

**National Action Plan for Responsible Business Conduct
Dialogue at the University of Oklahoma College of Law
Norman, Oklahoma
April 2, 2015**

Opening Plenary: Initial Perspective by Various Participants

Highlights:

1. The public input garnered as a result of the U.S. National Action Plan dialogues will be combined with input from relevant agencies to produce a foundational document for responsible business conduct for U.S.-based companies.
2. The National Action Plan presents the opportunity for the U.S. government and businesses to be leaders in good practices through effective government regulation, meaningful business accountability, and innovative collaboration to produce alternative solutions to human rights challenges.
3. The National Action Plan's emphasis will be on global, rather than domestic, operations, even though the standard produced would have domestic applicability.
4. There seemed to be broad support for using the UN Guiding Principles as a foundation on which to build a workable National Action Plan.
5. The National Action Plan should be careful not to embrace a "one size fits all" mentality, but should encompass "fit-for-purpose solutions" that leverage the experience and learning of a range of stakeholders gleaned from local level dialogues.

Memorable Quotes:

"Our perspective on a National Action Plan is not only to institutionalize the status quo but to recognize that this has been an evolving process over a decade and an opportunity for the U.S. to go beyond what we see today."

"In my years working and living abroad, I have seen the power of the business-government relationship"

"[The National Action Plan must implement a principled approach in integrating human rights with existing management systems--one that engages in] good governance without putting business at a competitive disadvantage."

Summary:

The open plenary began with a statement of the goal of the National Action Plan (NAP), which is to promote and incentivize corporations to engage in responsible business conduct (RBC) "especially when it comes to global operations." Because "gaps" in the regulatory

environment are more likely to exist and to be serious abroad, the focus of the upcoming NAP will be on business conduct abroad—though it was noted that the NAP would have implications domestically as well. Furthermore, the type of RBC found in the UN Guiding Principles on Business and Human Rights (Guiding Principles) and complemented by the Organization of Economic Cooperation and Development was “part of what [American] companies stand for.” (Quoting Secretary of State John Kerry) As seen in previous NAP meetings, a critical part of these dialogues involved allowing the U.S. government (USG) to engage with stakeholders from the private sector and non-governmental organizations with the objectives (1) to explore instructive examples of successes and failures; (2) to collaborate with companies by implementing a “good mix” of policies and spotlighting best practices; and (3) to prioritize the most urgent needs.

Next, a participant recognized the value of meaningful consultation opportunities with the USG and highlighted the energy industry’s current active role in the development and improvement of RBC through the Guiding Principles and called on the USG first to maintain the “balanced approach” established therein, that is: states have a duty to protect human rights; businesses have a responsibility to respect human rights; and both should give access to remedies. Second, it was noted that the USG has a role to play in supporting U.S.-based companies abroad, but its approach should be principled and in the form of high-level guidance allowing for flexibility of implementation with due regard for the diversities of size, scope, and local context inherent in conducting business globally. The NAP should be careful not to embrace a “one size fits all” mentality, but should encompass “fit-for-purpose solutions” that leverage the experience and learning of a range of stakeholders gleaned from local level dialogues.

Finally, a participant praised the “widespread change in thought” over the past fifteen years concerning the responsibility shared between states and business with regard to human rights. In addition to institutionalizing the status quo, it was hoped that the United States through the NAP would go “beyond what we see today.” Specifically, the NAP should incorporate transparency requirements in a meaningful way. Premised on the logic set forth in the Guiding Principles regarding identification and prevention, the NAP should also place greater focus on mandatory due diligence across all spheres. In addition, because business related abuses are borderless, the NAP must implement “borderless” solutions, that is, globally uniform standards.

In response to questions concerning the timeline for the NAP and the participation of USG agencies, it was stated that the White House was leading a process among relevant agencies that would be combined with the public input to produce a draft to be circulated, and the hope was expressed to have something by the end of 2015. One of the challenges of such an effort included familiarizing domestic agencies with the Guiding Principles. The public was also encouraged to provide written suggestions to NAP-RBC@state.gov. In response to questions raised over the domestic applicability of the NAP, concerns were expressed about the ability to achieve consensus if the scope grew too large. Developing a NAP that addresses all issues, domestic and international, was viewed as being too ambitious. The greater value proposition was in producing a foundational document similar to the Guiding Principles that would address businesses’ overseas conduct where governments are not as active in their regulatory presence. Another question sought agreement with the characterization of the NAP as creating a “code for business”—exceeding the concerns of human rights violations—and outpacing the NAP of other countries. It was agreed that human rights were a core element of RBC, but RBC goes

beyond human rights and the USG would provide guidance and help to other countries through leadership in this field. Another question involving domestic applicability elicited agreement that if the NAP created only an international standard, a messaging conflict could arise as to which standard businesses should follow. When asked to evaluate the NAP of other countries, a participant commented that “there is a reluctance to do too much” with some countries simply reporting their status quo, and others showing elements of their domestic agenda working in parallel with their NAP. Finally, the question as to whether anyone was examining how to incentivize good conduct provoked multiple responses. One participant stated that this was an issue of concern and was being discussed in informal dialogues. Another response highlighted the market incentives inherent in RBC that could be exploited citing as proof that foreign governments not only want US companies to bring capital, but also want American values and practices to serve as an example.

TOPIC 1: Use of Security Forces Abroad

Highlights:

1. Some processes the U.S. Government utilizes for addressing the provision of security abroad include the Overseas Security Advisory Committee (OSAC), the Voluntary Principles on Security and Human Rights, the International Code of Conduct (ICOC), and the Burma responsible investment reporting requirements.
2. It is important for governments, NGO’s, and companies to work together to find a common language, in order to prevent human rights abuses among security forces abroad.
3. When enforcing the Voluntary Principles or the United Nation’s Guiding Principles on Business and Human Rights, companies need to have flexibility in terms of reporting and transparency, because the size and type of the company is directly related to its ability to report and address certain issues.

Memorable Quotes:

“Reporting is a critical facet of accountability.”

“There is a business case for companies that are smaller in scale to be more cognizant of these issues.”

“It’s easily forgotten as we look ahead at the next challenges . . . to look behind and see how far we’ve come.”

Summary:

One participant noted the Voluntary Principles are useful for sharing best practices, articulating the issues, enhancing accountability, and demonstrating what is expected from companies in order to respect human rights. The participant recommended that working on the

ground in relevant countries could help bring governments, companies, and non-governmental organizations (NGOs) together to discuss how to ensure respect for human rights in a particular setting.

Another participant explained that U.S. companies should consult with non-traditional sources, in addition to the traditional legal vetting, to ensure they are doing their due diligence regarding human rights. Such sources include working with local embassies, consulting other local stakeholders, and utilizing online business and human rights resource centers. A common practice is for companies to develop a Memorandum of Understanding with host governments. While this productive agreement provides a platform to discuss the Voluntary Principles and clarify the intentions of each party, the lack of enforcement process makes it an extremely challenging exercise.

It was recommended that the U.S. government should implement an integrated approach regarding business and human rights, by uniting resources across government agencies. This participant explained the U.S. government can extend awareness by continuing participation in multi-stakeholder initiatives and collaborating with companies to help them protect human rights. The U.S. government can also assist companies by helping them identify the people who they can trust and work with.

Participants encouraged the U.S. government to: (1) ensure there is ongoing communication, trust building, and transparency throughout a company's business dealings; (2) recruit small companies to adhere to the principles; (3) have flexibility in terms of reporting, specifically to allow small company participation; and (4) approach the National Action Plan with humbleness and as a collaborative effort.

It was noted by a participant that the critical factors for longevity for the National Action Plan are to: (1) identify leadership who takes into account the public, company's and government's views; and (2) reinforce the accountability aspect of the principles by encouraging reporting. In terms of accountability, transparency is a necessity for governments to reward and incentivize good business conduct, which can be determined by a reasonableness standard. It was suggested that the new UN Guiding Principles Reporting Framework could be useful in this regard.

Some participants recommended the United States rally private actors to follow business and human rights principles in their business transactions. Another participant expressed the idea of local solutions for local problems, and encouraged the U.S. government to get other states to be more involved in addressing security issues.

Further, it was recommended by a group of participants that the National Action Plan should (1) strongly encourage all private security providers hired by U.S. companies to join the International Code of Conduct for Private Security Service Providers or, in the alternative, encourage any security providers not already a part of the Code to sign and implement the Code within a reasonable amount of time; (2) set forth the U.S. government's detailed expectations for U.S. companies operating abroad with respect to security and human rights. In particular, the NAP should highlight the importance of regular risk assessments, security training and vetting

guidelines, and robust human rights education; (3) develop and encourage a voluntary reporting process to ensure transparency and best practices with regard to the use of security forces abroad (the reporting requirements could be similar to those in the Burma regulations on Reporting Requirements on Responsible Investment and the reports should be posted on a governmental webpage for all stakeholders to examine; the US government could acknowledge the best reports with various forms of recognition; and (4) include a commitment by the U.S. Government to provide more experts to help guide companies on the use of security forces abroad and to help with implementation of NAP policies on the topic.

A participant asked whether the United States was involved in the Columbia and Bangladesh public security forces situations and suggested that a memorandum of understanding may be a productive outlet to engage in these situations. Another participant requested the government help corporate citizens by explaining to other governments what the U.S. government's expectations are of their citizens, so that host governments might cooperate with the company's standards.

TOPIC 2: Corruption & Transparency Issues

Highlights:

1. Many participants suggested that the key to combating corruption and increasing transparency lies in appropriate reporting measures aimed at increasing awareness and accountability.
2. While many of the participants noted that there are some great ideas already in place, they also expressed concerns that one of the major difficulties arising in this area is implementation, especially when dealing with multiple state governments and other organizations with diverse goals and agendas.
3. It is important to find appropriate ways to incentivize the good behavior of involved parties rather than merely rewarding those who discover and report problems after they happen.
4. Transparency and anticorruption are global issues. We, as a country, must do our best to work with companies and countries that share our appreciation for the importance of these values and strive to encourage other companies and countries to do the same.

Memorable Quotes:

“In the real world [having a law on the books] only matters so much... go beyond just putting laws on the book; we really try to change the culture surrounding transparency [and] anticorruption.”

“We shouldn't strive to be perfect with anti-corruption because we are never, as the human race, going to 'get over greed.' So what do we do? Tremendous amount of due diligence with everyone you do business with . . . enormous amounts and personal training – every single

employee – and not only that, but make the training fun and practical so it can easily be implemented. Make things implementable!”

“Remember that the race to the top does not only need to happen between U.S. companies . . . it also needs to happen between U.S. companies and foreign competitors.”

Summary:

One participant focused on the idea of a *culture* of transparency, noting that there are few topics more important than anti-corruption and transparency. Corruption is much more than just ‘immoral’: it siphons off money and important resources from the people who need them most. This participant suggested that, domestically, we focus on providing companies with the resources to comply with regulations. This entails training FSOs and CSOs on the ground to ensure that they possess the skills needed when working with companies overseas. The participant further encouraged viewing transparency guidelines as a useful resource to help guide companies, rather than a hassle that must be endured. This participant also noted the importance of criminalizing both active and passive bribery (the latter relating to government officials seeking and/or accepting money). This participant further encouraged transparency dialogues with countries like China, who have anti-bribery laws on the books but don’t consistently enforce them, emphasizing that having law on the books is only half the battle as the laws still must be enforced. This participant noted many important principles have been developed ‘bottom-up’ from the industry, i.e. from companies speaking out against corruption.

Another participant encouraged a focus on the positive role businesses can play in economic development while attempting to overcome the hurdles that corruption presents. This participant suggested specific steps the U.S. government could take such as direct dialogue and advocacy with foreign governments in taking anti-corruption measures. This participant also noted the Guiding Principles are the floor and the race to the top (“the ceiling”) shouldn’t be a race exclusive to U.S. companies but rather inclusive of all companies worldwide. This participant recommended measures structured similar to the Burma requirements – measures that connect a legal trigger (i.e., US businesses who spend more than a certain amount) to the value of transparency. This participant made sure not to endorse a ‘checkmark’ approach – issuing a checkmark list of tasks with which companies must abide – because such requirements differ from company to company. Rather, the participant recommended taking a framework approach through which U.S. companies learn to operate responsibly.

Another participant recommended that we focus on the positive role businesses can play in fighting corruption. For example, the majority of oil and gas investment is not currently being reported. This participant emphasized that *where* resources are going and *from where* they are coming must be transparent. This participant further emphasized that the bar must be set high in terms of governance: we must bolster outreach attempts and go beyond mere CSR representatives, and should venture into other departments such as compliance, legal, tax and accounting. This participant recommended specific things that the U.S. government in particular can do to enhance awareness of the state’s duty to protect human rights: educating foreign service officers, increasing outreach to U.S. companies abroad, leveraging embassy resources,

and engaging at all different levels, particularly in direct dialogue and advocacy with host governments. Lastly, this participant focused on the overall importance of reporting, including the following key issue: what happens when the host government prevents you from disclosure when your home country requires reporting. This participant recommended a consistent and harmonized approach as the kind of solution that would support company disclosure efforts while simultaneously making room for civil society to monitor said efforts. The participant further noted that the U.S. government should increase capacity building efforts for governments to strengthen the rule of law, anti-corruption measures, and good governance, as well as tie development assistance and trade preferences to anti-corruption measures and promote Secretary-level communications on this topic.

Another participant's recommendations were anchored to the notion that we shouldn't strive to be perfect with anti-corruption because, as a human race, we will never defeat the enemy: greed. This does not mean all transparency efforts are done in vain. Rather, this participant noted that businesses perform tremendous amounts of due diligence with every company with whom they interact. Such due diligence encompasses enormous amounts of personal training – training every single employee. This participant recommended businesses make the training fun and practical so that it can easily be implemented.

One participant recommended getting the World Bank and the IMF to help with enforcement of anti-corruption measures, particularly with regard to countries that are party to the anti-bribery convention but do not enforce it. One participant proposed finding allies and conglomerates that are willing to speak up. Another participant focused on human greed, suggesting the creation of a mechanism whereby procedures are put in place (for instance, with regard to customs officials) that remove as much discretion as possible for each individual actor, eliminating opportunities for corruption to arise. Another participant spoke about presenting aggregated data, as opposed to company specific disaggregated data, in order to protect company secrets. Finally, one participant noted that antitrust and competitions laws are equally as important as transparency and we can't let transparency trump everything else.

TOPIC 3: Vulnerable Groups

Highlights:

1. Concerns were raised with regard to the adverse impacts created by corporations on lands traditionally occupied by indigenous peoples. To deal with this issue, many participants advocated incentivizing transparency in the National Action Plan (NAP).
2. Several participants stated that the chief weakness of the United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”) is the lack of access to adequate remedies for indigenous peoples who are deprived of property or land. Some participants argued that corporate controlled remedies are hard for indigenous peoples to access. Corporate controlled remedies also give the appearance of being inherently

biased. These participants wanted to see the NAP include access to a government funded remedy process that would operate outside the sole control of corporations.

3. There was discussion about whether the NAP should require companies to engage in meaningful consultations with or to actually obtain consent from indigenous peoples when acquiring or changing property rights. Some stated that meaningful consultations would provide indigenous groups a seat at the table with corporations, while others took the position that consultations will provide little value unless corporations have to acquire consent.

Memorable Quotes:

“Across much of the developing world, land rights are poorly documented. Most land is not documented, so they [land rights] are not legally registered and not legally recognized.”

“When we talk about human rights, it is easy to lose sight of the human drama and misery that we are talking about that isn’t present to us.”

“Almost no one is making public the due diligence they do – they [companies] don’t want to be the first, so there is a transparency log jam. There is no movement without transparency, and it is unlikely that they will break on their own. Government intervention is helpful.”

Summary:

A participant spoke about the problems that exist when U.S. companies do not apply U.S. law abroad or to their dealings with tribes in the United States. The participant stated that U.S. corporations should not be able to sell pesticides in Latin American countries when those pesticides are deemed under U.S. law to be too dangerous to be sold domestically. The participant further claimed that U.S. pesticide companies are making children in Mexico sick with their exported products. The participant also stated that the pesticide companies are not warning Mexican workers or suppliers about the potential problems with their products. A company operating without an international legal standard in place that is similar to the U.S. standard puts individuals abroad at risk. Therefore, the NAP should have a way to better regulate companies and ensure compliance with the Guiding Principles.

Participants called for companies to make their due diligence process more transparent. There was discussion about a “transparency log jam” that occurs because companies do not want to be the first to expose all of their due diligence efforts. As a result, due diligence efforts are not displayed to the public and indigenous communities and others assume that no due diligence has been conducted.

Some participants expressed concerns that companies cannot wait until someone actually feels wronged, because that is when indigenous peoples and others might resort to violence. This violence may set companies back in their progress, so companies should consider it a priority to have more transparent practices. Government intervention is needed to change the incentives and encourage companies to be transparent about the due diligence that they are already engaged in.

Some participants wanted the NAP to include legal requirements allowing the U.S. State Department to collect due diligence reports, similar to the Burma Reporting Requirements.

Some participants stated that remedies should be an important part of the NAP. Some internal, company-administered grievance procedures are successful, but there should be a grievance procedure outside the complete control of companies that is agreed to by the company and paid for in part and backed by the U.S. government. Another participant called for a binding and enforceable program of remedies in order to empower indigenous communities. Also, a participant called for language in the NAP that would require companies to disclose their supply chains and procurement procedures.

A participant suggested that the U.S. State Department designate someone at each U.S. embassy to serve as a resource for companies trying to comply with the Guiding Principles and the NAP. This designee should also know which indigenous communities are in the country and should provide guidance on how to get in touch with those indigenous communities.

There was discussion about whether consultations or actual consent should be the minimum standard for companies that are trying to acquire lands from indigenous communities. Some participants stated that consultations are a good minimum standard as long as those consultations are meaningful. A group of participants proposed five “process factors” to ensure that consultation is meaningful. The process factors of a “meaningful consultation” were identified as: (1) proper notice (giving notice in the indigenous community’s native language and in a way that will actually reach them); (2) timeframe (ensuring that consultations are continually held throughout the process of development); (3) forum (locating the consultations in a location that is accessible to the indigenous group); (4) interpretation (hiring an independent interpreter that can translate the language of the indigenous population); and (5) Indigenous Community Leaders (identifying and including the community leaders in consultations).

A participant reacted to those statements and said that meaningful consultations are worthless if consent is not required because companies would not be bound to change any of their plans after they complied with consultation rules. Another participant pointed out that requiring consent would limit the ability of smaller governments to sell resources or make changes, and the NAP should respect the sovereignty of other nations and allow governments the ability to combat poverty within their own borders.

Some participants requested the incorporation of the United Nation’s Declaration on the Rights of Indigenous Peoples into the NAP. A participant also stated that the International Monetary Fund and the World Bank should be consulted before the NAP is finalized. There was also a concern about a “governance gap” in some countries where no land rights for indigenous peoples are recognized. A participant requested that the U.S. government do something within the NAP to encourage other countries to adopt such legal land rights systems.