional human rights provisions and to allow these provisions to be arbitrated.
6. Remove the language "otherwise consistent with this Treaty" from Article 12(5) of the 2012 Model BIT as it weakens the ability of governments to consider environmental concerns.
7. Address concerns regarding the transparency of the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership negotiations, particularly in terms of undue corporate influence, and consider how these issues can be addressed in further negotiations.

EXECUTIVE DEPARTMENTS

Executive Departments

1. Ban the manufacture and export of pesticides that have been banned (or deregulated) for use within the United States itself.

Department of Commerce (DOC)

1. Reexamine controls over military exports to ensure that interagency human rights reviews of importing countries are legally required before U.S. companies may sell military equipment to governments within those countries.

2. Use the model of the Government Corporation Control Act of 1945 to build human rights due diligence requirements centrally for all federal corporations. The Act provides for the standardized budget, auditing, debt management, and depository practices for listed corporations.
3. Include in DOC's country-specific commercial guides a focus on the risk of corporate human rights violations, and place specific emphasis on conflict-affected areas.

Department of Defense (DOD)

1. Monitor DOD anti-trafficking policies in contracts.
2. Commit to contracting only with contractors that are ICoC compliant.

Department of the Interior (DOI)

1. Mandate and guarantee free, prior, and informed consent of indigenous peoples in policy-making and decisions that affect them.
2. Strengthen aboriginal title law to offer adequate protections for customary land law recognition.

Department of Justice (DOJ)

1. Institute a business and human rights training policy in the education of judicial officials in Article III courts and administrative courts.
2. Along with other relevant departments and agencies (such as the Department of Homeland Security), investigate why federal prosecutions in the area of corporate crimes related to human rights remain rare, even within the DOJ's Human Rights and Special Prosecutions Section.
3. Along with other relevant departments and agencies (such as the Department of Homeland Security), mandate that all federal law enforcement officials and federal prosecutors are trained on criminal human rights laws.
4. Interpret Executive Order 12333, which gives the U.S. government immense power to collect intelligence information, in a way that does not allow the government to use ICT companies to violate privacy rights.
5. Require individual judicial assessment under Section 702 of the Foreign Intelligence Surveillance Act, which authorizes collection of data on non-U.S. persons from within the United States.

Department of Labor (DOL)

1. Investigate allegations that U.S. labor law is not being adequately enforced in relation to low-wage sectors such as agriculture and hotel services, including allegations that workers in these sectors are paid lower than minimum wage or not at all, and that health and safety measures are inadequate.
2. Develop initiatives and allocate resources to stop human rights abuses of undocumented workers.
3. Widely disseminate the Guidelines to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products, and require all U.S.-based agricultural companies to effectively apply them, particularly in relation to children who work in the tobacco industry.
4. Phase out the exemption that limits the Walsh-Healey Public Contracts Act to domestic procurement contracts in order to make the Act applicable to items produced outside of the United States, Puerto Rico, the Virgin Islands, or the District of Columbia.

5. Phase out the exemption in the Walsh-Healey Act with respect to items available in the open market, perishables and agricultural products, and the carriage of freight and personnel, and develop the capacity to monitor abuses for particular sectors and contracts.

Department of State (DOS)

1. Participate in the open-ended intergovernmental working group and its negotiations around an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, or, at a minimum, refrain from encouraging other States to refuse to participate in the working group.
2. Further increase the capacity of U.S. embassies with respect to business and human rights via the "Doing Business" portals on U.S. embassy websites in a number of countries abroad.
3. Clarify if and how the Direct Line Program provides human rights information to U.S. companies via U.S. ambassadors, as well as what type of guidance ambassadors may provide to U.S. companies in terms of business and human rights in each participating country.
4. Prioritize training of embassies to better protect human rights defenders.
5. Provide detailed human rights information and training materials to U.S. companies on business. usa.gov.
6. Include in the DOS's yearly country-specific Human Rights Reports a focus on the risk of corporate human rights violations, particularly in conflict-affected areas.
7. Open country offices devoted to investigating business and human rights issues.
8. Reflect a concern for human rights and social issues on the DOS's Bilateral Investment Treaties and Related Agreements website.
9. Increase resources allocated to the National Contact Point (NCP) for the OECD Guidelines to strengthen the specific instances procedure, and improve NCP transparency.
10. Identify best practices and lessons from NCP procedures and practices in other OECD Member States, and consider how to apply these to the U.S. NCP.

Department of the Treasury

1. Review the IFC's Office of Accountability for consistency with the criteria for an effective grievance mechanism under UNGP 31, and recommend solutions to resolve any inconsistencies.
2. Impose civil or criminal penalties under the International Emergency Economic Powers Act if businesses fail to submit reports required by the Reporting Requirements for Investment in Burma (Myanmar).
3. Investigate reports that banks have violated U.S. sanctions by financially supporting regimes that have been designated for such sanctions due to human rights violations.
4. Explicitly require financial institutions to identify and verify beneficial ownership information of all accountholders.
5. Amend 31 C.F.R. § 1010.205(b), the exempted anti-money laundering programs for certain financial institutions regulation, to remove from the list of exemptions: (i) sellers of vehicles, including automobiles, airplanes, and boats; and (ii) persons involved in real estate closings and settlements.

INDEPENDENT AGENCIES AND GOVERNMENT CORPORATIONS

Commission on Civil Rights

1. Expand the mandate of the Commission to cover all business-related human rights issues.
2. Develop a complaint or dispute resolution mechanism rather than requiring the Commission to refer victims out to federal offices.

Environmental Protection Agency (EPA)

1. Increase enforcement of federal legislation prohibiting environmental pollution to address the disproportionate impact of pollution caused by extractive and manufacturing industries on low-income and minority communities.
2. Make information publicly available regarding whether the EPA provides human rights training to relevant officials, and if so, with what focus and in what detail. If human rights training does not currently exist within the EPA, mandate such training for relevant officials, and publicly disclose when and in what manner such training will take place.

Export-Import Bank of the United States (Ex-Im)

1. Establish an independent, non-judicial grievance mechanism dedicated to addressing community complaints that is in line with the Ex-Im's commitment to the IFC Performance Standards and the Equator Principles.
2. Further integrate human rights considerations into the policies of export credit and investment guarantee agencies.
3. Require that mitigation measures be monitored, impose reporting requirements, and specify that failure in these reporting duties and in the implementation of mitigation measures can result in the withdrawal of coverage.

Federal Acquisition Regulation (FAR) Council

1. Amend the Federal Acquisitions Regulation (FAR) to provide full protection of human rights, including the prohibition of discrimination, the right to life, the right to dignity, the right to privacy, freedom of association, and the prohibition of all child labor.
2. Amend the FAR to authorize agencies to require, through contracts, supply chain transparency and compliance with domestic laws in the host State.
3. Amend the FAR to authorize agencies to require, through contracts, contractors' assurances or compliance plans.
4. Reform FAR 52.204-10 regarding reporting requirements for subcontracts under the Federal Funding Accountability and Transparency Act of 2006 to require reporting beyond the first-tier subcontract awards, consistent with the language of the Act, and remove the rule's exclusion of long-term vendor agreements for materials or supplies.
5. Reform the FAR Council's rule implementing Executive Order 13627 to apply to commercially available off-the-shelf items (COTS) as, currently, the rule's compliance plan requirement applies to supplies, other than COTS, acquired outside the United States or services to be performed outside the United States and that have an estimated value that exceeds \$500,000.
6. Provide a separate FAR accountability mechanism that allows agencies to use all commercial remedies if a contractor violates human rights, such as the withholding of payments or liquidated damages.

Overseas Private Investment Corporation (OPIC)

1. Review OPIC's Office of Accountability to examine institutional deficiencies and accountability gaps that cause harm on the ground.
2. Ensure that separate individuals conduct the problem-solving and compliance review functions of the Office of Accountability so as to provide objective and unbiased services to affected communities.
3. Reform OPIC's procedural requirements for filing complaints to allow for, in certain circumstances, access to effective remedies even after OPIC loans have been fully paid back and after insurance contracts are terminated.
4. Staff the Office of Accountability.

Securities and Exchange Commission (SEC)

1. Finalize rulemaking for Section 1504 of the Dodd-Frank Act.
2. Require companies to report on human rights risks and impacts through securities filings.
3. Enforce existing reporting requirements.

United States Agency for International Development

1. Expand on existing efforts to address the GAO report that found that USAID did not specifically monitor its anti-trafficking policies in many of its contracts, hindering its ability to detect potential abuses and implement the government's zero tolerance policy.
2. Expand on existing efforts to address the same GAO report's findings that USAID officials often monitor only for quality assurance and technical specifications rather than for human rights abuses, specifically neglecting to monitor subcontractors' labor practices.

United States International Trade Commission

1. Collaborate with the Department of Commerce, Energy, the Export-Import Bank, the Department of Agriculture, the Small Business Administration, the Overseas Private Investment Corporation, the U.S. Trade and Development Agency, the Department of State, the U.S. Trade Representative, and the Department of Treasury to incorporate human rights information, and the UNGPs in particular, into the "Export.gov" online portal.

CONGRESS

Labor

1. Amend the Fair Labor Standards Act (FLSA) to include farmworker protection in the overtime pay provision.
2. Further amend the FLSA to extend the minimum wage protections to employees who work on small farms, defined as those that employ under seven people per quarter.
3. Amend the National Labor Relations Act to apply to state and federal public employees, domestic workers, and agricultural workers as other legislation that may protect these groups is not as comprehensive and often does not protect the right to collective bargaining or to form a trade union.
4. Remove the exemption from the prohibition of the importation of goods made with forced labor under the Tariff Act of 1930, which currently exempts most products made outside of the United States because they are not also made domestically in sufficient quantities to meet consumptive demand.

Privacy

1. Pass the Global Online Freedom Act.
2. Create oversight and review committees to develop legislative reforms that would respect the rights of non-U.S. persons who currently have no meaningful defense against indiscriminate surveillance by the U.S. government.
3. Provide effective access to remedy for victims of abuses related to U.S. ICT companies, including abuses linked to U.S. companies that develop, market, and sell technology with the power to inspect and filter digital communications to governments that use it to violate privacy and chill freedom of expression abroad.
4. Amend the Electronic Communications Privacy Act (ECPA) to address the issue that U.S.-based ICT companies that work abroad are sometimes required to provide data to governments for surveillance of citizens, as the ECPA currently does not apply when a foreign government requests data and it remains in the discretion of the company whether or not to provide that information.
5. Develop uniform federal laws on privacy and technology, such as a consumer privacy bill of rights or an update to the Electronic Communications Privacy Act.

Extraterritorial Application of Human Rights Laws

1. Develop and pass more rigorous and specific legislation to ensure that U.S. human rights law applies extraterritorially.
2. Re-introduce and pass the Civilian Extraterritorial Jurisdiction Act (CEJA).

Torture and Crimes Against Humanity

1. Amend the Torture Victims Protection Act to apply to non-natural persons.
2. Criminalize and ensure civil remedies for crimes against humanity.

Supply Chain Reform

1. Codify a clear duty of care for parent corporations over subsidiaries in the United States.

Financial Reform

1. Pass bipartisan legislation that has been introduced in multiple legislative sessions of Congress that would require companies to disclose their ultimate owners at the time the company is formed and for that information to be made available to law enforcement.
2. Amend the American Recovery and Reinvestment Act of 2009 to explicitly condition business partnerships upon human rights requirements, including due diligence measures.

Health Care

1. Amend the Health Care Reform Act to better address the affordability gap for poor and lower middle class Americans.

Federal Procurement and Government Corporations

1. Remove exemptions from the Walsh-Healey Act, making the law applicable to items available in the open market, perishables and agricultural products, and the carriage of freight and personnel. In addition, apply the Act beyond prime contractors to a variety of subcontractors fulfilling a government contract.
2. Create an independent, interagency monitoring body to ensure adequate enforcement capacity and to prevent officers from awarding contracts to contractors that other agencies have excluded based on fraud, tax evasion, and national security violations.
3. Establish single committees in the House and/or the Senate that will oversee all government corporations to promote coordination and common practices among government corporations and facilitate the establishment of human rights due diligence standards.

International and Regional Obligations

1. Ratify the following international human rights legal instruments:
 - International Covenant on Economic, Social, and Cultural Rights (ICESCR) (signed 1977)
 - Convention to Eliminate all forms of Discrimination Against Women (CEDAW) (signed 1980)
 - Convention on the Rights of the Child (signed 1995)
 - Convention on the Rights of Persons with Disabilities (signed 2007)
 - Rome Statute of the International Criminal Court (signed 2000)
2. Sign and ratify the following international human rights legal instruments:
 - International Convention on Civil and Political Rights (ICCPR) – Optional Protocol 1
 - ICCPR – Optional Protocol 2
 - ICESCR – Optional Protocol 1
 - CEDAW – Optional Protocol
 - Convention Against Torture – Optional Protocol
 - International Convention on the protection of the rights of all Migrant Workers and members of their families
 - International Convention for the Protection of all persons from Enforced Disappearance
 - International Convention on the Suppression and Punishment of the Crime of Apartheid
 - Convention on the Rights of Persons with Disabilities (CRPD) – Optional Protocol
 - ILO Conventions:
 - Discrimination (Employment and Occupation) Convention, C111 (fundamental)
 - Equal Remuneration Convention, 1951, C100 (fundamental)
 - Right to Organise and Collective Bargaining Convention, C98 (fundamental)
 - Freedom of Association and Protection of the Right to Organise Convention, C87 (fundamental)
 - Forced Labour Convention, C29 (fundamental)
 - Minimum Age Convention, C138 (fundamental)

- United Nations Convention against Transnational Organized Crime:
 - Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime
3. Sign and ratify the following international human rights legal instruments:
- Inter-American Convention on Human Rights
 - Inter-American Convention to Prevent and Punish Torture
 - Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – “Protocol of San Salvador”
 - Protocol to the American Convention on Human Rights to Abolish the Death Penalty
 - Inter-American Convention on the Forced Disappearance of Persons
 - Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women
 - Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CRPD)

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ENDNOTES

- ¹ In relation to investment, this might include relevant roles of other actors in the State Department, and cover a wide range of activities in relation to trade and investment, so a degree of specificity as to who should be mandated to do what is required.
- ² <http://mneguidelines.oecd.org/oecddeclarationanddecisions.htm>
- ³ According to one speaker, the official statistics for ODA are around or less than 2% of GDP. 17% of the overall aid is going to USAID, but aid is also directed to other areas, such as via the Department of Agriculture, Department of State, Health and Human Services, and multilateral organizations, with the majority of contributions going to Health and Population.
- ⁴ Despite the U.S.'s non-ratification of the Convention on the Rights of the Child, this could be taken as the normative standard for consideration in policy formation.
- ⁵ This included but was not limited to discussions about extra-territoriality.
- ⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)
- ⁷ As opposed to being negotiable with the Tax Ministry.
- ⁸ One speaker quoted the World Bank's Stolen Asset Recovery Unit's as noting 70% of grand corruption cases over the last 30 years involved opaque company structure, and that out of 60 countries, the U.S. was the easiest country in which to establish a shell company. [Reluctance in litigation to pierce the veil].
- ⁹ *Reporting Requirements*, EMBASSY OF THE U.S. RANGOON BURMA, <http://burma.usembassy.gov/reporting-requirements.html> (last visited Jan. 2, 2015).
- ¹⁰ DEPT OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS 6 (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf>.
- ¹¹ *Id.* at 4.
- ¹² 19 U.S.C. §§ 2641 et seq.
- ¹³ *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Mar. 2, 2015).
- ¹⁴ 19 U.S.C. § 1307.
- ¹⁵ *Human Rights and Investment Policymaking: Relevance and Integration*, LSE HUMAN RIGHTS (Oct. 28, 2014), <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/background-and-summary-investment-human-rights-relevance-and-integration-panel-discussions-2014-world-investment-forum/>; *In focus: Transatlantic Trade and Investment Partnership (TTIP)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/in-focus/ttip/> (last updated Jan. 16, 2015); Letter from AFL-CIO et al. to Amb. Michael Froman & Comm'r Karel de Gucht (May 12, 2014), available at http://ciel.org/Publications/TTIP_REGCO_12May2014.pdf; Transcript from the Closing Press Conference of the Fifth Round of Transatlantic Trade Investment Partnership (T-TIP) Negotiations (May 23, 2014), OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2014/May/Transcript-from-Closing-Press-Conference-Fifth-Round-TTIP-Negotiations>; Lance Compa, *Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: An American Perspective* (Transatlantic Stakeholder Forum, Working Paper, July 2014), available at <http://transatlanticrelations.org/sites/default/files/CompaFESTTIPpaperJune26.pdf>; *Transatlantic Trade and Investment Partnership (TTIP): Background & Commentaries on Social & Environmental*

Impacts, BUS. & HUM. RTS. RESOURCE CENTRE, <http://business-humanrights.org/en/transatlantic-trade-and-investment-partnership-ttip-background-commentaries-on-social-environmental-impacts-0> (last visited Jan. 22, 2015) (general mini database of info on this topic).

- ¹⁶ Int'l Labor Rights Fund v. U.S., 391 F. Supp. 2d 1370 (CIT 2005).
- ¹⁷ Cora Currier, *In Big Win for Defense Industry, Obama Rolls Back Limits on Arms Exports*, PROPUBLICA (Oct. 14, 2013), <http://www.propublica.org/article/in-big-win-for-defense-industry-obama-rolls-back-limits-on-arms-export>.
- ¹⁸ See Foreign Assistance Act of 1961, PL 87-195 at § 101(a)(2).
- ¹⁹ *Id.* at § 102 (emphasis added).
- ²⁰ USAID, UNITED STATES GOVERNMENT SUPPORT TO GOOD LAND GOVERNANCE, available at http://usaidlandtenure.net/sites/default/files/USAID_and_MCC_Support_to_Land_Tenure_and_Property_Rights_0.pdf.
- ²¹ *Id.*
- ²² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, HUMAN TRAFFICKING: OVERSIGHT OF CONTRACTORS' USE OF FOREIGN WORKERS IN HIGH-RISK ENVIRONMENTS NEEDS TO BE STRENGTHENED 46 (2014), available at <http://www.gao.gov/assets/670/666998.pdf>.
- ²³ USAID, GUIDANCE ON THE IMPLEMENTATION OF AGENCY-WIDE COUNTER TRAFFICKING IN PERSONS CODE OF CONDUCT (2011), available at http://pdf.usaid.gov/pdf_docs/PDACT175.pdf.
- ²⁴ *Id.* at 47.
- ²⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 20.
- ²⁶ *Id.*
- ²⁷ *Id.* at 23.
- ²⁸ *Id.* at 32.
- ²⁹ *List of Goods Produced by Child Labor or Forced Labor*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/> (last visits Feb. 25, 2015).
- ³⁰ Pres. Barack Obama, Executive Order 13627—Strengthening Protections Against Trafficking in Persons in Federal Contracts, Sept. 25, 2012, available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200750/pdf/DCPD-201200750.pdf>.
- ³¹ Vince Farhat et al., *United States: Proposed Anti-Human Trafficking Rule Could Significantly Affect Contractor Compliance Programs*, HOLLAND & KNIGHT (Jan. 8, 2014), <http://www.hklaw.com/publications/proposed-anti-human-trafficking-rule-could-significantly-affect-contractor-compliance-programs-01-08-2014/>.
- ³² *Id.*
- ³³ *Id.*
- ³⁴ Pres. Barack Obama, Executive Order — Fair Pay and Safe Workplaces, July 31, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ Stephen Lee, *Federal Contractors With Bad Safety Records Will Be Scrutinized Under Executive Order*, OCCUPATIONAL SAFETY & HEALTH REP., <http://www.bna.com/federal-contractors-bad-n17179893433/>.

- ³⁸ Executive Order 11246 — Equal employment opportunity (Sep. 24, 1965), available at <http://www.archives.gov/federal-register/codification/executive-order/11246.html> (last visited Jan. 23, 2015).
- ³⁹ ICAR Procurement Report, *supra* note 245, at 7.
- ⁴⁰ Executive Order 11246, *supra* note 475.
- ⁴¹ *Id.*
- ⁴² Executive Order – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employemen> (last visited Jan. 23, 2015).
- ⁴³ ICAR Due Diligence Report, *supra* note 150, at 32.
- ⁴⁴ H.R. Rep. No. 2946, 74th Cong. 2nd Sess., at 4. The House report stated specifically that “[t]he object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweatshops.” *Id.*
- ⁴⁵ FAR 14.408-2(a) (Responsible bidder – reasonableness of price).
- ⁴⁶ 41 U.S.C. § 2313(b) (Persons covered).
- ⁴⁷ 41 U.S.C. § 2313(c)(1)(E)(ii) (Information included).
- ⁴⁸ 41 U.S.C. § 2313(c)(6) (Information included).
- ⁴⁹ *Id.* at 24
- ⁵⁰ For contracts other than construction, the FAR requires affirmative action programs for contracts of \$50,000 or more for contractors with 50 or more employees. FAR 22.804 (Affirmative action programs); FAR 22.804-1 (Nonconstruction). The FAR’s affirmative action requirements for construction contracts are specific to “covered geographical areas.” FAR 22.804-2 (Construction). An affirmative action clause is limited to work performed in U.S. territory, which is one of several exceptions that include work on Indian reservations and contracts with state and local governments. FAR 22.807 (Exemptions). See Exec. Order No. 11,246, parts II and IV, 30 Fed. Reg. 12319 (Sept. 24, 1965). The contents of an affirmative action program must comply with Department of Labor regulations to ensure equal opportunity in employment to minorities and women. FAR 22.801 (Definitions).
- ⁵¹ FAR 22.805(4).
- ⁵² FAR 22.808 (Complaints); FAR 22.806 (Inquiries).
- ⁵³ ICAR Procurement Report, *supra* note 245, at 37.
- ⁵⁴ For a list of products requiring contractor certification as to forced or indentured child labor, see *List of Products Produced by forced or Indentured Child Labor*, DOL, <http://www.dol.gov/ilab/regs/eo13126/main.htm> (last visited Aug. 27, 2014).
- ⁵⁵ FAR 22.1503(c)-(d) (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor).
- ⁵⁶ FAR 22.17 (Combating trafficking in persons).
- ⁵⁷ 77 Fed. Reg. 60029 (Oct. 2, 2012) (“Strengthening Protections Against Trafficking in Persons in Federal Contracts”).
- ⁵⁸ ICAR Procurement Report, *supra* note 245, at 38-39.
- ⁵⁹ FAR Subpart 9.4 (Debarment, suspension); FAR 9.405 (Effect of listing).

- ⁶⁰ FAR 9.406-2 (Causes for debarment); FAR 9.407-2 (Causes for suspension).
- ⁶¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 46.
- ⁶² *Id.*
- ⁶³ *Id.* at 47.
- ⁶⁴ *Id.* at 46.
- ⁶⁵ *Id.* at 47.
- ⁶⁶ *Id.*
- ⁶⁷ *Id.*
- ⁶⁸ *Department of State to Incorporate International Code of Conduct into Worldwide Protective Services Contracts*, DOS (Aug. 16, 2013), <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm>.
- ⁶⁹ ICAR Procurement Report, *supra* note 245, at 25.
- ⁷⁰ *Id.* at 35.
- ⁷¹ Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 671-672 (Feb. 2001).
- ⁷² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-707T, *SUSPENSION AND DEBARMENT—CHARACTERISTICS OF ACTIVE AGENCY PROGRAMS AND GOVERNMENT-WIDE OVERSIGHT EFFORTS 3* (2013).
- ⁷³ ICAR Procurement Report, *supra* note 245, at 19.
- ⁷⁴ ICAR Procurement Report, *supra* note 245, at 25.
- ⁷⁵ *Id.*
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 26-27.
- ⁷⁸ *Id.* at 27.
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* at 30-31.
- ⁸¹ *Id.* at 31.
- ⁸² *Id.* at 34.
- ⁸³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 10.
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *About: What is the Open Government Partnership?*, OPEN GOV'T PARTNERSHIP, <http://www.opengovpartnership.org/about> (last visited Jan. 27, 2015).
- ⁸⁷ *What is the Open Government Partnership?*, OPEN GOV'T PARTNERSHIP, <http://www.opengovpartnership.org/about>.
- ⁸⁸ Kathryn Gordon, OECD, *International Investment Agreements: A Survey of Environmental, Labour and Anti-corruption Issues*, in *INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS* 135, 146 (2008), available at <http://www.oecd.org/daf/inv/investment-policy/40471550.pdf> (including in treaties with Oman, Morocco and Singapore).

- ⁸⁹ *Id.*
- ⁹⁰ 15 U.S.C. §§ 78dd-1, et seq.
- ⁹¹ 15 U.S.C. §§ 78dd-1 et seq.
- ⁹² See, e.g., Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges, US DOJ, Dec. 22, 2014. Other companies have been subjected to investigations and enforcement proceedings for improper payments characterized as “marketing expenses” (such as travel expenses for foreign officials), charitable contributions, and providing jobs to family members.
- ⁹³ SEC Enforcement Actions: FCPA Cases, SEC, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Dec. 22, 2014); FCPA and Related Enforcement Actions, DOJ, <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html> (last visited Jan. 21, 2015); SHEARMAN & STERLING LLP, FCPA DIGEST (July 2014), available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/07/Recent-Trends-and-Patterns-FCPA-Digest-LT-072114.pdf>.
- ⁹⁴ SEC Enforcement Actions: FCPA Cases, SEC, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Dec. 22, 2014).
- ⁹⁵ For example, the OECD Working Group has commended Norway’s enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. In its June 2013 Annual Report, the OECD Working Group on Bribery ranked Germany second in total number of bribery cases since 1999 after the United States.
- ⁹⁶ The Convention obligates Parties to enact laws criminalizing foreign bribery and to participate in a rigorous peer review process. All Parties to the Convention (who are not limited to OECD countries) have passed foreign bribery laws, many are modeled on or go beyond, the requirements of the Convention, such as the UK Bribery Act of 2010, the 2009 Chilean Corporate Criminal Liability Law, the new 2012 Italian Anti-Corruption Law (updating Italy’s laws against bribery of foreign public officials), and Brazil’s 2013 Law to Combat Corruption.
- ⁹⁷ See United Nations Convention Against Corruption (2004).
- ⁹⁸ Sarah N. Lynch & Lawrence Hurley, *U.S. Appeals Court Finds Conflict-Minerals Rule Violates Free Speech*, REUTERS, Apr. 14, 2014, <http://www.reuters.com/article/2014/04/14/us-court-sec-conflictminerals-idUSBREA3D13U20140414>; Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (“final rule”) (codified at 17 C.F.R. §§ 240, 249(b)), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-09-12/pdf/2012-21153.pdf>.
- ⁹⁹ *Specialized Corporate Disclosure*, SEC, <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (last modified May 30, 2013).
- ¹⁰⁰ *Id.*
- ¹⁰¹ See EU Rules for Disclosure of Payments, Publish What You Pay (November 2013).
- ¹⁰² Reporting Requirements, EMBASSY OF THE U.S. RANGOON BURMA, <http://burma.usembassy.gov/reporting-requirements.html> (last visited Jan. 2, 2015).
- ¹⁰³ DEP’T OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS 6 (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf>.
- ¹⁰⁴ *Id.* at 4.
- ¹⁰⁵ Institutions are required to implement an anti-money laundering program, report suspicious transactions, and conduct due diligence for private banking and correspondent bank accounts involving foreign persons. Suspicious Activity Reports (SARs) filed with the Financial Crimes Enforcement Network

(FinCEN) within the Department of Treasury report funds derived from illegal activity, transactions without lawful apparent purpose or unusual for a given customer, insider abuse, and currency transactions over \$10,000. The SEC has access to SAR filings, and investigations involving BSA and AML compliance issues often also involve OFAC, OCC, DOJ, the Board of Governors of the Federal Reserve System and other agencies.

- ¹⁰⁶ For example, in 2012 HSBC settled with Treasury for \$875 million, including separate assessments of \$500 million civil money penalties by the OCC and FinCEN for BSA violations. In that investigation, HSBC's anti-money laundering compliance violations were particularly egregious as they allowed Mexican drug trafficking organizations to launder hundreds of millions of dollars. Individual accountability for failings has also been raised. For example, on February 15, 2015, Benjamin Lawsky, Superintendent of the New York Department of Financial Services, suggested New York may require senior bank executives to attest to the adequacy of their institutions' BSA/AML monitoring systems, making them personally responsible.
- ¹⁰⁷ The World Bank and UNODC Stolen Recovery Initiative, *The Puppet Masters, How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011).
- ¹⁰⁸ White House Fact Sheet about G8 commitment and U.S. National Action Plan on Preventing the Misuse of Companies and Legal Arrangements, June 18, 2013.
- ¹⁰⁹ *Senate amendment to H.R. 83*, HOUSE OF REPRESENTATIVES COMMITTEE ON RULES, <http://rules.house.gov/bill/113/hr-83> (last visited Mar. 2, 2015).
- ¹¹⁰ Federal Funding Accountability and Transparency Act of 2006 § 2, Pub. L. No. 109-282, § 2, 120 Stat. 1186, codified at 31 U.S.C. § 6101 note, § 2(a)(1)-(2), 2(e).
- ¹¹¹ *Id.* § 2(b)(1)(D).
- ¹¹² This interpretation is stated in the Federal Register notice of the final rule implementing the Act. Federal Acquisition Regulation; Reporting Executive Compensation and First-Tier Subcontract Awards, 77 Fed. Reg. 44047, 44052-53 (July 26, 2012).
- ¹¹³ Global Witness, *The Great Rip Off, Anonymous company owners and the threat to American Interests*, September 2014.
- ¹¹⁴ *The Whistleblower Protection Programs*, OSHA, <http://www.whistleblowers.gov/> (last visited Jan. 27, 2015).
- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.*
- ¹¹⁷ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Public Law 112-208 (Dec. 14, 2012), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/pl112_208.pdf.
- ¹¹⁸ *Cardin, McCain Reintroduce Global Magnitsky Human Rights Accountability Act*, BEN CARDIN U.S. SENATOR FOR MD. (Jan. 28, 2015), <http://www.cardin.senate.gov/newsroom/press/release/cardin-mccain-reintroduce-global-magnitsky-human-rights-accountability-act>.
- ¹¹⁹ US Attorney General Eric Holder on July 25, 2010, available at <http://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit>. The US also cooperates with related global initiatives, such as the Ukraine Forum on Asset Recovery and Arab Forum on Asset Recovery.
- ¹²⁰ US Attorney General Eric Holder announcement of Kleptocracy Unit, July 25, 2010. The US also cooperates with related global initiations, such as the Ukraine Forum on Asset Recovery and Arab Forum on Asset Recovery.

- ¹²¹ Key seizures by the Kleptocracy Asset Recovery Initiative have returned millions to Equatorial Guinea for charitable and development purposes in the DOJ's efforts involving Second Vice President of the Republic of Equatorial Guinea Teddy Obiang; the DOJ will return hundreds of millions back to Nigeria having seized \$480 million in corruption proceeds hidden in bank accounts around the world by former Nigerian dictator Sani Abacha and his co-conspirators. In March 2015, DOJ seized \$28.7 million in corruption proceeds of a former president of the Republic of Korea. See US DOJ press releases re the Teddy Obiang forfeiture, Abacha forfeiture, and Chun Doo Hwan forfeiture.
- ¹²² *Sanctions Programs and Country Information*, DOT, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last updated Jan. 16, 2015); *Economic Sanctions Policy and Implementation*, DOS, <http://www.state.gov/e/eb/tfs/spi/> (last visited Jan. 21, 2015).
- ¹²³ *U.S. Treasury Department Announces \$619 Million Settlement with ING Bank, N.V.*, DOT (June 12, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx>.
- ¹²⁴ *Civil Penalties and Enforcement Information*, U.S. DEPT. OF TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last updated Nov. 21, 2014).
- ¹²⁵ *About Us*, BETTER WORK, http://betterwork.org/global/?page_id=300 (last visited Jan. 27, 2015); Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 26th Sess., June 10-27, 2014, U.N. Doc. A/HRC/26/25 (May 5, 2014), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32_en.pdf.
- ¹²⁶ PROF. GWYNNE SKINNER ET AL., ICAR, THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS 11-12 (Dec. 2013), available at <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> [hereinafter ICAR Third Pillar report].
- ¹²⁷ See *id.*
- ¹²⁸ Working Group U.S. Visit Report, *supra* note 16, at 13-14.
- ¹²⁹ Mohr Letter, *supra* note 409.



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