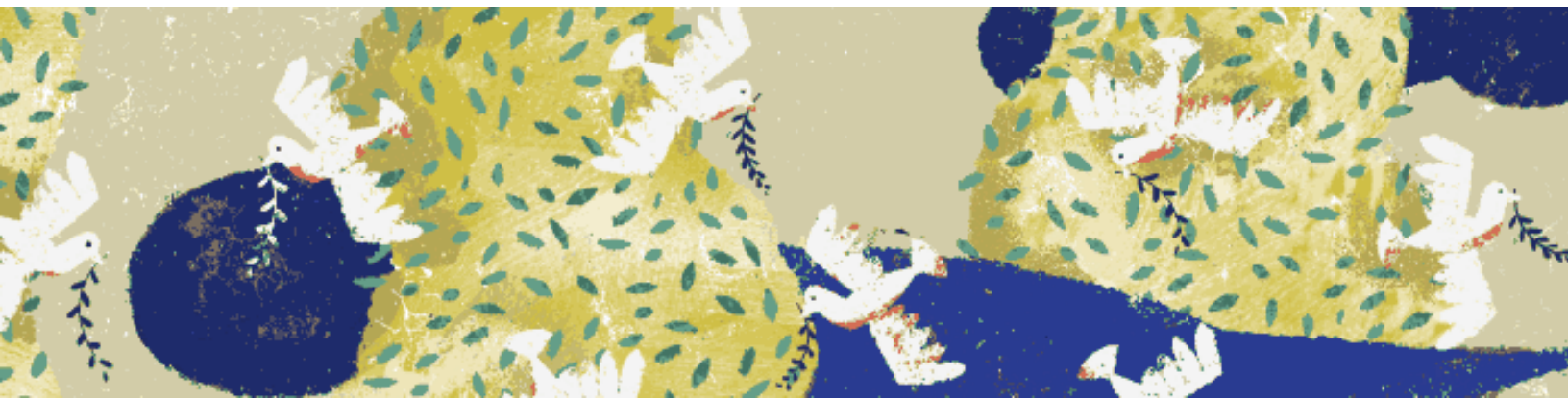


“Shadow” National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks

The United States

Pillar I



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(NBA) of Current Implementation of
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March 2015

The International Corporate Accountability Roundtable
(ICAR)

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The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

Sara Blackwell, ICAR's Legal and Policy Associate, coordinated this project, with indispensable assistance and inputs from Amol Mehra, Katie Shay, Amanda Werner, and Erica Embree.

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INTRODUCTION

BACKGROUND

In June 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).¹ Three years later, in June 2014, the Council called on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts.² This development followed similar requests to Member States made by the European Union in 2011³ and 2012⁴ and by the Council of Europe in 2014.⁵ Since 2011, and due in part to these initiatives, a number of individual States have developed and published NAPs on business and human rights, and many more are currently in the process.⁶

In August 2013, the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) launched a joint project to develop guidance on NAPs in the form of a “toolkit” for use by governments and other stakeholders.⁷ This collaboration took place alongside further interventions, by both organizations, highlighting the need for NAPs and for their development in line with a human rights-based approach.⁸ This guidance was published in June 2014, in a report entitled *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*.⁹

THE NATIONAL BASELINE ASSESSMENT (NBA) TEMPLATE

The first component of the joint ICAR-DIHR NAPs Toolkit is the National Baseline Assessment (NBA) Template. The NBA Template provides criteria, indicators, and scoping questions by which to assess how far current law, policy, and other measures at the national level give effect to the State’s duty to protect human rights under the UNGPs and other international business and human rights standards. The NBA Template offers a standardized approach to business and human rights baseline analysis across countries, but ICAR and DIHR designed it to be adapted by local users to ensure that it can be used in a context-sensitive way. The NBA Template itself is found at Annex 4 to the ICAR-DIHR report.¹⁰

Using the NBA Template to develop a NBA will help a State coherently and transparently identify and select measures to include in its NAP. It will also facilitate State reporting on the impact of NAPs over time.

WHAT IS A BASELINE ASSESSMENT?

In general, a baseline assessment is a study conducted at the start of an intervention to analyze current conditions. The results of the baseline assessment can then be used to assess impact. A government can use the baseline to compare future conditions with the initial status after a particular intervention or program has taken place and to provide greater understanding of its effects and results.¹¹

The NBA Template primarily uses qualitative indicators, but these could be supplemented with quantitative indicators and benchmarks at the national level and, if resources permit and States and other stakeholders so-desire, at the regional or international levels.

U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT

On 24 September 2014, President Obama announced plans to develop a U.S. National Action Plan (NAP) on responsible business conduct.¹² The NAP will be consistent with the UNGPs and the OECD Guidelines for Multinational Enterprises.

A subsequent White House announcement¹³ noted 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.¹⁴

Throughout this consultation process thus far, the U.S. government has not formally committed to completing a NBA, or similar mapping and gap analysis, of current implementation of business and human rights frameworks in the United States,¹⁵ despite the following statement from the UN Working Group on Business and Human Rights following its U.S. site visit:

[T]he Working Group considers it imperative for the Government of the United States to undertake an assessment of the current state of overall policy coherence and coordination between Government entities, the effectiveness of the measures taken, identification of good practices and gaps[,] and challenges in the protection of rights and access to remedy. Such an analysis could contribute to a wider national action plan to implement the Guiding Principles.¹⁶

As strong advocates for this step in the NAP process and in support of the immense value it sees in completing a NBA to inform the eventual content of the U.S. NAP, the International Corporate Accountability Roundtable (ICAR) has completed a “Shadow” U.S. NBA for standards falling under Pillar I of the UNGPs, presented here. It is important to note that this is a living document, subject to continuous developments in the business and human rights landscape in the United States. It is also important to note that ICAR will release the full NBA, evaluating implementation under both Pillar I and Pillar III of the UNGPs, in the coming months as the consultations on the U.S. NAP continue.

APPROACH AND STRUCTURE OF THE ICAR “SHADOW” NBA

As stated above, the aim of the NBA Template is to allow for the evaluation of a State’s current implementation of the UNGPs and relevant business and human rights frameworks on a transparent and consistent basis and in line with the general principles of the human rights-based approach and human rights measurement, as set out in the ICAR-DIHR NAPs Toolkit.

Accordingly, the structure of ICAR’s “Shadow” NBA mirrors that of the UNGPs: the NBA is made up of a set of tables, one for each UNGP under Pillars I and III. Only Pillar I is presented here; Pillar III will follow in the coming months.

Because the UNGPs are wide-ranging in nature, each UNGP is broken down further into a number of elements. Indicators are then defined for each element identified.

Many of the indicators in the NBA Template are derived from relevant international law and standards from intergovernmental organizations. However, because these indicators provide increased clarity and can contribute to the State’s duty to protect human rights, some of these indicators are based on or refer to other business and human rights frameworks, such as those devised through multi-stakeholder initiatives and those addressing specific thematic concerns or industry sectors.

The indicators in the NBA operationalize the UNGPs by earmarking a concrete piece of information that can be examined, at the national level, as a marker of the United States’ compliance with the UNGP in question. Short sets of scoping questions are included per indicator to provide enhanced clarity.

It should also be noted that, in contrast to human rights indicators in other contexts, a relatively longer list of indicators is included in the NBA. This is because, rather than focusing on a single human right (e.g., the right to water), the UNGPs and many of the business and human rights frameworks captured in this NBA reference a host of human rights and labor rights standards. Thus, a wide variety of national measures will usually be relevant to satisfying a given indicator, and the list of indicators included is not meant to be exclusive or exhaustive.

Moreover, whereas it is advised that the NBA should be as comprehensive as possible, readers will note that the NBA includes indicators in relation to Pillar I (and the State remedy aspects of Pillar III in the coming months) only. This is largely because the intent of the NBA process is to capture State practice on human rights. Corporate respect for human rights may be inferred from examining the various voluntary and regulatory mechanisms the State employs, but that is beyond the scope of ICAR’s efforts with this NBA and its broader work around business and human rights NAPs.

Finally, it should be reiterated that the analysis and approach that have been adopted in developing the “Shadow” U.S. NBA take inspiration from established approaches to developing human rights monitoring frameworks based on indicators, as well as existing guidance on NAPs.¹⁷

KEY RECOMMENDATIONS – PILLAR I

The following is a list of key recommendations 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

Department of Agriculture (DOA)

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 (DOT)

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 account holders.
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 Bank)

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 (USAID)

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 (USITC)

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:
 - a. International Covenant on Economic, Social, and Cultural Rights (ICESCR) (signed 1977)
 - b. Convention on the Rights of the Child (signed 1995)
 - c. Convention on the Rights of Persons with Disabilities (signed 2007)
 - d. Rome Statute of the International Criminal Court (signed 2000)
2. Sign and ratify the following international human rights legal instruments:
 - a. International Convention on Civil and Political Rights (ICCPR) – Optional Protocol 1
 - b. ICCPR – Optional Protocol 2
 - c. ICESCR – Optional Protocol 1
 - d. CEDAW – Optional Protocol
 - e. Convention Against Torture – Optional Protocol
 - f. International Convention on the protection of the rights of all Migrant Workers and members of their families
 - g. International Convention for the Protection of all persons from Enforced Disappearance

- h. International Convention on the Suppression and Punishment of the Crime of Apartheid
- i. Convention on the Rights of Persons with Disabilities (CRPD) – Optional Protocol
- j. ILO Conventions:
 - i. Discrimination (Employment and Occupation) Convention, C111 (fundamental)
 - ii. Equal Remuneration Convention, 1951, C100 (fundamental)
 - iii. Right to Organise and Collective Bargaining Convention, C98 (fundamental)
 - iv. Freedom of Association and Protection of the Right to Organise Convention, C87 (fundamental)
 - v. Forced Labour Convention, C29 (fundamental)
 - vi. Minimum Age Convention, C138 (fundamental)
- k. United Nations Convention against Transnational Organized Crime:
 - i. 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:
 - a. Inter-American Convention on Human Rights
 - b. Inter-American Convention to Prevent and Punish Torture
 - c. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – “Protocol of San Salvador”
 - d. Protocol to the American Convention on Human Rights to Abolish the Death Penalty
 - e. Inter-American Convention on the Forced Disappearance of Persons
 - f. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women
 - g. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CRPD)

PILLAR I

| GUIDING PRINCIPLE 1 | |
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| States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. | |
| Commentary to Guiding Principle 1 <p>States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.</p> <p>The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.</p> | |
| 1.1. International and Regional Legal Instruments <p>Has the government signed and ratified relevant international and regional legal instruments?</p> | |
| Indicators | Scoping Questions |
| International Human Rights Legal Instruments | Has the government signed and ratified relevant international human rights legal instruments, such as ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, CPED, CRPD, the core ILO conventions, and any corresponding protocols? |
| Regional Human Rights Legal Instruments | Has the government signed and ratified relevant regional human rights legal instruments, such as the African (Banjul) Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and |

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| | Fundamental Freedoms; and any corresponding protocols? |
| Other Human Rights Legal Instruments | Are there any other relevant human rights legal instruments that the government has signed and ratified? |
| Implementation Status | Gaps |
| <p>The first and second indicators and the corresponding scoping questions above request information about the international and regional human rights legal instruments that the U.S. government has signed and ratified, as such action holds the U.S government legally accountable to the standards set out therein. Correspondingly, the international and regional human rights legal instruments listed below articulate legal human rights obligations to which the U.S. government has consented. This both provides evidence of the U.S. government’s level of commitment or lack of commitment to human rights and also demonstrates the framework of human rights harms that the U.S. government is obligated to “take appropriate steps to prevent, investigate, punish, and redress”¹⁸ in relation to third party abuses.</p> <p>The U.S. government has <u>ratified/acceded to</u> the following international human rights legal instruments:¹⁹</p> <ol style="list-style-type: none"> 1. International Covenant on Civil and Political Rights (ICCPR) (ratified 1992); 2. Convention Against Torture (CAT) (ratified 1994); 3. Convention on the Elimination of all forms of Racial Discrimination (CERD) (ratified 1994); 4. Optional Protocol to the Convention on the Rights of the Child (on the involvement of children in armed conflict) (ratified 2002); 5. Optional Protocol to the Convention on the Rights of the Child | <p>Despite ratifying the international and regional human rights legal instruments listed under the “Implementation Status” section to the left, there are gaps in the legal human rights obligations to which the U.S. government has consented. These gaps come in three forms.</p> <p>First, there are international and regional human rights legal instruments that the United States has ratified/acceded to with a number of reservations, declarations, or understandings that limit the applicability of certain provisions in the United States.</p> <p>Second, there are international human rights legal instruments that the U.S. government has signed but not ratified. Under the Vienna Convention on the Law of Treaties, however, the United States is obligated to not act in a way that “defeats the object and purpose of a treaty” that has been signed but not ratified.²¹</p> <p>Third, there are international and regional human rights legal instruments that the U.S. government has neither signed nor ratified. Except to the extent that the content of these international and regional human rights legal instruments reflect <i>jus cogens</i> under customary international law, the lack of ratification and signature of these instruments constitute gaps in the human rights legal framework that the U.S. government has consented to, which in turn governs the obligation to “take appropriate steps to prevent, investigate, punish, and redress”²² in relation to third party abuses. Signing and ratifying</p> |

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- (child prostitution and child pornography) (ratified 2002);
6. International Convention on the Prevention and Punishment of the Crime of Genocide (ratified 1988);
 7. The Convention to Suppress the Slave Trade and Slavery (acceded 1929);
 8. Protocol Amending the Slavery Convention (acceded 1956);
 9. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (acceded 1967);
 10. Protocol relating to the Status of Refugees (acceded 1968);
 11. International Labor Organization (ILO) Conventions:
 - a. No reservations permitted;
 - b. Ratified fourteen of 189 Conventions; twelve of those fourteen are in force.²⁰ Those most relevant to business and human rights include:
 - i. Worst Forms of Child Labour Convention, C182 (fundamental) (ratified 1999);
 - ii. Abolition of Forced Labour Convention, C105 (fundamental) (ratified 1991);
 - iii. Tripartite Consultation Convention, C144 (governance) (ratified 1988);
 - iv. Shipowners' Liability (sick and injured seamen) Convention, C055 (technical) (ratified 1938);
 - v. Minimum age (sea) Convention (revised), C058 (technical) (ratified 1938);
 - vi. Certification of Able Seamen Convention, C074 (technical) (ratified 1953);
 - vii. Merchant Shipping (minimum standards) Convention, C147 (technical) (ratified 1988);
 - viii. Labour Administration Convention, C150

these agreements would address these gaps.

The U.S. government has ratified/acceded to the following **international and regional human rights legal instruments** with the following reservations, declarations, or understandings:

1. International Covenant on Civil and Political Rights (ICCPR) (ratified 1992):
 - a. Reserving that Article 20 of the ICCPR does not authorize or require U.S. action that would restrict the right of free speech and association as protected by U.S. law, reserving the right to impose capital punishment, limiting the definition of "cruel, inhumane or degrading treatment or punishment" to the national definition, and reserving the right to treat juveniles as adults when circumstances warrant;²³
 - b. Declaring that "the provisions of Article 1 through 27. . . are not self-executing."²⁴
2. Convention Against Torture (CAT) (ratified 1994):
 - a. Restricting the definition of "cruel, inhumane or degrading treatment or punishment" to the U.S. constitutional definition and restricting acts of torture to a specific list;²⁵
 - b. Declaring that "the provisions of Article 1 through 16. . . are not self-executing."²⁶
3. Convention on the Elimination of all forms of Racial Discrimination (CERD) (ratified 1994):
 - a. Maintaining robust protections of the rights of speech, association, and assembly;²⁷
 - b. Declaring that "the provisions of the Convention are

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- (technical) (ratified 1995);
- ix. Labour Statistics Convention, C160 (Technical) (ratified 1990);
- x. Safety and Health in Mines Convention, C176 (technical) (ratified 1995).

12. United Nations Convention against Transnational Organized Crime (ratified 2005):
 - a. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention; against Transnational Organized Crime (ratified 2005)
 - b. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (ratified 2005).
13. United Nations Convention against Corruption (ratified 2006);
14. Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (ratified 1998).

The U.S. government has ratified the following **regional human rights legal instruments**:

1. Inter-American Convention on the Granting of Political Rights to Women;
2. Inter-American Convention against Corruption.

not self-executing.”²⁸

4. Optional Protocol to the Convention on the Rights of the Child (on the involvement of children in armed conflict) (ratified 2002):
 - a. Reservations, understandings, or declarations include those regarding the age of military recruitment;²⁹
 - b. Understanding that there is “no assumption of obligations under the Convention on the Rights of the Child.”³⁰
5. Optional Protocol to the Convention on the Rights of the Child (child prostitution and child pornography) (ratified 2002):
 - a. Reservations, understandings, or declarations include definitions of specific terms and understanding that the United States was not obligated to criminalize certain conduct until it became party to the Hague Convention (which since entered into force in the United States in 2008);³¹
 - b. Understanding that there is “no assumption of obligations under the Convention on the Rights of the Child.”³²
6. International Convention on the Prevention and Punishment of the Crime of Genocide (ratified 1988):
 - a. Requiring the consent of the United States prior to bringing every dispute to the International Court of Justice and other limits to participation in an international penal tribunal (as described in Article VI).³³
7. The Convention to Suppress the Slave Trade and Slavery (accessed 1929):
 - a. Reservation regarding the permissibility of forced

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labor as punishment for crime.³⁴

8. United Nations Convention against Transnational Organized Crime (ratified 2005):
 - a. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (ratified 2005):
 - i. Reservations regarding plenary obligations on board ships carrying the U.S. flag or aircraft registered under U.S. law and assuming obligations under the Protocol only as consistent with the principles of federalism.³⁵
9. Inter-American Convention Against Corruption:
 - a. Understandings include limiting sections (such as transnational bribery and the establishment of criminal sanctions) to U.S. domestic law, limits on extradition, and a prohibition on assistance to the International Criminal Court.³⁶

The U.S. government has signed but not ratified the following **international human rights legal instruments**.³⁷

1. International Covenant on Economic, Social, and Cultural Rights (ICESCR) (signed 1977);
2. Convention to Eliminate all forms of Discrimination Against Women (CEDAW) (signed 1980);
3. Convention on the Rights of the Child (signed 1995);
4. Convention on the Rights of Persons with Disabilities (signed 2007);
5. Rome Statute of the International Criminal Court (signed

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2000).

The U.S. government has not signed the following **international human rights legal instruments**:³⁸

1. ICCPR — Optional Protocol 1;
2. ICCPR — Optional Protocol 2;
3. ICESCR — Optional Protocol 1;
4. CEDAW — Optional Protocol;
5. Convention Against Torture — Optional Protocol;
6. International Convention on the protection of the rights of all Migrant Workers and members of their families;
7. International Convention for the Protection of all persons from Enforced Disappearance;
8. International Convention on the Suppression and Punishment of the Crime of Apartheid;
9. Optional Protocol — CRPD;
10. ILO Conventions: The U.S. government has not ratified seventy of the ILO conventions that are in force. In addition, the U.S. government has only ratified two of the eight fundamental ILO conventions. Below is a list of the six fundamental ILO conventions that the United States has not ratified:
 - a. Discrimination (Employment and Occupation) Convention, C111 (fundamental);
 - b. Equal Remuneration Convention, 1951, C100 (fundamental);
 - c. Right to Organise and Collective Bargaining Convention, C98 (fundamental);
 - d. Freedom of Association and Protection of the Right to Organise Convention, C87 (fundamental);
 - e. Forced Labour Convention, C29 (fundamental);

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| | <p>f. Minimum Age Convention, C138 (fundamental).</p> <p>11. United Nations Convention against Transnational Organized Crime:</p> <p>a. 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.</p> <p>The U.S. government has <u>not signed</u> the following regional human rights legal instruments:</p> <ol style="list-style-type: none"> 1. Inter-American Convention on Human Rights; 2. Inter-American Convention to Prevent and Punish Torture; 3. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”); 4. Protocol to the American Convention on Human Rights to Abolish the Death Penalty; 5. Inter-American Convention on the Forced Disappearance of Persons; 6. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women; 7. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CRPD). |
| 1.2. International and Regional Soft Law Instruments Has the government signed relevant international and regional soft law instruments? | |
| Indicators | Scoping Questions |

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| International Human Soft Law Rights Instruments | Has the government signed relevant international human rights soft law instruments, such as the UDHR, other UN declarations and/or resolutions, and the ILO Tripartite Declaration? |
| Regional Human Rights Soft Law Instruments | Has the government signed relevant regional human rights soft law instruments, such as the American Declaration of the Rights and Duties of Man and the ASEAN Human Rights Declaration? |
| Other Human Rights Soft Law Instruments | Are there any other relevant human rights soft law instruments that the government has signed? |
| Implementation Status | Gaps |
| <p>The first and second indicators and the corresponding scoping questions above request information about the international and regional soft law instruments the U.S. government has signed. Although these instruments are not legally binding, they constitute a significant portion of the human rights framework aiming to address the harms that the U.S. government should “take appropriate steps to prevent, investigate, punish, and redress”³⁹ in relation to third party abuses.</p> <p>Below is a list of the international and regional soft law instruments the U.S. government has <u>signed or indicated its support for</u>:</p> <ol style="list-style-type: none"> 1. United Nations: <ol style="list-style-type: none"> a. Universal Declaration of Human Rights (UDHR) (signed 1948); b. United Nations Guiding Principles on Business and Human Rights (UNGPs) (unanimously adopted in 2011 by the United Nations Human Rights Council, including the United States as a Member State); c. Basic Principles and Guidelines on the Right to a | <p>Although the U.S. government has signed or otherwise indicated its direct support for the international and regional soft law instruments listed under “Implementation Status” to the left, gaps still exist in that there are declarations the U.S. government has not explicitly supported.</p> <ol style="list-style-type: none"> 1. However, due to the fact that the majority of voluntary declarations are taken up without a country-by-country vote, it is difficult to list all soft law mechanisms at the international and regional level that the U.S. government has not directly supported. In order to close the gaps in the U.S. government’s recognition of these non-binding declarations, the U.S. government should sign or otherwise indicate its support for them. 2. A recent resolution that was passed at the UN Human Rights Council, in June 2014, was notably not supported by the U.S. government. This resolution established an “open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on |

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| <p>Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (signed 2005);</p> <p>d. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (The United States did not initially support UNDRIP when it was passed in 2007, but announced a change in this position in 2010).⁴⁰</p> <p>2. International Labor Organization:</p> <p>a. ILO Declaration on Fundamental Principles and Rights at Work (signed 1998);</p> <p>i. In 1998, all members of the ILO were required to sign the Declaration on Fundamental Principles of Rights at Work as a condition of membership. Though the Declaration is not a treaty with the binding force of law, as a signatory, the United States has agreed to be bound by the eight fundamental ILO Conventions that prohibit forced labor (Convs. 29 and 105), child labor (Convs. 138 and 182), and discrimination (Convs. 100 and 111) and that protect fundamental rights to freedom of association and collective bargaining (Convs. 87 and 98).</p> <p>b. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th Edition, signed 2014);</p> <p>c. International Labor Organization (ILO) Declaration on Social Justice for a Fair Globalization (signed 2008).</p> <p>3. Organization of American States:</p> | <p>transnational corporations and other business enterprises with respect to human rights.”⁴¹ The resolution passed with the support of twenty Member States. The United States, along with thirteen other countries, voted against the resolution (thirteen countries abstained), has indicated that it will not participate in negotiations around the binding instrument, and has encouraged other States to also refuse to participate in the working group.⁴²</p> |
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| <ul style="list-style-type: none"> a. American Declaration of the Rights and Duties of Man (1948). <p>4. Other:</p> <ul style="list-style-type: none"> a. Organization for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises (revised 2011); b. International Finance Corporation (IFC) Environmental and Social Performance Standards (updated 2012). | |
| 1.3. UN Guiding Principles on Business and Human Rights Is the State actively implementing the UNGPs? | |
| Indicators | Scoping Questions |
| Formal Statement of Support | Has the State given a formal statement of support for the UNGPs? |
| Implementation Structures | Has the State put in place relevant structures to ensure implementation of the UNGPs, for example, through the establishment or designation of a body tasked with implementation measures or through the allocation of internal resources? |
| Capacity-Building | Has the State put in place measures to capacitate government actors and local citizens with knowledge and information on the UNGPs, for example, through workshops, conferences, or other events? |
| Information | Has the State disseminated information about the UNGPs through public media sources, internal guidance documents, or other materials? |
| Other UNGPs Implementation Measures | Has the State taken any other measures to implement the UNGPs within the State? |
| Implementation Status | Gaps |
| The first indicator and the corresponding scoping question above request information about whether the U.S. government has formally stated its support of the UNGPs, which is a necessary first step in | Although evidence that the U.S. government is actively implementing the UNGPs is provided under “Implementation Status” to the left, there are still gaps related to the indicators and scoping questions |

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committing to and actively implementing the UNGPs, as well as other business and human rights frameworks that reinforce them.

The United States has made a **formal statement of support** for the UNGPs and has continued to publically support the UNGPs in the following ways:

1. The United States formally supported the UNGPs by co-sponsoring the UN Human Rights Council Resolution that endorsed the UNGPs in June 2011.⁴³
2. In 2013, the United States expressed its support of the UNGPs in the “U.S. Government Approach on Business and Human Rights.”⁴⁴ In this document, the United States says that the UNGPs are “an important framework for corporations, states, civil society, and others” and that they should be treated as a “floor” and not a “ceiling.”⁴⁵ This guidance is publicly available at humanrights.gov, which is the U.S. government’s portal for access to U.S. law, regulations, and policies in relation to human rights. The U.S. Government Approach includes summaries of the UNGPs, of how the United States includes business and human rights considerations in its foreign policy and domestic legislation, the business case for complying with human rights standards, and suggestions for corporate best practices.⁴⁶
3. In expressing support for the UNGPs, the United States has focused on States’ obligations to respect human rights and to ensure compliance, as well as stressing the importance of multi-stakeholder initiatives.⁴⁷
4. The United States announced the development of its National Action Plan (NAP) on Responsible Business Conduct in

above.

The following is a brief explanation of some of the gaps in the United States’ **formal statement of support** for the UNGPs:

1. U.S. Government Approach:
 - a. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises noted that the U.S. government is committed to the UNGPs.⁶⁵ However, although the Working Group recognized the value of the document that lays out the U.S. government’s approach to implementation of the UNGPs, titled “U.S. Government Approach on Business and Human Rights,” it also pointed to flaws in that document.⁶⁶ Specifically, the Working Group noted that the document’s scope is limited and there has been no “rigorous and comprehensive review of the current legal and policy environment for businesses.”⁶⁷ It also noted the inadequate number of references to Pillar III of the UNGPs on access to remedy.⁶⁸
2. UNGPs implementation by the U.S. government has primarily focused on the United States’ work internationally (such as UN treaties and assessments) and largely omits a thorough documentation of how U.S. domestic law and internal policy fulfill or do not fulfill international standards, including the UNGPs. This limitation is reflected in the White House’s announcement of the National Action Plan (NAP) on Responsible Business Conduct, which specifically limits the scope of the NAP to promoting “responsible business conduct abroad.”⁶⁹ This limited scope is also reflected, although clarified

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September 2014, citing the need to “promote and incentivize responsible business conduct, including with respect to transparency and anticorruption, consistent with the UN Guiding Principles on Business and Human Rights.”⁴⁸

The second indicator and scoping question above request information about whether the U.S. government has created any structures to ensure the UNGPs are implemented. Whether or not such structures have been put in place provides evidence that the U.S. government either is, or is not, actively implementing the UNGPs. The U.S. government has created/made use of existing structures that are intended to do this.

The United States has put into place the following **implementation structures**:

1. The U.S. Department of State’s Bureau of Democracy, Human Rights and Labor (DRL):
 - a. Within this Bureau, the Internet Freedom, Business, and Human Rights section currently leads coordination of U.S. implementation of the UNGPs.⁴⁹ For example, this team works with the UN Working Group on Business and Human Rights, funds relevant programs through the Human Rights and Democracy Fund, and supports dialogue about the UNGPs between governments, civil society, and business.⁵⁰
2. The Department of the Interior (DOI):
 - a. The DOI is in charge of implementing the Extractive Industries Transparency Initiative (EITI) domestically.⁵¹
3. In developing its National Action Plan on Responsible Business

to reflect a somewhat more flexible approach, in the U.S. Department of State’s answers to “Frequently Asked Questions” about the National Action Plan, where it is stated, “while some [domestic] efforts may be highlighted as examples in the NAP, they will not be the focus of our process.”⁷⁰

The following is a brief explanation of some of the gaps in the United States’ **implementation structures**:

1. As the UN Working Group pointed out, the U.S. government could make more of an effort to incorporate the UNGPs into the work of the Office of the U.S. Trade Representative, the Department of the Treasury, and the Department Commerce, among other agencies.⁷¹

The following is a brief explanation of some of the gaps in the United States’ **capacity-building efforts** and **dissemination of information**:

1. As highlighted in the “Implementation Status” to the left, the U.S. government has made a number of notable efforts in relation to increasing the capacity of U.S. embassies in regards to the UNGPs. However, one area in which there remain gaps in U.S. government promotion of UNGPs capacity in U.S. embassies is with regard to the “Doing Business” portals on U.S. embassy websites in a number of countries abroad. While such portals provide detailed guidance for companies on doing business in such countries, the UNGPs are rarely, if ever, mentioned on such portals.⁷²
2. Similarly, the Direct Line Program highlighted in the “Implementation Status” to the left, as well as in the “U.S.

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Conduct, the U.S. government has set up “interagency working groups on the following reinforcing issue areas: transparency and anti-corruption, investment and trade, labor rights (including protections against human trafficking), procurement, human rights, land tenure and agricultural investment.”⁵²

The third indicator and corresponding scoping question above request information about capacity-building efforts the U.S. government has undertaken. These capacity-building efforts are important because they empower citizens and government agents to become a part of the dialogue on the UNGPs and to push for their full implementation. Government efforts, or lack thereof, to provide capacity building regarding the UNGPs provides evidence that the government either is, or is not, actively implementing the UNGPs.

Examples of U.S. **capacity-building efforts**, which include consular outreach, UNGP events, UNGP workshops, and public-private workshops, are listed below:

1. Embassy Outreach:

- a. The Department of State has been working to increase the capacity of U.S. embassies by giving them information about the UNGPs, OECD Guidelines, Voluntary Principles, and other relevant frameworks.⁵³ This information is intended to assist embassies when they work with local government officials and U.S. companies that do business or wish to do business in a particular country.⁵⁴
- b. Direct Line Program: This program allows U.S. companies to directly engage with U.S. ambassadors

Government Approach on Business and Human Rights,” does not explicitly provide human rights information to U.S. companies that utilize the program. While the inclusion of the program in the U.S. Government Approach document indicates that the United States sees this program as an opportunity to provide key information to U.S. companies with regard to the human rights context within various countries, the Approach itself does not clarify if and how this information is provided within the program, nor does it indicate what type of guidance may be provided to U.S. companies by ambassadors in terms of business and human rights in each participating country.

3. Another area in which there remain gaps in U.S. government promotion of human rights in the context of business is with regard to the Export.gov online portal, which is managed by the International Trade Administration, in collaboration with Commerce, Energy, the Export-Import Bank, Agriculture, SBA, OPIC, USTDA, State, USTR, and Treasury.⁷³ While this online portal provides resources from across the U.S. government to give detailed guidance for U.S. companies in “planning their international sales strategies and succeed in today’s global marketplace,” human rights, and the UNGPs in particular, are rarely mentioned throughout the site.⁷⁴

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overseas via teleconference if they are either already operating in the country where the ambassador is based or if they are interested in doing so.⁵⁵

2. UNGPs-related events:

- a. The Department of State has committed to holding four large-scale, multi-stakeholder meetings based on the UNGPs in order to connect directly with stakeholders and obtain their views about the domestic implementation of the UNGPs.⁵⁶
- b. The Department of State also facilitates regular meetings and conference calls among U.S. companies and U.S. government experts, during which business and human rights challenges and ways to overcome those challenges are addressed.⁵⁷ For example, in past meetings and conference calls topics such as labor rights in Vietnam and fire safety in Bangladesh have been discussed.⁵⁸

3. UNGPs-related workshops:

- a. In January 2014, the U.S. Department of State hosted a multi-stakeholder workshop on government procurement and human rights as part of its meeting series on the UNGPs.⁵⁹
- b. In 2013, two workshops with investors were conducted.⁶⁰ Discussions during these workshops focused on strategies that investment firms can employ to implement the UNGPs, such as incorporating non-financial factors into decision-making.⁶¹

4. Public-private workshops:

- a. These workshops have also been a part of the implementation effort. For example, as part of the

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effort to combat human trafficking, the United States hosts an “Innovation Workshop” to improve support to survivors.⁶²

The fourth indicator and corresponding scoping question above request information describing the U.S. government’s efforts to disseminate information about the UNGPs. Dissemination of information about the UNGPs enhances the likelihood that stakeholders will engage in the implementation process and push the State to fully and effectively implement the UNGPs. Government efforts, or lack thereof, to disseminate information about the UNGPs provide evidence that the government either is or is not actively implementing the UNGPs.

The U.S. government has attempted to **disseminate information** to the public in the following ways:

1. Publications:

- a. The UNGPs are regularly mentioned in U.S. government publications and guidelines that have been published after the adoption of the UNGPs. They are, for example, mentioned in the Responsible Investment Reporting Requirements for Burma. They are also mentioned on [humanrights.gov](https://www.humanrights.gov), the U.S. government’s human rights portal, which has a section dedicated to business and human rights.⁶³

2. Internet:

- a. [Humanrights.gov](https://www.humanrights.gov), as mentioned above, is the U.S. government’s portal for access to U.S. efforts in human rights. The site has a section on business and human rights, which includes the U.S. Government Approach

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| to Business and Human Rights, discussed earlier, as well as answers to “Frequently Asked Questions” on the National Action Plan on Responsible Business Conduct. ⁶⁴ | |
| 1.4. Other Relevant Standards and Initiatives Is the State supporting or participating in other standards and initiatives relevant to business and human rights? | |
| Indicators | Scoping Questions |
| Standards | Has the government supported other standards on business and human rights, such as the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact? |
| Initiatives | Has the government participated in initiatives, multi-stakeholder or otherwise, on business and human rights, such as the Global Network Initiative (GNI), the International Code of Conduct for Private Security Service Providers Association (ICoCA), and the Voluntary Principles on Security and Human Rights (VPs)? |
| Implementation Status | Gaps |
| <p>The two indicators and scoping questions above request information about business and human rights related standards and initiatives that the government supports and is involved with. Below is a list of both standards the U.S. government has supported as well as initiatives the U.S. government is a part of. It is important to note that these initiatives may also include their own standards. Although some of the standards listed below were also mentioned under Section 1.1 above, this section further explains the domestic implementation of these standards.</p> <p>The U.S. government supports and is involved with the following standards and initiatives:</p> | <p>Although the U.S. government is involved in the standards and initiatives listed under “Implementation Status,” there are gaps that could be filled in order to make the government’s participation or support of these standards and initiatives more effective. The following explains some of the gaps in the U.S. government’s support or involvement in relevant standards and initiatives:</p> <ol style="list-style-type: none"> 1. IFC Performance Standards and Equator Principles: <ol style="list-style-type: none"> a. The UN Working Group on Business and Human Rights identified stakeholder concerns that the procedures of the IFC’s Office of Accountability “might not be fully |

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1. IFC Performance Standards:

- a. The Overseas Private Investment Corporation (OPIC) and Export-Import Bank (Ex-Im) use the IFC Performance Standards, which incorporate aspects of the UNGPs, as part of their criteria in evaluating and selecting projects to finance.
- b. Complaints about the social and environmental impact of OPIC supported projects can be received by OPIC's Office of Accountability.⁷⁵
- c. For more information on OPIC and the Export-Import Bank, see Sections 4.1 and 4.2.

2. OECD Guidelines for Multinational Enterprises and National Contact Point:

- a. The United States adheres to the Guidelines and has established a National Contact Point (NCP) that is housed in the Department of State's Bureau of Economic and Business Affairs to "promote and support implementation of the Guidelines."⁷⁶
- b. The NCP is tasked with promoting awareness and working with the NCPs of other governments.⁷⁷ The NCP also provides a forum for discussion between business and stakeholders that is confidential and takes the form of dispute resolution for specific instances as well as broader discussions about human rights abuses and potential responses.⁷⁸

3. Voluntary Principles on Security and Human Rights Initiative:

- a. This multi-stakeholder initiative (MSI) promotes implementation of the Voluntary Principles in order to help guide oil, gas, and mining companies in relation to

consistent with the criteria for an effective grievance mechanism under UNGP 31 and recommends that a review be undertaken to address any inconsistencies."⁹¹

- b. Although the Export-Import Bank (Ex-Im) incorporates the IFC performance standards and the Equator Principles, there is concern about actual implementation because there is no mechanism to hold the Ex-Im Bank accountable to those standards.⁹²

2. OECD Guidelines for Multinational Enterprises:

- a. There are also gaps in the U.S. National Contact Point. In particular, the UN Working Group on Business and Human Rights in its country visit report noted that the NCP is under-resourced.⁹³ Further, the NCP currently does not have the authority to make findings of fact or determine whether the OECD guidelines have been breached,⁹⁴ and its voluntary mediation and conciliation process are not transparent.⁹⁵

3. Joint International Labor Organization and International Finance Corporation Better Work Standards:

- a. 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.⁹⁶

4. Principles for Responsible Investment in Agriculture and Food Systems, United Nations Committee on World Food Security:

- a. The Columbia Center on Sustainable Investment has identified that, while these Principles provide

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- human rights risks associated with security measures taken to protect their operations.⁷⁹
- b. U.S. supporting efforts include outreach, implementation, and funding.
- 4. International Code of Conduct for Private Security Service Providers:
 - c. The United States joined the International Code of Conduct in 2013. The International Code of Conduct sets standards for the private security service industry and also creates an external and independent oversight mechanism.⁸⁰ The ICoC has been signed by over 600 private security companies, including “many that contract with the U.S. government in places like Iraq and Afghanistan.”⁸¹
 - d. Compliance with the Code is anticipated to be required for Worldwide Protective Services contractors, as well as for successor contract signees.⁸²
- 5. Joint International Labor Organization and International Finance Corporation Better Work Standards:
 - a. 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.⁸³
- 6. The Extractive Industries Transparency Initiative (EITI):
 - a. This initiative, led by a multi-stakeholder board (which includes a U.S. representative as an alternate), sets international transparency standards regarding countries’ natural resources and their extraction.
 - b. In 2011, President Obama announced U.S. support and planned implementation of the EITI, as part of the Open Government Partnership (OGP) national action

important guidance on responsible agricultural investment, there remain significant gaps in ensuring that foreign investment in agriculture is conducted responsibly, transparently, and with respect for the human rights of workers, local communities, and other stakeholders, particularly in terms of large-scale land acquisitions. In addition, current government initiatives neither sufficiently ensure victims’ access to remedy nor do they exclude human rights violators from investment agreement protections.⁹⁷

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- plan.
- c. The Department of State supports the Department of the Interior in implementing the EITI domestically and serves as an Alternate on the international EITI Board.⁸⁴
- d. The United States is currently a Candidate Country, which is implementing the EITI but has not yet met all compliance standards.⁸⁵
- 7. Global Network Initiative (GNI):
 - a. The GNI is a non-governmental organization; its goals include preventing government Internet censorship and protecting individual Internet privacy.
 - b. The U.S. Department of State has issued statements supporting the GNI, although concrete information regarding the nature of support is not readily available. The GNI lists increased transparency in surveillance laws in the United States as part of its 2013 successes.⁸⁶
- 8. Open Government Partnership:
 - a. The United States is a founding member (2011) of this partnership between governments and civil society.⁸⁷
 - b. 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.”⁸⁸
- 9. Principles for Responsible Investment in Agriculture and Food Systems, United Nations Committee on World Food Security
 - a. Approved in October 2014, these Principles are “meant to guide investment in agriculture and food systems, aimed at assuring that cross-border and corporate investment flows lead to improved food security and

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| <p>sustainability and respect the rights of farm and food workers.”⁸⁹</p> <p>b. The U.S. government developed an inter-agency group that played an active role in the negotiations of the Principles, including USAID, the Department of State, the Millennium Challenge Corporation, the Department of Agriculture Foreign Agriculture Service, and the Office of the U.S. Trade Representative.⁹⁰</p> | |
| 1.5. National Laws and Regulations | |
| Does the general law of the State provide protection against business-related human rights abuses? | |
| Indicators | Scoping Questions |
| Constitution | Does the constitution contain wording aimed at human rights protection? |
| Labor Law | Has the government put in place labor laws and regulations to ensure the protection and promotion of workers’ rights? |
| Environmental Law | Has the government put in place environmental laws and regulations to ensure the protection and promotion of the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land? |
| Property and Land Management Law | Has the government put in place land management laws and regulations to ensure the protection of the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices? |
| Health and Safety Law | Has the government put in place health and safety laws and regulations to ensure the physical and mental health of workers and communities? |

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| Corporate and Securities Law | Has the government put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as through financial reporting, incorporation/registration, and stock exchange listing requirements? |
| Tax Law | Has the government put in place tax laws and regulations to support ethical corporate behavior? |
| Trade Law | Has the government put in place trade laws and regulations to support the protection and promotion of human rights within trade practices? |
| Disclosure and Reporting | Has the government put in place law to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues? |
| Procurement Law | Has the government put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector? |
| Anti-Bribery and Corruption | Has the government put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments? |
| Human Rights Defender and/or Whistleblower Protection | Has the government put in place laws and regulations aimed at protecting the rights of human rights defenders and/or whistleblowers? |
| Information and Communications Technologies (ICT) Law | Has the government put in place laws and regulations to ensure the protection of access to information, freedom of expression, privacy, and other information- and communication-based rights, online as well as offline? |

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| Other Laws and Regulations | Has the government put in place any other relevant laws and regulations aimed at protecting and promoting human rights from business-related harms, including torture, genocide, and crimes against humanity? Do such laws and regulations extend extraterritorially, as permitted by the UNGPs and international human rights law? |
| Implementation Status | Gaps |
| <p>In order to assess whether the general law of the United States provides protection against business-related human rights violations, this section presents information about the Constitution, labor law, environmental law, property and land management law, health and safety law, corporate and securities law, tax law, trade law, procurement law, anti-bribery and corruption law, whistleblower protections, and other relevant laws and regulations of the United States. The existence of or lack of laws in these areas that protect human rights provides evidence of whether the general laws of the United States provide protection against business-related human rights abuses or not.</p> <p>The first indicator and scoping question above request information about the U.S. Constitution and whether or not it contains language that is protective of human rights. The existence or lack of existence of such language provides evidence that the general laws either do or do not protect business-related human rights.</p> <p>The following language from the U.S. Constitution is aimed at protecting human rights:</p> <ol style="list-style-type: none"> 1. First Amendment: <ol style="list-style-type: none"> a. The First Amendment protects the freedom of religion, | <p>Despite the ways that the general law of the United States provides protection against business-related human rights violations explained under “Implementation Status,” gaps remain.</p> <p>The following explains some of the gaps that exist in the protection of business-related human rights abuses under U.S. labor law:</p> <ol style="list-style-type: none"> 1. Enforcement of International Labour Organization (ILO) Standards: <ol style="list-style-type: none"> a. The United Nations Working Group on Business and Human Rights, along with leading labor rights groups in the United States,²¹³ notes significant gaps in enforcement of the ILO standards within the United States, including unfair labor practices and infringements on the right to freedom of association, low-wage issues, and problems specific to migrant workers, the mining industry, the financial industry, and Native Americans (especially in the context of the extractives industry).²¹⁴ 2. Fair Labor Standards Act (FLSA): <ol style="list-style-type: none"> a. First, farmworkers are not protected by FLSA’s overtime pay provision.²¹⁵ b. Second, the minimum wage protections of FLSA do |

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| <p>the freedom of speech and the press, the freedom of assembly, and the right to petition the government.⁹⁸</p> <ol style="list-style-type: none"> 2. The Fourth Amendment: <ol style="list-style-type: none"> a. The Fourth Amendment protects against unlawful searches and seizures.⁹⁹ 3. The Fifth Amendment: <ol style="list-style-type: none"> a. The Fifth Amendment protects against the arbitrary deprivation of life, liberty, and property, without due process of law.¹⁰⁰ 4. The Sixth Amendment: <ol style="list-style-type: none"> a. The Sixth Amendment gives criminal defendants the right to a fair trial, which includes an impartial jury, a lawyer, a speedy and public trial; to be informed of the charges; and to confront the witnesses against him.¹⁰¹ 5. The Eighth Amendment: <ol style="list-style-type: none"> a. The Eighth Amendment prohibits cruel and unusual punishment.¹⁰² 6. The Thirteenth Amendment <ol style="list-style-type: none"> a. The Thirteenth Amendment prohibits slavery and forced labor.¹⁰³ 7. The Fourteenth Amendment: <ol style="list-style-type: none"> a. The equal protection clause of this amendment protects individuals against violations of the human rights provided for in the Constitutions of U.S. state governments, which includes certain actions by individuals and private companies who are acting “under color of authority” of a government.¹⁰⁴ 8. The Fifteenth and Nineteenth Amendments: <ol style="list-style-type: none"> a. These Amendments protect the right to vote regardless of race or gender.¹⁰⁵ | <p>not apply to employees who work on small farms, defined as those that employ fewer than seven people per quarter.²¹⁶</p> <ol style="list-style-type: none"> 3. National Labor Relations Act (NLRA): <ol style="list-style-type: none"> a. The NLRA, which protects the right to organize and bargain collectively, does not apply to state and federal public employees, domestic workers, and agricultural workers.²¹⁷ 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.²¹⁸ 4. Failure to enforce U.S. law: <ol style="list-style-type: none"> a. There are allegations that U.S. labor law is not being adequately enforced in relation to low-wage sectors such as agriculture and hotel services.²¹⁹ b. Allegations include that workers are paid lower than minimum wage or not at all, and that health and safety measures are inadequate.²²⁰ c. There are also allegations that the United States fails to adequately protect undocumented workers, who are at high risk for human rights abuses as they fear reporting their employers.²²¹ d. The UN Working Group has suggested that the U.S. government’s initiatives and allocation of resources to stop these practices is currently insufficient, and that the laws and regulations themselves may be insufficient as they have too many loopholes, among other reasons.²²² 5. Child Labor: <ol style="list-style-type: none"> a. Although the U.S. government is making efforts to |
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The second indicator and scoping question relate to labor law and request information on existing labor laws that protect workers' rights. Existence or lack of existence of such laws provides evidence that the general laws either do or do not protect business-related human rights.

The following is a non-exhaustive list of existing **U.S. labor laws** that protect various areas of workers' rights:

1. Wages and Hours:

- a. Fair Labor Standards Act (FLSA) — This Act prescribes standards for wages and overtime pay, which affect most private and public employment. It covers agricultural and non-agricultural operations and child labor. The Wage and Hour Division administer the Act.¹⁰⁶
- b. Under the FLSA, U.S. law generally prohibits the worst forms of child labor in nearly all sectors, though certain forms of hazardous child labor are still permitted in the agriculture sector primarily (see the "Gaps" section to the right).

2. Workplace Safety and Health:

- a. Occupational Safety and Health Act (OSHA Act) — This Act creates a general duty for employers to ensure their workplace does not have serious hazards.¹⁰⁷ It is administered by the Occupational Safety and Health Administration (OSHA), which enforces the Act by conducting inspections of workplaces.¹⁰⁸ OSHA also promulgates safety and health regulations and standards with which employers that fall under the Act

protect children from child labor, there are gaps in the law and in implementation.²²³

- b. Specifically, while the Food, Conservation, and Energy Act of 2008 established a Consultative Group to develop Guidelines to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products,²²⁴ children who work in agriculture within the United States are not adequately protected (such as in the tobacco industry).²²⁵ They are allowed to conduct hazardous activities that they are banned from doing in other sectors and they are not protected by federal minimum wage and work hour limits.²²⁶ Moreover, children of migrants are disproportionately affected in this regard.²²⁷ Lastly, since their release in 2012, these Guidelines have not yet been widely disseminated across all agricultural sectors, nor have agricultural companies based in the United States effectively applied them.²²⁸

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **U.S. environmental law** and **U.S. property and land management law**:

1. Pesticides

- a. U.S. law currently allows for the manufacture and export of pesticides from the United States that have been banned (or deregulated) for use in the United States itself.²²⁹

2. Low-Income and Minority Communities:

- a. The Committee on the Elimination of Racial

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- must comply.¹⁰⁹
3. Worker's Compensation:
 - a. Federal Employees' Compensation Act.¹¹⁰
 - b. Longshore and Harbor Workers' Compensation Act.¹¹¹
 - c. Energy Employees Occupational Illness Compensation Program Act.¹¹²
 4. Employee Benefit Security:
 - a. Employee Retirement Income Security Act — This Act regulates employers who offer pension or welfare benefit plans for their employees.¹¹³
 5. Work Leave:
 - a. Family and Medical Leave Act — This Act requires employers of fifty or more employees to give up to twelve weeks of unpaid, job-protected leave to eligible employees for the birth or adoption of a child or for the serious illness of the employee or a spouse, child or parent.¹¹⁴
 6. Right to Organize:
 - a. National Labor Relations Act — This Act was enacted in 1935 with the purpose of protecting employee and employer rights, ending harmful labor and management practices that were occurring in the private sector, and pushing for collective bargaining.¹¹⁵
 7. Government Contractors:
 - a. Davis-Bacon Act — This Act requires payment of prevailing wages and benefits to employees of contractors engaged in federal government construction projects.¹¹⁶
 - b. McNamara-O'Hara Service Contract Act — This Act sets wage rates and other labor standards for employees of

Discrimination, in its concluding observations on the fourth report of the United States, expressed ongoing concern with the disproportionate impact of pollution caused by extractive and manufacturing industries on low-income and minority communities and called for increased enforcement of federal legislation prohibiting environmental pollution.²³⁰

3. Native American Land Rights:
 - a. Most Native American land in the United States is held in trust by the federal government, meaning that the federal government holds title to the lands, but the tribes have beneficial ownership.²³¹ Despite having the fiduciary duty to protect tribal lands, the U.S. government does not always effectively carry out this duty.²³²
 - b. Aboriginal title law offers only weak protections for customary land law recognition. Native land can still be taken by purchase, treaty, or invasion, which essentially affords no protection for the land of natives. The biggest issue today facing native communities with claims to traditional lands is that once native title to land is lost, it cannot be regained.
 - c. There remains a "lack of concrete progress achieved to guarantee, in law and in practice, the free, prior, and informed consent of indigenous peoples in policy-making and decisions that affect them."²³³
 - d. Recently, Congress passed the National Defense Authorization Act for Fiscal Year 2015, which included a provision granting a subsidiary of Rio Tinto mining rights to 2,400 acres of Native American land, which

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contractors furnishing services to the federal government.¹¹⁷

- c. Walsh-Healey Public Contracts Act — This Act requires payment of minimum wages and other labor standards by contractors providing materials and supplies to the federal government.¹¹⁸

8. Migrant & Seasonal Agricultural Workers:

- a. The Migrant and Seasonal Agricultural Worker Protection Act — This Act protects the wages paid by employers (“agricultural employers, farm labor contractors, and associations”) that hire seasonal and migrant workers.¹¹⁹ It also lays out safety standards for seasonal and migrant workers’ housing and transportation, regulates registration requirements for farm labor contractors, and includes requirements for disclosure.¹²⁰
- b. The Fair Labor Standards Act — This Act requires that large farms (defined as those with over about seven full-time workers) pay their workers the minimum wage.¹²¹ However, it allows agricultural employers not to provide overtime premium pay.¹²² It also creates regulations for child labor that are specific to agricultural work.¹²³

9. Mine Safety & Health:

- a. Federal Mine Safety and Health Act of 1977 — This Act, as the name implies, governs miners.¹²⁴ Specifically, it lays out the training requirements that miners must meet, makes the health and safety of miners the responsibility of the mine’s operators, allows for health and safety standards for mines to be

includes sites sacred to the Apache that will be destroyed by mining in the area.²³⁴

- e. This is relevant to business and human rights issues because stronger protection of customary land rights may make it harder for corporations to adversely impact the rights of Native Americans. For example, if land rights are not adequately protected, Native Americans may not be able to control or have a say in business activities, such as mining, on their land.²³⁵

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **U.S. corporate and securities law** and **U.S. tax law**:

1. Corporate and Securities Law:

- a. Despite ongoing litigation at the D.C. Circuit Court changing the current rule stemming from Dodd-Frank Section 1502, companies have begun complying with the law by reporting on their due diligence measures to the SEC as the majority of the rule remains intact. However, final rulemaking on the entirety of the rule is still pending.²³⁶
- b. Dodd-Frank Section 1504 is also still pending final rulemaking after being invalidated in the D.C. District Court.
- c. Further, there is no overarching requirement to require companies to report on human rights through securities filings.
- d. Additionally, the lack of adequate consequences for not reporting is problematic.²³⁷

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set, and allows mines to be closed if inspectors determine that they are unsafe.¹²⁵ The Act also lays out the penalties for violations of the Act.¹²⁶

10. Construction:

- a. Several agencies administer programs related solely to the construction industry.
- b. OSHA has special occupational safety and health standards for construction.¹²⁷
- c. The Wage and Hour Division, under Davis-Bacon and related acts, requires payment of prevailing wages and benefits.¹²⁸
- d. The Office of Federal Contract Compliance Programs enforces Executive Order 11246, which requires federal construction contractors and subcontractors, as well as federally assisted construction contractors, to provide equal employment opportunity.¹²⁹
- e. The anti-kickback section of the Copeland Act precludes a federal contractor from inducing any employee to sacrifice any part of the compensation required.¹³⁰

11. Anti-Discrimination:

- a. The U.S. Equal Employment Opportunity Commission (EEOC) — This Commission is responsible for enforcing Title VII of the Civil Rights Act of 1964¹³¹ and other federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **U.S. trade law**:

1. Unilateral Trade Preference Programs

- a. Protection and promotion of fundamental human rights and strong environmental laws are not mandatory eligibility requirements for a country, or a product produced by companies in that country, to benefit from preferential market access.
- b. The “mandatory” eligibility criteria are only discretionary when a company is applying to have its products included on the list of goods that get duty free treatment under the preference programs. Determinations related to product eligibility do not include mandatory human rights eligibility criteria, just as in the case of “country” eligibility.
- c. Determinations regarding whether certain products meet the eligibility requirements for inclusion in the duty free program under 19 U.S.C. § 2643 are not yet subject to the same complaints/petition process as “Country Practice” determinations pursuant to 19 U.S.C. § 2642, which would enable more targeted trade policies that apply in specific industries but across country borders.

2. Free Trade Agreements (FTAs):

- a. By providing private entities the power to bring governments into binding arbitration for “indirect expropriation,” NAFTA governments have significantly impeded their ability to implement future human

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| <p>participated in an employment discrimination investigation or lawsuit.</p> <p>b. EEOC laws cover most employers with at least fifteen employees (twenty employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.¹³²</p> <p>12. Forced Labor, Trafficking, and Child Labor:</p> <p>a. U.S. law prohibits forced labor and trafficking.¹³³ Any person found guilty faces up to life in prison.¹³⁴ Also, any person that “benefits” from forced labor is similarly criminally responsible. The law applies to private business enterprises, which are considered “persons” under U.S. law.¹³⁵ U.S. forced labor and trafficking laws apply extraterritorially.</p> <p>b. Guidelines for Eliminating Child and Forced Labor in Agricultural Supply Chains</p> <p>i. The Food, Conservation, and Energy Act of 2008 (“Farm Bill”) set up a Consultative Group to develop a set of voluntary guidelines for agricultural companies to combat child and forced labor in their supply chains. These guidelines advocate for such companies to put in place measures for “supply chain mapping and risk assessment, remediation, and independent third-party review.”¹³⁶</p> <p>c. The Departments of Labor and Agriculture have joint initiatives aimed at reducing child labor both in the United States and abroad, including the development</p> | <p>rights and environmental regulations that would apply to foreign corporations without incurring potentially significant legal liability to private business enterprises.²³⁸</p> <p>b. U.S. government policy related to FTAs does not include protection and promotion of human rights other than core labor rights and any related to the four environmental treaties listed as mandatory.</p> <p>c. The U.S. government process for negotiating FTAs has been largely non-transparent, though the government has granted privileged access to certain companies and other business entities during the negotiations process. For example, the government created formal, credentialed advisory positions for representatives from companies and trade associations.</p> <p>3. Bilateral Investment Treaties (BITs):</p> <p>a. BITs often have investor-State dispute settlement (ISDS) agreements, which allow companies the right to arbitration if a foreign government acts in a way that undermines the “rights” of investors (e.g. expropriation and discrimination).²³⁹</p> <p>b. Corporations have been able to exploit these clauses, to the detriment of local citizens.²⁴⁰</p> <p>c. These dispute settlement agreements undermine the ability of foreign governments to regulate corporate activities that could harm the environment and human rights.²⁴¹</p> <p>d. Some governments are now refusing to agree to include ISDS clauses in BITs. However, the United States still supports these clauses.²⁴²</p> |
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and funding of programs to support foreign States and companies in combating child labor, “including assisting them to carry out risk assessments and due diligence on labour rights in their supply chains.”¹³⁷

- d. The Department of Labor has also produced a “toolkit” for use by businesses in ensuring that their goods and raw materials are not made by child labor or forced labor, as well as a set of “voluntary recommendations” for agricultural companies in this regard.¹³⁸

The third indicator and scoping question specifically request information about environmental regulations that are intended to protect the right to health, a healthy environment, and livelihoods. Existence or lack of existence of such laws provides evidence that the general laws either do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant existing **environmental laws**:

1. Policy:

- a. The National Environmental Policy Act of 1969¹³⁹ — This Act describes environmental policies and goals on a national scale; requires that federal agencies consider environmental outcomes and effects in their decision-making; and creates the Council on Environmental Quality to advise the President on environmental matters.
- b. The “Audit Policy” of the U.S. Environmental Protection Agency incentivizes due diligence activities by companies through an offer of leniency when a

4. Tariff Act of 1930:

- a. The Tariff Act specifically exempts many products produced by forced labor from the import ban. The “consumptive demand” exemption to the Tariff Act states that “. . . in no case shall [§1307 of the Tariff Act] be applicable to . . . goods . . . which are not . . . produced in such quantities in the United States as to meet the consumptive demands of the United States.” As a result, U.S. Customs and Border Protection is not empowered to stop the trade in forced labor-made goods in a growing number of industries.
- b. When it was passed in 1930, the Smoot-Hawley Tariff Act was intended to protect domestic industry from having to compete with foreign producers using forced labor. As a result, victims of forced labor were found to be outside the “zone-of-interests” of the statute since the statute was not intended to combat forced labor or protect victims of forced labor. Therefore, 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 as required.²⁴³
- c. Though Immigration and Customs Enforcement (ICE) has conducted several investigations, Customs and Border Protection (CBP) has not issued a detention order or an exclusion order since 1992.
- d. DHS regulations are silent on the standards for company investigations when it is required to make “every reasonable effort . . . to determine the

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company has adopted an implemented “an effective compliance program aimed at ensuring compliance with environmental laws.”¹⁴⁰

2. Clean air:

- a. Clean Air Act — This Act creates “goals and standards” for air quality in the United States.¹⁴¹ In 1990, these standards were toughened through amendments to the Act, which also focused on controlling air pollution through market forces.¹⁴²

3. Clean water:

- a. Clean Water Act — This Act creates “goals and standards” for water quality in the United States.¹⁴³ In 1987, it was amended to toughen control of toxic pollutants.¹⁴⁴ It was amended again in 1990 to address harms caused by oil spills.¹⁴⁵
- b. Safe Drinking Water Act — This Act creates standards for drinking and tap water safety.¹⁴⁶ It requires that rules protect against contamination of groundwater from underground injection.¹⁴⁷ It was amended in 1996 to create a fund for upgrading water systems, to require that new standards for common contaminants be created, and to give the public a “right to know” about their tap water.¹⁴⁸

4. Cultivable land:

- a. Comprehensive Environmental Response, Compensation and Liability Act — This Act, commonly referred to as CERCLA or “superfund,” mandates cleanup of areas that have been contaminated by toxic waste.¹⁴⁹ It was amended in 1986 to make liability and clean up requirements more clear, leading to “the

character of the labor used” pursuant to the regulation.

5. Arms Exports

- a. In late 2013, the U.S. government loosened controls over military exports and made it easier for U.S. companies to sell military aircraft that fuels conflict by moving categories of equipment from control by the Department of the 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 U.S. military parts to conflict areas, as well as challenges in enforcing arms sanctions.²⁴⁴

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **U.S. procurement laws and regulations**:

1. The Federal Acquisition Regulation (FAR):

- a. Through the executive orders discussed under “Implementation Status,” federal procurement guidelines codified in the FAR prohibit forced child labor, several types of human trafficking, and discrimination within U.S. territory. However, the FAR provides only partial protection for the prohibition of discrimination and the right to life, which only apply to U.S. territory.²⁴⁵ Further, the right to dignity, the right

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creation of a due diligence process that enables business enterprises to cope with the Act's strong liability scheme."¹⁵⁰

The fourth indicator and scoping question request information about property and land management law. Specifically, whether laws in this category recognize customary land rights and incorporate environmental and human rights into licensing and social impact assessments. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

Below is a non-exhaustive list of relevant U.S. laws related to **property and land management**:

1. Government Seizure:
 - a. Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."¹⁵¹
2. Tenant Rights:
 - a. Protection of Tenant Rights is important to ensure that large real estate companies are not allowed to violate the rights of their tenants.
 - b. This is dependent on the individual U.S. state, but general common law protections include:
 - i. Covenant of Quiet Enjoyment;
 - ii. Implied Warranty of Habitability;
 - iii. Duty to Repair;
 - iv. Constructive Eviction;

to privacy, freedom of association, and the prohibition of (non-forced) child labor are not included in the FAR.²⁴⁶

- b. The FAR does require compliance with domestic laws that implement internationally recognized rights, but these are limited to only a few examples and, again, only apply to work in U.S. territory.²⁴⁷ There is no explicit contract obligation for federal contractors to comply with domestic laws.²⁴⁸
2. For a more in-depth discussion of gaps in federal procurement law, see Sections 5 and 6.

The following explains some of the gaps that exist in the protection of **human rights defenders**:

1. Human rights defenders may be targeted for speaking out against human rights violations, and should be protected from abuse, including extrajudicial killings, surveillance, and intimidation.²⁴⁹ Peace Brigades International (PBI) has pointed out that the U.S. government currently lacks "a comprehensive plan for consultation with, support for, and protection of human rights defenders."²⁵⁰ Training of embassies with regard to human rights defenders is also an area for further prioritization by the U.S. government in its outreach abroad.

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **whistleblower protection**:

1. Senators Cardin and Durbin have introduced S.284, the Global

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- v. Breach of Covenant;
 - vi. Prohibition on Retaliatory Eviction.¹⁵²
- 3. Customary Land Law:
 - a. Customary land mostly exists in the form of tribal trust land. Tribal trust lands are lands that the U.S. government holds in trust for use by a tribe. This means that the U.S. government holds the legal title, while the tribe is entitled to the beneficial interest.¹⁵³ Tribes are entitled to regulate activities in their jurisdiction, which includes zoning, licensing, and controlling access.¹⁵⁴
- 4. Human rights in environmental and social impact assessments related to property:
 - a. Environmental Impact Statement (EIS): Under the National Environmental Policy Act, agencies must create an Environmental Impact Statement when they undertake “major Federal actions significantly affecting the quality of the human environment.”¹⁵⁵
 - b. Regulatory Impact Analyses (RIA): The purpose of an RIA is to evaluate and describe the social costs and benefits that may be created by a regulation.¹⁵⁶ These social costs must also include costs that cannot be monetarily quantified.¹⁵⁷ The EPA uses RIAs, for example, when it creates air pollution regulations.¹⁵⁸
- 5. Land governance in developing countries:
 - a. 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

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.” Passing this law would close a loophole that allows perpetrators of gross human rights violations to go unpunished.²⁵¹

The following explains some of the gaps that exist in the protection of business-related human rights abuses under **U.S. information and communications technologies (ICT) law**:

- 1. Global Online Freedom Act (GOFA):
 - a. This Act is designed to “deter U.S. businesses from cooperating with internet-restricting countries in affecting online censorship.”²⁵²
 - b. Although it was introduced in numerous sessions since 2013, it has not yet been passed.²⁵³
- 2. Surveillance:
 - a. Abroad
 - i. U.S.-based ICT companies that work abroad are sometimes required to provide data to governments for surveillance of citizens.²⁵⁴
 - ii. There do not appear to be any U.S. regulations or laws intended to address this issue.²⁵⁵ Instead, because the Electronic Communications Privacy Act does not apply when a foreign government requests data, it is in the discretion of the company whether or

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programs ongoing worldwide, with a total investment of nearly \$184 million.”¹⁵⁹ 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.”¹⁶⁰

The fifth indicator and scoping question request information about whether health and safety laws and regulations that the physical and mental health of workers and communities exist. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant existing **U.S. health and safety laws and regulations**:

1. Occupational Safety and Health Administration:
 - a. The Occupational Safety and Health Administration administers the Occupational Safety and Health Act (OSHA). Administration-approved state plans regulate safety and health conditions in most private industries. Other than miners, the self-employed, many public

not to provide that information.”²⁵⁶

- iii. U.S. companies 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.²⁵⁷ U.S. laws and courts do not currently provide effective access to remedy for victims of these types of abuses related to U.S. ICT businesses.²⁵⁸

b. The NSA

- i. Executive Order 12333 gives the U.S. government immense power to collect foreign intelligence information.²⁵⁹
- ii. This Executive Order (EO) is also used to collect information about American citizens when it is collected abroad and “incidentally” during a lawful investigation of a foreign individual, which in reality is a large loophole.²⁶⁰ Further, there is evidence that the National Security Agency (NSA) and Department of Justice interpret the EO as allowing direct wiretapping and collection of data from American citizens in certain situations.²⁶¹
- iii. According to the American Civil Liberties Union, the U.S. government uses this executive order to “sweep up the international communications of countless Americans.”²⁶² Not only does the use of this EO in this manner constitute a gap in

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employees, and some transportation workers, OSHA has jurisdiction over almost every employee in the United States.¹⁶¹ Employers subject to OSHA also have a general duty to provide work and a workplace free from recognized, serious hazards.¹⁶²

2. Mine Safety and Health Administration (MSHA):

- a. The Department of Labor's MSHA is responsible for the administration and enforcement of the Mine Safety and Health Act of 1977, which protects the safety and health of workers employed in the nation's mines. This Act covers all mining and mineral processing operations within the United States. The number of employees, extraction methods used, and size of these operations does not determine application of the Act.¹⁶³

3. Surface Mining Control and Reclamation Act:¹⁶⁴

- a. This Act regulates surface mining with respect to standards of performance, permitting, bonding, inspection and enforcement and land restrictions, as well as a fund for mine cleanup and environmental repair.

4. The Fair Labor Standards Act:

- a. This Act, administered by the Department of Labor's Wage and Hour division, regulates the employment of workers under age 18.¹⁶⁵ Specifically, it has minimum age requirements, restrictions on what type of work young people can be involved in, and what time of day they can and cannot work.¹⁶⁶ Its overall purpose is to "protect the health and well-being" of young Americans.¹⁶⁷

protection of business and human rights-related abuses, but it constitutes the government actively using ICT companies to violate privacy rights.

- iv. Section 702 of the Foreign Intelligence Surveillance Act authorizes collection of data on non-U.S. persons from within the United States. Based on this authority, the NSA also engages in collection of data about Americans, for a "foreign intelligence purpose."²⁶³ In practice, this results in massive data collection that does not require individual judicial assessment, but rather annual certification of "targeting" and "minimization" procedures and certifications, which are broad. The collection is executed with the assistance of electronic communication service providers.²⁶⁴ Individuals subject to this collection have no right to contest the government's actions at the Foreign Intelligence Surveillance Court, and no meaningful recourse or right to remedy under law. In fact, because of secrecy provisions, individuals are not likely to know that their communications have been collected within the NSA's surveillance net.
- v. Oversight and review committees have failed to suggest legislative reforms that would respect the rights of non-U.S. persons.²⁶⁵ As a result, according to Access Now, non-U.S.

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The sixth indicator and scoping question request information about whether corporate and securities laws that support ethical corporate behavior and business respect for human rights exist. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant existing **U.S. corporate and securities laws** that support ethical corporate behavior and business respect for human rights:

1. Dodd-Frank Act of 2010:
 - a. Section 1502 mandates corporate disclosure of information about conflict minerals from the Democratic Republic of Congo used in a company's products.¹⁶⁸
 - b. Section 1504 orders oil, natural gas, and mineral extraction companies to disclose certain payments made to the U.S. government and foreign governments.¹⁶⁹
2. Shareholder resolutions:
 - a. The integrated disclosure requirements for registered securities are organized in the comprehensive Securities and Exchange Commission's Regulation S-K (or Regulation S-B for small businesses).
 - b. Shareholders are empowered to demand additional disclosure, beyond what is required by Regulation S-K, by putting forward a resolution during proxy solicitations for annual shareholder meetings.¹⁷⁰

persons have no meaningful defense against indiscriminate surveillance by the U.S. government.

The seventh indicator and scoping question request information about

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whether tax laws and regulations that support ethical corporate behavior exist. Existence or lack of existence of such laws provides evidence that the U.S. general laws do or do not protect human rights with regard to business activity.

The following is a non-exhaustive list of relevant existing **U.S. tax law and regulation**:

1. Foreign Account Tax Compliance Act (FATCA) (2014):
 - a. The FATCA targets tax non-compliance by U.S. taxpayers with foreign accounts.
 - b. FATCA focuses on reporting about “certain foreign financial accounts and offshore assets” by U.S. taxpayers and reporting about “financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest” by foreign financial institutions.¹⁷¹
 - c. For non-compliant foreign institutions, the withholding agent (the American individual taxpayer) must withhold 30% of its payments to the institution.¹⁷²

The eighth indicator and scoping question request information about trade law and whether existing trade laws and regulations support the protection and promotion of human rights within trade practices. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant **U.S. trade law and practices**:

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1. Unilateral Trade Preference Programs

- a. 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).¹⁷³
- b. Other programs include the African Growth and Opportunity Act, the Caribbean Basin Economic Recovery Act (including the Caribbean Basin Trade Partnership Act and the Caribbean Basin Initiative), the Andean Trade Preferences Act/Andean Trade Preferences and Drug Eradication Act, the Haitian Hemispheric Opportunity through Partnership Encouragement Act, and West Bank/Gaza Strip Qualifying Industrial Zones preferences (QIZs).¹⁷⁴
- c. Under these programs, if a “country” and a “product” meet certain eligibility criteria, then exporters from those countries will be granted preferential access to U.S. markets through tariff reductions. While eligibility criteria varies some between programs, for each program the U.S. Trade Representative (USTR) is instructed to examine “the effect [expanding GSP benefits] will have on furthering the economic development of developing countries through the expansion of their exports” and to consider the impact extending benefits will have on broad-based economic development in the particular sector and countries in which the potential GSP eligible product is produced.¹⁷⁵
- d. The GSP statute was amended in 1984 to create, as a

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mandatory eligibility criterion, the requirement that beneficiary countries be “taking steps to afford” internationally recognized workers’ rights, which includes taking effective measures to ensure companies are complying with the standards. Other eligibility criteria that related to the UNGPs include “making progress” to combat corruption; implementing policies to reduce poverty, increasing availability of health care and educational opportunities; and eliminating forced labor and child labor practices.¹⁷⁶

- e. The GSP statute grants the USTR the discretion to “limit the application of the duty-free treatment” accorded to a product under 19 U.S.C. §2463, which governs the petition process utilized by governments and companies to have their products added to the list of eligible goods. When doing so, the USTR is instructed to “consider the factors set forth in §2461 and §2462(c),” including “whether or not such country has taken or is taking steps to afford workers in that country (including in any designated zone in that country) internationally recognized workers’ rights.”¹⁷⁷
- f. “Any person” can file a petition alleging violations of the eligibility criteria by a government to invoke a formal review of a government’s compliance with certain eligibility criteria. Only “interested parties,” which are limited to governments, companies, and trade unions representing workers in an industry, are eligible to file petitions seeking to apply eligibility criteria to individual product lines.¹⁷⁸ Also, the statute establishes a bifurcated eligibility determination. While

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countries are subject to mandatory labor rights eligibility criteria, labor rights standards are discretionary when applied to specific products.¹⁷⁹

2. Preferential Trade Agreements (PTAs):

- a. The United States has focused on labor rights (in addition to political participation and access to medicines) in negotiating PTAs due to influence from trade unions.

3. Free Trade Agreements (FTAs)

- a. The United States has entered into free trade agreements with twenty countries.¹⁸⁰ The North American Free Trade Agreement (NAFTA), signed in 1993 by Canada, Mexico, and the United States, was the first to include explicit human rights provisions.¹⁸¹ Labor rights were included in a side agreement, and chapters and language meant to create more public participation and transparency were also included.¹⁸² NAFTA also includes an Investor-State Dispute Settlement provision that provides private investors, usually corporations, with unique power to compel a government to enter into binding arbitration if any new laws or regulations, including environmental laws, directly or indirectly expropriate at least a portion of their investment.¹⁸³
- b. In May 2007, Executive and Legislative Branches agreed to the “Bi-Partisan Agreement on Trade Policy,” now known as the “May 10” agreement, which established a set of standards to be included in all future U.S. trade agreements, including the protection of labor rights and the environment, among others.¹⁸⁴ Since 2007, the

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United States has ratified free trade agreements with Peru, Panama, Colombia, and South Korea that have included the labor and environmental standards established by the May 10 agreement as a formal part of the agreement.

- c. Recent FTAs also include a formal dispute resolutions process when a government party to the treaty is in breach of the labor chapter of the treaty, which includes a formal arbitration process. A government that is a party to the treaty can only invoke the dispute resolution process.
 - d. Currently, the United States is negotiating two additional free trade agreements, the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership. See Section 9.1 for further discussion of these agreements.
4. Tariff Act of 1930:
- a. 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.¹⁸⁵
 - b. Goods produced by prison labor are strictly forbidden from entering the United States. Goods produced with other forms of forced labor, including slavery, indentured servitude, forced child labor and trafficked labor, are prohibited from entering the United States

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only if there is sufficient domestic production of the same or a substantially similar product to meet U.S. consumer demand for the class of product.

- c. To prevent a product made with forced or indentured labor from entering the United States, regulations require that the Commissioner of Customs issue a finding that:
 - i. The product is made in whole or in part with forced labor;
 - ii. The product is being, or is likely to be, imported into the United States, and
 - iii. Merchandise of the same class is being produced in the United States in such quantities as to meet the consumptive demands of the United States.¹⁸⁶
- d. The regulations provide U.S. Customs and Border Protection (CBP) with authority to immediately issue a detention order “as long as the investigation undertaken by Immigration and Customs Enforcement reasonably but not conclusively indicates that merchandise within the purview of section 1307 is being, or is likely to be, imported” into the United States.¹⁸⁷
- e. Due Diligence Requirement: Once the Commissioner of Customs determines that a product is of a prohibited class pursuant to §1307, regulations require that the CBP issue a detention order and detain the product “unless the importer establishes by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of”

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forced labor.¹⁸⁸ After conducting the due diligence required by the regulations, if the importer can prove that forced labor was not used in the manufacture of the product, then CBP will release to good into the U.S. market. If the company cannot meet its burden of proof, CBP will issue a permanent exclusion order for the good. In situations where political and legal climate prevents credible on-site investigations of the company, CBP has authority to issue a permanent exclusion order based on findings and reports from Departments of State and Labor, as well as other government agencies; international organizations; human rights organizations; and the media.¹⁸⁹

5. Bilateral Investment Treaties:

- a. Article 8(3)(c) of the Model Bilateral Investment Treaty — This Article makes it possible for a State to mandate that in order to make use of the benefits of a bilateral investment treaty, a corporation has to “take actions favorable to human rights laws.”¹⁹⁰

The tenth indicator and scoping question relate to procurement law and request information about whether existing procurement laws and regulations support the incorporation of human rights considerations into procurement decisions. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant existing **U.S. procurement laws and regulations**:

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1. Executive Order 13126 — Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor:
 - a. 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.¹⁹¹
2. Executive Order 13627 — Strengthening Protections Against Trafficking in Persons in Federal Contracts:¹⁹²
 - a. 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.¹⁹³ 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.¹⁹⁴ They also have to submit to audits and inspections and notify relevant authorities in the case of non-compliance.¹⁹⁵
3. Executive Order 13673 — Fair Pay and Safe Workplaces:¹⁹⁶
 - a. 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.¹⁹⁷
 - b. Labor Department officials will determine whether a bidder’s actions “rise to the level of a lack of integrity or business ethics,”¹⁹⁸ but will weigh only the most

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egregious violations.

- c. The order applies to contracts valued at more than \$500,000.
- d. 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.¹⁹⁹

The last four indicators and scoping questions request information about anti-bribery and corruption law, whistleblower protections, information and communication technologies laws that protect access to information and freedom of expression, and other relevant laws and regulations. Existence or lack of existence of such laws provides evidence that the general laws do or do not protect business-related human rights.

The following is a non-exhaustive list of relevant **anti-bribery and corruption law, whistleblower protection, information and communication technologies law**, and **“other”** laws and regulations:

1. Anti-Bribery and Corruption Law:
 - a. The Foreign Corrupt Practices Act of 1977 — This Act makes it illegal for certain classes of people and entities to bribe foreign officials in order to keep or get new business.²⁰⁰
2. Whistleblower Protection:
 - a. 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

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complaint with their employer, employees that are part of an inspection, or employees that want to access certain employer records related to safety.²⁰¹ If this prohibited retaliation or discrimination occurs, the employee can file a complaint with OSHA.²⁰² Since this Act was passed, OSHA's whistleblower authority has been expanded and now protects workers under twenty-one federal laws.²⁰³

- b. 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.²⁰⁴

3. Information and Communications Law:

- a. Freedom of Information Act — This Act provides that the federal government can be petitioned to release, partly or in whole, documents owned by them so long as the documents do not fall under one of nine exceptions.²⁰⁵
- b. As a result of years of advocacy and awareness-raising efforts by human rights organizations, the Treasury Department's Office of Foreign Assets Control in the Obama Administration has issued a General License to revoke sanctions related to some Internet services and equipment for personal communication use of Iranians.²⁰⁶ This license gives financial authorization for

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| <p>Iranian citizens inside Iran to send funds to U.S. companies to purchase hardware, software, and Internet and communication services, which were removed from the sanctions list on 30 May 2013.²⁰⁷ Previously, the U.S. government had authorized such financial transactions for Iran for the purchase of medicine and food items.²⁰⁸ Treasury has also allowed similar personal communication exports to Sudan.²⁰⁹</p> <p>4. Other:</p> <ul style="list-style-type: none"> a. Foreign Aid: USAID has an official code of conduct on human trafficking, based off the Trafficking Victims Protection Act.²¹⁰ b. Foreign Assistance Act: 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.”²¹¹ To promote these objectives, U.S. law prioritizes “sustaining growth <i>with equity</i>,” 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.”²¹² | |
| 1.6. Investigation, Punishment, and Redress Measures | |
| Do relevant State agencies responsible for law enforcement address business and human rights? | |
| Indicators | Scoping Questions |
| Sector Risk Assessment | Is the State undertaking or supporting any specific activities to identify specific business sectors or activities that may have particularly negative impacts on human rights, such as the extractive, apparel, and other sectors? |

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| Vulnerable Group Assessment | Is the State undertaking or supporting any specific activities to identify specific impacts on particularly vulnerable groups, such as women, children, minorities, and indigenous peoples? |
| Police | Have police authorities been provided with information and training on issues related to business and human rights? Are the police given statutory authority to address business-related human rights harms? |
| Labor, Health, and Safety | Are relevant labor, health, and safety authorities aware of potential or actual adverse impacts by business on labor, health, and safety? Are such State actors given statutory authority to address business-related human rights harms? |
| Environment | Have relevant environmental authorities been provided with information and training on issues related to business and human rights? Are such State actors given statutory authority to address business-related human rights harms? |
| Tax | Have relevant tax authorities been provided with information and training on issues related to business and human rights and connections to local tax laws? Are such State actors given statutory authority to address business-related human rights harms? |
| Judicial Grievance Mechanisms | Are the judiciary, including civil, criminal, and commercial courts, as well as employment and other administrative tribunals, and those with prosecuting authority informed and trained on issues related to business and human rights? Is the judiciary given statutory authority to address business-related human rights harms, including through civil, criminal, or administrative penalties for business-related human rights harms? |
| Non-Judicial Grievance Mechanisms | Does the State support and/or participate in non-judicial grievance mechanisms aimed at securing redress for business-related human rights harms, including through entities such as National Human Rights |

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| | Institutions, OECD National Contact Points, or ombudsmen? |
| Legal Aid and Assistance | Does the State support legal aid and assistance that aims to address barriers in accessing remedy for business-related human rights harms? |
| Other Measures | Are there any other measures taken by the State to promote the investigation, punishment, and redress of business-related human rights harms? |
| Implementation Status | Gaps |
| <p>In order to assess to what extent relevant State agencies responsible for law enforcement address business and human rights, this section presents information about sector risk assessments, vulnerable group assessments, police training, labor, health and safety authorities, environmental authorities, judicial grievance mechanisms, non-judicial grievance mechanisms, and measures.</p> <p>The first and second indicators and scoping questions relate to risk assessments and request information about any efforts the State takes to identify business sectors or activities that pose significant risk of human rights abuses, as well as information about any efforts to identify victims that are particularly vulnerable to abuses.</p> <p>The following is a list of efforts the U.S. government is making to identify high-risk sectors or activities through sector risk assessments and to identify particularly vulnerable victims through vulnerable group assessments:</p> <ol style="list-style-type: none"> 1. Sector Risk Assessment: <ol style="list-style-type: none"> a. The Department of Justice’s most prominent work in this area includes supporting assessments related to human trafficking and its associated industries, including outlining risk sectors.²⁶⁶ | <p>Although the information presented under “Implementation Status” explains how relevant U.S. agencies for law enforcement address business and human rights, gaps remain.</p> <p>The following explains some of the gaps that exist in how relevant State agencies involved in regulating the environment and tax address business and human rights:</p> <ol style="list-style-type: none"> 1. The Environmental Protection Agency (EPA): <ol style="list-style-type: none"> a. The EPA does not have information publicly available regarding whether it provides human rights training to relevant officials, and if so, with what focus and in what detail. 2. The Internal Revenue Service (IRS): <ol style="list-style-type: none"> a. There does not appear to be a human rights policy in effect for IRS training and information dissemination. <p>The following explains some of the gaps that exist in how State bodies involved in judicial grievance mechanisms address business and human rights:</p> <ol style="list-style-type: none"> 1. Training: <ol style="list-style-type: none"> a. There appears to be no business and human rights |

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- b. The Department of State targets certain, but not all, sectors and countries. One example of its work is the Responsible Investment Guide to Burma, which identifies human rights violations and corruption within the extractive sector of Burma. It also provides guidelines (e.g. the OECD Guidelines) for conducting risk assessment as part of human rights due diligence.²⁶⁷
- c. The Department of Labor’s Bureau of International Labor Affairs (ILAB) does extensive work in this area, including:
 - i. Implements Executive Order 13216, which identifies goods made in at-risk sectors for indentured and forced child labor;²⁶⁸
 - ii. Publishes the TDA Report, which is an annual report entitled “Findings on the Worst Forms of Child Labor” and mandated by the Trade and Development Act of 2000;²⁶⁹
 - iii. Implements the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA) mandates the creation and maintenance of a list of goods that are created by both forced labor and child labor;²⁷⁰
 - iv. Develops and implements assessment projects: The Bureau of International Labor Affairs (ILAB) has worked with the ILO’s International Program on the Elimination of Child Labor and its Statistical Information and Monitoring Program on Child Labor, including funding studies, reports and funding, as well as a free,

training policy in the education of judicial officials in Article III courts and administrative courts.

- 2. Crimes Against Humanity
 - a. The United States has not yet criminalized crimes against humanity.
- 3. Torture Victims Protection Act (TVPA):
 - a. The TVPA does not apply to non-natural persons.
- 4. The Alien Tort Statute (ATS):
 - a. The ATS 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.”³⁰¹ 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.³⁰²
 - b. For more information on both the ATS and gaps created by *Kiobel*, see Section 2.1 and the forthcoming Pillar III section of the NBA.

The following explains some of the gaps that exist in how State bodies involved in **non-judicial grievance mechanisms** address business and human rights:

- 1. National Contact Point (NCP):
 - a. As discussed under Section 1.4, the U.S. NCP is only given limited resources, making it harder for it to be an effective grievance mechanism.³⁰³
 - b. The specific instances procedure is also weak as there is no authority to make findings of fact or

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interactive online toolkit for businesses to formulate a social compliance system (“Reducing Child Labor and Forced Labor: a Toolkit for Responsible Business”).²⁷¹ The toolkit, released in December 2012, focuses on “stakeholder engagement, codes of conduct, remediation of child and forced labor, and public reporting on a company’s performance relative to labor standards.”²⁷²

2. Vulnerable Groups Assessment:

- a. Children: There has been an extensive focus on child labor throughout various U.S. government initiatives (see “1. Sector Risk Assessment” above).
- b. Women: a focus on women’s rights has primarily been featured in reports on children. ILAB has also funded independent reports on the trafficking of women.²⁷³
- c. Minorities and Indigenous Peoples: Efforts include identifying vulnerable populations, grants, and individual projects to combat forced labor (for example, in Brazil, Peru, and Bolivia).²⁷⁴

The third indicator and scoping question request information on the police and whether they are trained on business and human rights issues and whether they have authority to address these types of harms. The existence or lack of existence of this type of training and authority provides evidence that state agencies responsible for law enforcement do or do not address business and human rights issues.

The following is a non-exhaustive list of relevant **police training initiatives**:

determinations of whether the OECD guidelines have been breached.³⁰⁴

- c. Inadequate transparency is also a gap in the NCP.³⁰⁵

2. U.S. Commission on Civil Rights:

- a. This Commission only covers civil rights. While this means that some business-related human rights are covered, others are not.³⁰⁶
- b. Efforts to expand its mandate have not been successful.³⁰⁷
- c. The Commission also lacks a complaint or dispute resolution mechanism of its own, and can only refer victims to the appropriate federal office.³⁰⁸

The following explains some of the gaps that exist in how State bodies use **other measures** to investigate, punish, and redress business-related human rights harms:

1. The U.S. Treasury Department has been called on by leading civil society groups to better investigate reports that certain banks have violated sanctions by financially supporting regimes that have been designated for U.S. sanctions due to human rights violations. For example, civil society group have called for the Treasury Department to investigate sanctions violations by Russian banks that are financially enabling the regime of Syria’s Bashir al-Assad. Specifically, Human Rights First has asked the Treasury and Department of State to determine if a Russian-owned bank is “holding accounts from and may be facilitating transactions for the Commercial Bank of Syria, an entity that has been designated for U.S. sanctions.”³⁰⁹

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1. Blue Campaign:
 - a. The Department of Homeland Security launched this campaign in 2010. It was intended to unify efforts of the Department to combat human trafficking and make them more effective. The Campaign included raising awareness about human trafficking, providing assistance to victims, providing trainings, and carrying out law enforcement investigations.²⁷⁵
2. The Federal Law Enforcement Training Centers (FLETC):
 - a. The FLETC offers trainings to law enforcement officers on how to identify human trafficking through an online course, as part of the DHS Blue Campaign.²⁷⁶
3. Immigration and Customs Enforcement (ICE):
 - a. ICE holds trainings on human trafficking and has created education media for identifying human trafficking.²⁷⁷

The fourth and fifth indicators request information about whether safety, health, and labor authorities and environmental authorities are aware of the potential harmful impacts of business on safety, health, and labor and the environment, respectively. They also request information on whether these bodies have the authority to address business-related human rights abuses. The existence or lack of existence of this type of knowledge and authority provides evidence that state agencies responsible for safety, health, and labor and the environment do or do not address business and human rights issues.

The following is a list of ways through which the U.S. government's **labor, health, and safety, environmental, and tax** bodies learn about

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business-related abuses and the authority they have to address those abuses:

1. Labor, Health, and Safety:
 - a. OSHA complaint mechanism:
 - i. Workers can anonymously submit complaints to the agency, which reviews the complaint and may investigate the workplace. Violations carry statutory monetary penalties,²⁷⁸ and can be grounds for criminal prosecution under OSHA.²⁷⁹
 - b. Enforcement of Fair Labor Standards Act (FLSA):
 - i. Investigators stationed across the United States carry out the Wage & Hour Division's enforcement of the Fair Labor Standards Act (FLSA).²⁸⁰ These investigators collect information about employment conditions, such as hours and wages, to ensure employers are not violating the law.²⁸¹ If violations are detected, the employer may face civil penalties or even criminal prosecution.²⁸²
2. Environment:
 - a. The Environmental Protection Agency (EPA) is statutorily empowered to bring administrative actions, civil actions, and criminal actions. These actions are used to ensure private and intra-governmental compliance with federal environmental laws. Clean-up enforcement is a common way through which businesses are held accountable for human rights violations stemming from toxic spills.²⁸³

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3. Tax:

- a. The Illegal Source Financial Crimes Program investigates money laundering committed by individuals and businesses engaged in illegal activities that are connected to human rights abuses, such as human trafficking, and allows for criminal and civil prosecution against violators.²⁸⁴ For example, it forced a money-laundering Vietnamese sex trafficker to pay restitution to the trafficking victim and then sentenced him to 168 months in jail.²⁸⁵

The seventh indicator and scoping question request information about whether the judiciary has the authority to deal with business related human rights abuses. The existence of or lack of this authority provides evidence that state agencies responsible for law enforcement do or do not address business and human rights issues.

The following is a non-exhaustive list of issues relevant to **judicial grievance mechanisms** in the United States. Such mechanisms will be discussed in much more details in the forthcoming Pillar III section of the NBA:

1. Federal Civil Liability:

- a. Torture: Torture Victim Protection Act²⁸⁶ — This Act provides jurisdiction for federal courts to hear a torture-based civil claim.²⁸⁷
- b. Trafficking and Forced Labor: Trafficking Victims Protection Act²⁸⁸ — This Act provides a civil cause of action for trafficking and, more generally, forced labor claims. The statute of limitations is ten years.

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- c. General Human Rights Violations: Alien Tort Statute²⁸⁹
— This Act provides federal court jurisdiction over torts committed against aliens against customary international law. For more information on the Alien Tort Statute, including gaps, see Section 2.1.
- 2. Federal Criminal Liability:
 - a. The United States has federal criminal statutes in the areas of genocide,²⁹⁰ war crimes,²⁹¹ torture,²⁹² and forced recruitment of child soldiers.²⁹³ Under each of these statutes, the Department of Justice’s Human Rights and Special Prosecutions Section may prosecute businesses for conspiring to engage in these human rights-related crimes.²⁹⁴ In addition, those who aid or abet such crimes can be prosecuted as principals under general federal criminal law.²⁹⁵
 - b. Trafficking and Forced Labor: 18 U.S.C. Ch. 77’s individual sections expand on specific crimes within the umbrella of trafficking, such as trafficking in children.²⁹⁶

The eighth indicator and scoping question requests information about whether the U.S. government supports or participates in any non-judicial grievance mechanisms that provide redress for business related human rights abuses. Whether the government participates in or supports these non-judicial grievance mechanisms provides evidence that the state agencies responsible for law enforcement either do or do not address business and human rights.

The following is a non-exhaustive list of issues relevant to **non-judicial grievance mechanisms** that the U.S. government either supports or participates in. Such mechanisms will be discussed in much more details

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in the forthcoming Pillar III section of the NBA:

1. National Contact Point for OECD Guidelines for Multinational Enterprises (NCP):
 - a. The NCP offers a “specific instance” complaint procedure for interested parties against corporations who are alleged to be violating the norms. If the complaint is accepted, the Contact Point can offer to facilitate voluntary conciliation and mediation to resolve the dispute.²⁹⁷
 - b. The U.S. NCP is located in the Department of State’s Bureau of Economic and Business Affairs.²⁹⁸
2. U.S. Commission on Civil Rights Complaint:
 - a. The Commission’s mandate only includes civil rights, despite efforts to expand its mandate to include human rights more broadly and to house the National Contact Point for the OECD Guidelines. Because national civil rights overlap with the enforcement of some international human rights, however, its work is relevant to a business and human rights assessment.²⁹⁹
 - b. The Commission does not offer a complaint or dispute resolution mechanism, but it offers a complaint information referral system that connects the public with the proper federal office with which to file a complaint.³⁰⁰

GUIDING PRINCIPLE 2

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

Commentary to Guiding Principle 2

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

2.1. Home State Measures with Extraterritorial Implications

Has the State adopted domestic measures that set out clearly the expectation that businesses domiciled in their territory and/or jurisdiction respect human rights abroad?

| Indicators | Scoping Questions |
|-------------------------------------|--|
| Expectation setting | Has the State set out and fully disseminated to relevant government agencies (including embassies and consulates) clear policy statements on the expectation that all companies domiciled in its territory and/or jurisdiction respect human rights? |
| Criminal or civil liability regimes | Has the State introduced criminal or civil liability regimes that allow for prosecutions or civil lawsuits against corporations based on where the |

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|--|--|
| | corporation is domiciled, regardless of where the offense occurs? |
| "Duty of care" for parent companies | Has the State established a "duty of care" for parent companies in terms of the human rights impacts of their subsidiaries, regardless of where the subsidiaries operate? |
| Reporting requirements | Has the State introduced requirements on companies to publicly report on their operations abroad, including on human rights and labor issues? |
| Support for soft law measures | Does the State support and participate in relevant soft-law instruments, such as the OECD Guidelines and the Due Diligence Guidance for Responsible Supply Chains? |
| Performance standards for over-seas investments | Do State institutions that support overseas investment have and enforce performance standards that support the protection and promotion of human rights? |
| Implementation Status | Gaps |
| <p>In order to assess whether the U.S. government has adopted domestic measures that clearly set out the expectation that businesses domiciled in the United States respect human rights throughout their operations, this section presents information on government activities in expectation setting, the existence of criminal or civil liability regimes, "duty of care" requirements for parent companies, reporting requirements, government support for soft law measures, and performance standards for overseas investments.</p> <p>The first indicator and scoping question request information about whether or not the U.S. government has disseminated policy statements to relevant government agencies stating that all U.S.-domiciled companies are expected to respect human rights abroad. Whether or not the U.S. government has done this provides evidence that the government either has or has not adopted domestic measures</p> | <p>Although the U.S. government has adopted measures (including expectation setting and measures with extraterritorial implications) discussed under "Implementation Status" that set out the expectation that businesses domiciled in the United States respect human rights throughout their operations, there remain notable protection gaps in these measures.</p> <p>Below is a brief explanation of some of the gaps in U.S. government activities for expectation setting:</p> <ol style="list-style-type: none"> 1. As highlighted in the "Implementation Status" section, the U.S. Department of State has integrated business and human rights language into its press releases, conference appearances, and strategy papers. However, it is not clear whether there are clear policy statements, or accompanying best practices, that |

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clearly setting out this expectation.

The following is a non-exhaustive list of government activities that may constitute **expectation setting**:

1. Press Releases:
 - a. The U.S. Department of State has integrated the language of human rights corporate accountability into its press releases, conference appearances, and strategy papers.
2. Bureau of Economic and Business Affairs:
 - a. The U.S. Department of State has a team within the Bureau of Economic and Business Affairs devoted to business and human rights issues, including Corporate Social Responsibility (CSR); its stated mission is to “promote a holistic approach to CSR” and “provide guidance and support to American companies engaging in socially responsible, forward-thinking corporate activities that complement U.S. foreign policy and the principles of the Secretary’s Award for Corporate Excellence Program.”³¹⁰ The team’s webpage references the UNGPs and the OECD Guidelines for Responsible Business and as well as information targeted at conflict minerals and Internet freedom.
 - b. Business.usa.gov is the U.S. government’s website devoted to supporting U.S.-domiciled business. It is accessible to private citizens and serves to connect citizens and business owners with agencies, experts, and other resources.
3. Reports:

have been sent out to all agencies.

2. Business.usa.gov does not provide detailed information or training materials on human rights.
3. The U.S. Government Approach on Business and Human Rights takes the form of summaries rather than in depth discussion, advice, or mapping.

Below is a brief explanation of some of the gaps in the extraterritorial application of **criminal or civil liability regimes**. These gaps undermine other messages sent to corporations that they should respect human rights throughout their operations:

1. General U.S. jurisdiction practices:
 - a. Common-law countries such as the United States do not assert national jurisdiction for all criminal offenses, meaning that not all criminal laws in the United States will have extraterritorial effect. There is a presumption in these countries that criminal laws do not apply abroad unless it is specified that they do.³³⁸ Because of this, rather than a criminal extraterritorial regime, the United States has rules of statutory construction that courts apply to individual cases governed by individual laws.
2. Criminal law:
 - a. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), outlined in “Implementation Status,” includes criminal liability for people who are “employed by or accompanying the armed forces” abroad. However, this includes contractors and sub-contractors hired by the Department of Defense only. The proposed

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- a. In 2013, the U.S. government published the “U.S. Government Approach on Business and Human Rights.” This guidance is publicly available at humanrights.gov, discussed in Section 1.3, and includes summaries of the UNGPs, of how the United States includes business and human rights considerations in its foreign policy and domestic legislation, the business case for complying with human rights standards, and suggestions for corporate best practices.³¹¹
 - b. The United States issues annual human rights reports on all countries receiving assistance and on all UN Member States.³¹² These reports can include individual sections such as worker rights and human trafficking; they do not, however, systematically include a section devoted to business and human rights.³¹³
4. Other:
- a. See Sections 1.3, 7.3, and 8.1 of this table for a further discussion of internal dissemination (as far as is publicly visible) of business and human rights standards, including publicly available information, agency policy, Department of State initiatives, and U.S. government work with foreign embassies.

The second indicator and scoping question request information about whether or not the U.S. government has introduced criminal or civil liability regimes that allow for jurisdiction over the actions of corporations that are domiciled in the United States regardless of where the actions occurred. Existence of these regimes or lack thereof provides evidence that the government has or has not adopted domestic measures that clearly set out the expectation that U.S.-

Civilian Extraterritorial Jurisdiction Act of 2011 (CEJA) aimed to address this gap by amending Title 18 of the United States Code to clarify and expand federal criminal jurisdiction over federal contractors and employees who commit certain crimes outside of the United States while employed by or accompanying any agency of the United States other than the Department of Defense (DOD).³³⁹ The CEJA bill was introduced on 3 June 2011, in a previous session of Congress, but was not enacted.

- b. See Section 1.6 for more gaps in criminal liability regimes in the United States.

2. Civil law:

- a. Alien Tort Statute
 - i. *Kiobel*, discussed in more depth under “Implementation Status,” weakened the protection provided by the Alien Tort Statute for victims of business-related human rights harms.
 - ii. For a corporation to be subject to jurisdiction under the ATS, the violation must “touch and concern the United States . . . with sufficient force” because there is a general presumption against extraterritorial application of U.S. laws. The court held that “mere corporate presence” of a foreign multinational in the United States is insufficient for jurisdiction under the ATS for a claim arising from actions that took place entirely outside the United States. The court did not provide any other

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domiciled companies need to respect human rights abroad.

The following is a non-exhaustive list of **criminal or civil liability regimes** in the United States that have extraterritorial implications for corporations:

1. See Section 1.6 and the forthcoming Pillar III section of the NBA for further information on judicial remedies.
2. Anti-Discrimination Laws:
 - a. Examples of U.S. law applying to corporations operating abroad include if the corporation employs U.S. citizens abroad.
 - b. Specifically, U.S. anti-discrimination laws apply, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.³¹⁴
3. National Security Interests:
 - a. Corporate actions abroad may also come under U.S. jurisdiction if they have transactions with foreign investors that involve U.S. national security interests,³¹⁵ if they have transactions with declared terrorist groups, if they have transactions with nations subject to sanction, or if they give improper payments to foreign officials.³¹⁶
4. Other Criminal Laws:
 - a. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) includes criminal liability for people who are “employed by or accompanying the armed forces” abroad.³¹⁷ This includes contractors and sub-contractors hired by the Department of Defense.³¹⁸

standards or guidance on the definition of “touch and concern.”³⁴⁰ The *Kiobel* court declined to resolve the split between federal circuit courts on the issue of whether corporations may be liable for violations of international human rights law.³⁴¹

- iii. Future cases will further define the “touch and concern” standard for ATS cases, and will thus clarify the extent to which *Kiobel* created a gap in the extraterritorial implications of the ATS for corporations.
- b. The Torture Victim Prevention Act
 - i. The TVPA has been interpreted not to apply to non-natural persons.
- c. General Jurisdiction
 - i. The U.S. Supreme Court's ruling in *Daimler AG v. Bauman* has made it more difficult to establish general jurisdiction over a corporation for its conduct outside the territory of the forum. Following the decision, general jurisdiction over a company is limited to where it is incorporated or has its principal place of business, regardless of whether the company “engages in a substantial, continuous, and systematic course of business” within the jurisdiction.³⁴²

Below is a brief explanation of the gaps in measures relating to “**duty of care**” for parent companies and **reporting requirements**:

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- b. The USA PATRIOT Act of 2001 extends liability to civilian contractors for violations of U.S. federal criminal law committed on U.S. facilities abroad.³¹⁹
- 5. Alien Tort Statute:
 - a. The Alien Tort Statute (ATS) gives U.S. courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³²⁰ The statute was not widely used until 1980, when the U.S. Court of Appeals for the Second Circuit held that the ATS gives the U.S. jurisdiction to hear certain claims by foreign nationals against defendants charged with modern customary international law.³²¹ In 2004, the Supreme Court held that the ATS only applied to international norms “defined with specificity.”³²²
- 6. For a further list of extraterritorially applicable laws, see Sections 1.5, 1.6, 7, and 9.2.

The third indicator and scoping question request information about whether the U.S. government has established a requirement of “duty of care” for parent companies regarding the human rights impacts of their subsidiaries regardless of where the harms occur. The existence of such a “duty of care” requirement or lack thereof provides evidence that the government has or has not adopted domestic measures that clearly set out the expectation that U.S.-domiciled companies need to respect human rights abroad.

The following is a description of how the parent-subsidary corporate relationship is dealt with in the United States, including information about a **“duty of care” for parent companies**:

- 1. “Duty of Care” for Parent Companies:
 - a. There appears to be no codified, unified, or clear duty of care in the United States for parent corporations over their subsidiaries.³⁴³
- 2. Reporting Requirements:
 - a. The UN Working Group on Business and Human Rights recommends that the United States “ensure that reports submitted . . . include information as to how submitting companies have addressed human rights risks” and ensures “meaningful consequences for companies who do not fulfill reporting requirements.”³⁴⁴
 - b. See Section 1.5 above for gaps related to Sections 1502 and 1504 of the Dodd-Frank Act.³⁴⁵
 - c. All corporate reports made under the Burma Reporting Requirements are public.³⁴⁶ The Item 11 provision does not require the public disclosure of risks and/or impacts and the steps that have been, will be, and will continue to be taken to mitigate them..
 - d. In addition, while Section (f) of Item 5 of the Burma Reporting Requirements captures some disclosures concerning U.S. companies’ exposure to high risk business partnerships, U.S. companies are not required to report on joint venture partners and equity and non-equity partnerships, including contracts, distribution agreements, licenses, and production sharing agreements with the Myanmar Oil and Gas Enterprise (MOGE).³⁴⁷

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1. There appears to be no codified, unified, or clear duty of care in the United States for parent corporations over their subsidiaries.³²³
2. Limited liability of parent corporations, as shareholders of their subsidiaries, is the rule in the United States. However, one applicable legal concept is that of piercing the corporate veil, allowing parent companies to be liable. However, U.S. courts are usually reluctant to do apply this doctrine.³²⁴ Thus, limited liability of parents is a major gap toward holding parent corporations liable for acts of their subsidiaries.
3. U.S. corporations can also be held responsible for the behavior of subsidiaries (if sufficient connection is proven) based on theories of actual or constructive fraud, agency, joint and several liability, strict liability, and imputed negligence.³²⁵ The Racketeering Influenced and Corrupt Organizations Act (RICO) may also be applicable, albeit with limitations.³²⁶

The fifth indicator and scoping question requests information on whether the U.S. government requires corporations to publically report about their operations abroad, including on their human rights impacts. The existence of such reporting requirements or lack thereof provides evidence that the government has or has not adopted domestic measures that clearly set out the expectation that U.S.-domiciled companies need to respect human rights abroad.

The SEC has broad **reporting requirements** on both financial and non-financial information of corporations. In recent years, the United States has increased reporting requirements directly relevant to human rights. The following is a list of these reporting requirements:

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act (2010):
 - a. This Act deals with corruption and bribery, mine safety, and conflict mineral sourcing.³²⁷
 - b. 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.³²⁸
 - c. Section 1504 requires oil, natural gas, and mineral extraction companies to disclose certain payments made to foreign governments.³²⁹
 - d. Corporations failing to report or that report falsely under Dodd-Frank are also subject to Exchange Act Section 18 liability for fraudulent or false reporting.³³⁰
2. Burma Reporting Requirements for Responsible Investment (2013):
 - a. These requirements are transparency rules for new investments in Burma.
 - b. The reporting requirements are triggered when an investment exceeds \$500,000 or when any investment is made in the oil and gas sector.³³¹
 - c. The Reporting Requirements' "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."³³²
 - d. Section (f) of "Item 5. Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures" in the Reporting Requirements concerns the extent to which a corporate submitter's policies

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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.”³³³

3. Foreign Corrupt Practices Act (FCPA) (1977):
 - a. The FCPA not only prohibits bribing foreign officials in the course of business, but sets standards for company recordkeeping.³³⁴
4. Mandatory Reporting of Greenhouse Gases Rule (2010):
 - a. Requires reporting of greenhouse gas (GHG) data and other relevant information from large sources and suppliers in the United States.³³⁵
5. Emergency Planning and Community Right-To-Know-Act (1986):
 - a. Requires corporations to inform citizens of toxic chemical releases and waste management activities in their areas.³³⁶
6. SEC Commission Guidance Regarding Disclosure Related to Climate Change (2010):
 - a. This guidance clarified existing requirements as they relate to climate change, arguing that consensus has established climate change as a reality. Actual disclosures of potential harm, however, have been minimal.³³⁷
7. For further information, see Sections 1.5, 3.3, and 7.1.

The last two indicators and scoping questions request information about whether the U.S. government supports or participates in soft law measures and whether the U.S. institutions responsible for supporting overseas investment enforce performance standards that are protective of human rights. The existence of such support or

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| <p>enforcement or lack thereof provides evidence that the government has or has not adopted domestic measures that clearly set out the expectation that U.S.-domiciled companies need to respect human rights abroad.</p> <p>See Sections 1.4 and 7 for information on support for soft law measures, and Sections 1.4 and 1.6 for information on enforcement of performance standards for overseas investments.</p> | |
| 2.2. Implementation of Recommendations from International or Regional Bodies | |
| Has the State received and followed-up on recommendations from international or regional bodies, such as the UN Human Rights Council and UN treaty bodies, regarding steps to prevent abuse abroad by business enterprises domiciled within the State's territory or jurisdiction? | |
| Indicators | Scoping Questions |
| Human Rights Council Recommendations | Has the State noted and accepted recommendations from the UN Human Rights Council, such as through the Universal Periodic Review (UPR) process, that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations and has the State monitored its implementation of the recommendations? |
| UN Treaty Body Recommendations | Has the State noted and accepted recommendations from UN treaty bodies that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations? Has the State monitored its implementation of the recommendations? |
| Other International or Regional Body Recommendations | Has the State noted and accepted recommendations by any other international or regional bodies regarding steps to prevent business-related human rights abuses abroad? |
| Implementation Status | Gaps |

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The three indicators and scoping questions in this section request information on whether the U.S. government has received and followed up on recommendations regarding the prevention of business related human rights abuses both domestically and abroad from the Human Rights Council, UN treaty bodies, and other international or regional bodies. The existence of follow up on such recommendations or lack thereof provides evidence that the government either does or does not set the clear expectation that companies should respect human rights throughout their operations.

The following includes information about recommendations received from the **Human Rights Council, United Nations treaty bodies**, and other **international or regional bodies** and any follow up by the U.S. government:

1. Human Rights Council Recommendations:

- a. The United States was part of the 2010 cycle of Universal Periodic Reviews (UPR).³⁴⁸ It received 228 recommendations regarding human rights generally. Business concerns were raised³⁴⁹ but they were not a prominent focus of the final report.
- b. In its follow-up, the United States commented on changes in ten broad areas of rights since the review. Several of these are directly relevant to business and human rights. The United States stated that, since the review, the EPA had two settlements regarding greenhouse gas emissions,³⁵⁰ the Customs and Border Protection Agency launched a media campaign targeting human trafficking, the President's Equal Pay Task Force is working on a response to the gender

UN Treaty Body Recommendations:

1. The report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises³⁵⁷ also highlighted areas for further improvement, including developing a National Action Plan (which the United States has since announced), implementing "meaningful consequences" for corporations not complying with reporting requirements, requiring government contractors to comply with the International Code of Conduct for Private Security providers (which certain agencies within the U.S. government have begun to address), greater funding for the OECD National Contact Point, better integrating business and human rights considerations into the work of agencies, various measures to strengthen labor rights, a continuation of anti-trafficking initiatives, aligning access to remedy with the UNGPs and generally ensuring better remedy mechanisms, increasing connections between industries such as finance and mining, better addressing issues relating to indigenous communities, and continuing working with business and civil society organizations.

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wage gap, the Justice and Equality in the Workplace program is ongoing, and the government has undertaken an education campaign regarding the civil rights of immigrant workers.³⁵¹ The United States reinforced its commitment to the domestic enforcement of international treaties,³⁵² and the Executive is pushing for Senate ratification of human rights and related humanitarian treaties despite the high threshold.³⁵³ The United States noted that recommendations concerning specific judicial cases are outside Executive control.³⁵⁴

2. UN Treaty Body Recommendations:

- a. On 6 May 2014 the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises issued its report on a country visit to the United States conducted in spring of 2013. The report highlighted both the difficulty of smoothly implementing the UNGPs in the fragmented government structure of the United States and noted efforts the United States is undertaking to advance human rights in the area of business.³⁵⁵

3. Other international or regional body recommendations

- a. On 27 May 2014, the Organization of American States issued a draft resolution on the promotion and protection of human rights in business. The resolution included urging Member States to apply the UNGPs and disseminate them as broadly as possible, to create awareness and share best practices, and to foster dialogue among various stakeholders.³⁵⁶

GUIDING PRINCIPLE 3

In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Commentary to Guiding Principle 3

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures—national and international, mandatory and voluntary—to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise

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on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

3.1. Development and Enforcement of Relevant Laws and Regulations

What laws and regulations exist that directly or indirectly regulate business respect for human rights?

| Indicators | Scoping Questions |
|------------------------------|---|
| Corporate and Securities Law | Has the State put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as those relating to financial reporting, articles of incorporation, registration, corporate board, director, and stock exchange listing requirements? |

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| Labor Law | Has the State put in place labor laws and regulations to ensure business respect for workers' rights? |
| Environmental Law | Has the State put in place environmental laws and regulations to ensure business respect for the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land? |
| Property and Land Management Law | Has the State put in place land management laws and regulations to ensure business respect for the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices? |
| Health and Safety Law | Has the State put in place health and safety laws and regulations to ensure business respect for the physical and mental health of workers and communities? |
| Consumer Law | Has the State put in place consumer laws and regulations to ensure business respect for human rights and to promote consumer interest in the human rights impacts of purchased products and services? |
| Non-Discrimination Law | Has the State put in place anti-discrimination laws and regulations to support ethical corporate behavior and business respect for human rights? |
| Tax Law | Has the State put in place tax laws and regulations to support ethical corporate behavior and business respect for human rights? |
| Trade Law | Has the State put in place trade laws and regulations to support business respect for human rights within trade practices? |
| Privacy and Technology Law | Has the State put in place information security and privacy laws and regulations to support ethical corporate behavior and business respect for human rights? |

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| Disclosure and Reporting | Has the State put in place laws and regulations to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues? |
| Procurement Law | Has the State put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector? |
| Anti-Bribery and Corruption | Has the State put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments? |
| Human Rights Defender and/or Whistleblower Protection | Has the State put in place laws and regulations aimed at supporting business respect for the rights of human rights defenders and/or whistleblowers? |
| Criminal Law | Has the State put in place criminal laws and regulations to ensure that corporate crimes that are related to human rights are investigated, prosecuted, and properly sanctioned? |
| Civil Law | Has the State put in place civil laws and regulations to ensure investigation, punishment, and redress of business-related human rights harms? |
| Other Law | Has the State put in place any other laws and regulations to ensure business respect for human rights? |
| Implementation Status | Gaps |
| <p>For further coverage of corporate and securities, labor, environmental, property and land management, health and safety, non-discrimination, tax, trade, disclosure and reporting, procurement, anti-bribery and corruption, and whistleblower protection laws, see Sections 1.5 and 1.6.</p> <p>For further coverage of disclosure and reporting laws, see Section 2.1.</p> | <p>For further coverage of corporate and securities, labor, environmental, property and land management, health and safety, non-discrimination, tax, trade, disclosure and reporting, procurement, anti-bribery and corruption, and whistleblower protection laws, see Sections 1.5 and 1.6.</p> <p>For further coverage of disclosure and reporting laws, see Section 2.1.</p> |

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For coverage of **U.S. criminal and civil liability**, see Section 2.1.

Consumer Law

The United States has fairly extensive consumer protection laws.³⁵⁸ A survey of major laws that relate to business and human rights issues follows:

1. Consumer Credit Protection Act³⁵⁹
 - a. Composed of several titles (e.g., Title I: Truth in Lending Act, Title II: extortionate credit transactions, Title III: restrictions on wage garnishment, Title IV: National Commission on Consumer Finance)
 - b. Amended by Fair Debt Collection Practices Act,³⁶⁰ which targets abusive debt collection
2. Fair Credit Reporting Act covers collection, dissemination, and use of consumer information.³⁶¹
3. Truth in Lending Act (1968) requires disclosure about terms of consumer credit and standardizes cost calculations.³⁶²
4. Fair Credit Billing Act protects from unfair billing practices and provides mechanisms for addressing errors in 'open credit' accounts.³⁶³
5. Home Mortgage Disclosure Act (1975) requires financial institutions to provide mortgage data to the public.³⁶⁴
6. Home Owners Protection Act (1998) addresses difficulties in canceling home mortgage insurance.³⁶⁵
7. Glass-Steagall Act limits commercial bank affiliations and activities in securities.³⁶⁶
8. Gramm-Leach-Bliley Act repealed parts of Glass-Steagall Act (four provisions of Banking Act of 1933), allowing consumer

For coverage of **U.S. criminal and civil liability**, see Section 2.1.

Consumer Law

Notable gaps in U.S. consumer law include those related to current political debates in the United States, including financial industry regulation and health care laws:

1. Criticisms of the Dodd-Frank Act include that it did not go far enough in regulating the financial industry (for example, in limiting the use of derivatives) and that it did not limit the ability of the government to rescue troubled banks, thereby creating incentives to take more risks.³⁸²
2. Criticisms of the Health Care Reform Act include that the Act does not go far enough in addressing the affordability gap for poor and lower middle class Americans. Although the number of uninsured has fallen, costs are still rising and outcomes are not yet fully traceable or comprehensible. This is in part because of the difficulty in understanding the cause of the high cost of health care in the United States, and in part because of the difficulty in agreeing which type of insurance system the United States should have. There are also discrepancies in coverage because U.S. states have discretion whether to implement all aspects of the law; some states may choose to not participate in health care exchanges. This regulatory and government complexity is part of the difficulty in implementing human rights in the United States, as noted by the United Nations in its 2014 report on business and human rights in the U.S. context.³⁸³

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banks to consolidate with investment banks and other entities. This Act did not give the Securities and Exchange Commission authority to regulate large investment bank holding companies.³⁶⁷

9. Dodd-Frank Wall Street Reform and Consumer Protection Act was passed as a response to the financial and consumer crisis of the 2000's. This Act restructures regulatory aspects of consumer law, including responsible agencies, increases oversight of systemically high-risk institutions including early warning systems and even executive compensation, increases transparency, and eliminates some loopholes believed to have led to the 2008 crisis. The Act amends many existing consumer laws.³⁶⁸
10. Patient Protection and Affordable Care Act (2010): Paired with the Health Care and Education Reconciliation Act, this Act is the most significant regulatory modifications to U.S. health care system since Medicare and Medicaid in 1965. Goals include expanding health care coverage and affordability, lowering the uninsured rate, using mandates, subsidies and insurance exchanges. Also included new requirements for insurance companies (requiring coverage of certain treatment, ended non coverage for preexisting conditions, and gendered cost discrimination). Constitutionality upheld by the U.S. Supreme Court in 2012.³⁶⁹
11. Uniform Deceptive Trade Practices Act: Uniform laws adopted by U.S. states that regulate unfair or fraudulent business practices and untrue or misleading advertising.³⁷⁰
12. The U.S. government has implemented regulatory programs to improve the environmental impact of agriculture business practices, through the National Organic Program,³⁷¹ and tuna

3. While supportive of consumer-friendly labeling regulations to improve environmental impact of businesses, the U.S. government has not pursued similar types of proposed programs to address other human rights or social impacts related to the production of consumer goods other than providing basic guidelines for companies.
4. The primary mission of the U.S. Department of Agriculture (USDA) is to promote U.S. agriculture enterprises and interests, including facilitating access for U.S. agriculture products to overseas markets. The USDA does not have a mandate to address issues related to business and human rights.

Privacy and Technology Law

1. The United Nations Working Group on Business and Human Rights noted a need for regulation of the sale or disclosure of data by corporations to the government, due to government surveillance concerns.³⁸⁴
2. There remains a significant lack of uniform federal laws on privacy and technology. Several proposed laws, including a consumer privacy bill of rights and an update to the Electronic Communications Privacy Act, have not been successful.³⁸⁵ Additionally, the Global Online Freedom Act (GOFA), discussed in Section 1.5, also stalled in Congress.
3. Amendments Act of 2013 (introduced): This proposed Act prohibits electronic communication and remote computing providers from knowingly divulging information to a government entity and revises government requirements for overcoming this prohibition and requires notification.³⁸⁶ It did not pass.

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fishing practices, through the Dolphin Protection Consumer Information Act.³⁷² Both programs involve detailed criteria for production and labeling of a company's product so consumers can have a level of assurance that the goods they are purchasing are manufactured, processed, or harvested in environmentally responsible manner. The U.S. Department of Agriculture issued a set of "Guidelines" for Multinational Enterprises with supply chains that include goods identified by the U.S. Department of Labor as "at risk" of being produced with forced or child labor. The Guidelines recommend third-party, independent monitoring of supply chains and provide detailed criteria on "due diligence" practices for forced and child labor.³⁷³ Though not expressly referenced, the Guidelines incorporate many of the key principles outlined in the UNGPs.

The above laws are enforced by the Federal Trade Commission, Consumer Financial Protection Bureau, and the U.S. Department of Justice.

Privacy and Technology Law

1. Many U.S. laws dealing with information, technology, and privacy are targeted at limiting or regulating government access or at private actions taken against private citizens (identity theft, for example). More recent laws that involve corporations are concerned with use of corporate-held consumer data for government purposes. The U.S. Senate, agencies, and the Supreme Court have all recently dealt with or launched initiatives concerning technology and privacy issues.³⁷⁴
2. Electronic Communications Privacy Act: This Act extends

4. Surveillance Transparency Act (introduced 2013 by Senator Al Franken): This proposed Act regulates the collection of broadband and phone information by the government from private companies and expands government reporting for actions taken under the PATRIOT Act and Foreign Intelligence Surveillance Act.³⁸⁷ It did not pass.
5. Location Privacy Protection Act (proposed, 2014 by Senator Al Franken): This proposed Act addresses the use of data.³⁸⁸ It did not pass.

Other Law

1. There is a loophole in U.S. law that enables corrupt individuals and other criminals to easily hide their identity behind anonymous companies to launder dirty money through U.S. banks. U.S. banks, with few exceptions, are not required to identify the true, or "beneficial," owner of legal entities that open accounts. This means they are not doing nearly enough to identify the actual human that the money they are handling belongs to, or what might have been done to obtain it. If the bank has not identified the beneficial owner, it cannot meaningfully assess the risk that somebody is trying to launder the proceeds of crime. If the client is a Politically Exposed Person (PEP), the bank is supposed to perform extra checks, but if the bank has not identified that the ultimate owner is a PEP, the bank will not implement the required enhanced due diligence. Financial institutions are not yet explicitly required to identify and verify beneficial ownership information of all accountholders.
2. The Treasury Department gave "seller[s] of vehicles, including

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government restrictions on wiretaps to computer data and provides new protections for stored data.³⁷⁵

3. The U.S. Senate has a Subcommittee on Privacy, Technology and the Law, created in 2011. Its jurisdiction includes:
 - a. Oversight of laws and policies governing the collection, protection, use, and dissemination of commercial information by the private sector, including online behavioral advertising, privacy within social networking websites and other online privacy issues;
 - b. Enforcement and implementation of commercial information privacy laws and policies;
 - c. Use of technology by the private sector to protect privacy, enhance transparency, and encourage innovation;
 - d. Privacy standards for the collection, retention, use, and dissemination of personally identifiable commercial information; and
 - e. Privacy implications of new or emerging technologies.³⁷⁶
4. The U.S. Supreme Court has recently taken up privacy and technology cases, including *United States v. Jones*, where the Court held that the government cannot use a global positioning system (GPS) to track an individual's location without a warrant.³⁷⁷
5. In 2011 the Securities and Exchange Commission published guidance regarding disclosure obligations relating to cyber-security risks and cyber incidents.³⁷⁸
6. For further discussion of other issues related to Privacy and Technology, see Section 1.5.

automobiles, airplanes, and boats" and "person[s] involved in real estate closings and settlements" a temporary exemption in 2002 from the law requiring them to establish anti-money laundering programs. This was to allow the Financial Crimes Enforcement Network (FinCEN) and the Department of the Treasury to assess to what extent these industries should be regulated. In 2003, FinCEN sought comments about the real estate sector in order to develop a regulation. To date, a final rule has not been issued about regulating real estate closings and settlements or businesses engaged in vehicle sales. 31 C.F.R. § 1010.205(b) includes the following the following exemptions:

- a. Seller of vehicles, including automobiles, airplanes, and boats;
 - b. Person involved in real estate closings and settlements.
3. A similar requirement to establish anti-money laundering programs does not currently extend to lawyers and other legal professionals, accountants, and company service providers when they carry out transactions for their clients including, but not limited to, the following (as recommended by the Financial Action Task Force (FATF)):
 - a. Buying and selling of real estate;
 - b. Managing of client money, securities or other assets;
 - c. Management of bank, savings or securities accounts;
 - d. Organization of contributions for the creation, operation or management of companies;
 - e. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.³⁸⁹

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Other Law

1. Banks are required to perform “due diligence” to identify who the customer is and where the money came from prior to accepting funds from a client. They also need to perform extra checks on politically exposed persons, senior officials, or their family members and associates, because individuals who potentially have access to state funds are considered a higher risk.³⁷⁹ Each financial institution that establishes, maintains, administers, or manages a private banking account or a correspondent account in the United States for a non-U.S. person, including a foreign individual visiting the United States, or a representative of a non-U.S. person must establish appropriate, specific, and where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts.³⁸⁰
2. The PATRIOT Act requires financial institutions to establish anti-money laundering programs to keep dirty money out of the U.S. financial system, unless exempted by the Treasury Department.³⁸¹

3.2. Relevant Policies

Have policies that seek to foster business respect for human rights been adopted and publicly communicated by the State?

Indicators

National Action Plans (NAPs)

Scoping Questions

Has the State introduced and/or implemented policies to help facilitate business respect for human rights through the adoption of National Action Plans (NAPs) on business and human rights, corporate social responsibility, development, anti-discrimination, government transparency, women’s rights, or human rights in general?

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| Sector-Specific Policies | Has the State introduced and/or implemented sector-specific policies to help facilitate business respect for human rights within particularly high-risk industries, such as the extractive, apparel, and other sectors? |
| Other Policies | Have other policies been adopted by the State that aim to foster business respect for human rights? |
| Implementation Status | Gaps |
| National Action Plans (NAPs): <ol style="list-style-type: none"> 1. The United States is in the process of developing a National Action Plan (NAP) on Responsible Business Conduct (announced 24 September 2014). Although the content of the NAP will be drafted in 2015, a number of multi-stakeholder consultations have taken place to inform the eventual content of the NAP. The NAP is expected to lay out current U.S. policy and any plans for future regulatory enhancement.³⁹⁰ For further discussion of the announcement of the U.S. NAP, see Section 1.3. 2. The White House released its second National Action Plan for open government in December 2013,³⁹¹ which fulfills a membership requirement of the Open Government Partnership (OGP). The OGP is an international and multi-platform initiative that requires government and civil society to work together on the creation and implementation of open government reforms. In this second National Action Plan for open government the White House committed to continuing to publicly advocate for legislation requiring disclosure of meaningful information at the time a company is formed, showing not just who owns the company, but also who receives financial benefits from the entity. 3. The United States has also committed under its G-8 Action Plan for Transparency of Company Ownership and Control to advocate for | National Action Plans (NAPs): <ol style="list-style-type: none"> 1. There is concern that the U.S. National Action Plan on Responsible Business Conduct may only bind executive agencies, and not independent agencies. Further, the scope of the commitments may only apply to executive actions, and may not result in congressional or judicial reforms. There is also expressed concern that the scope of the eventual content of the NAP will refrain from commitments that address harmful business practices at home and will instead exclusively focus on business activities abroad.³⁹³ 2. American companies are not required to disclose beneficial ownership (ultimate ownership) information to the government at the time the company is formed. This is “a critical element of a broader strategy to safeguard the international financial system from abuse of legal entities.”³⁹⁴ The Administration committed to the collection of beneficial ownership information in the U.S. Open Government Partnership National Action Plan and in the U.S. G-8 Action Plan for Transparency of Company Ownership and Control.³⁹⁵ Bipartisan legislation has been introduced in multiple legislative sessions of Congress that would require companies to disclose their ultimate owners and for that information to |

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| comprehensive legislation to require identification and verification of beneficial ownership information at the time a company is formed. ³⁹² For coverage of sector-specific policies , see Sections 1.5 and 7. | be made available to law enforcement. To date, the legislation has not passed. For coverage of sector-specific policies , see Sections 1.5 and 7. |
| 3.3. Corporate Reporting and Public Communications What type of reporting and public communications by business enterprises on how they address their human rights impacts is required by law? | |
| Indicators | Scoping Questions |
| Financial Reporting | Is corporate financial reporting required the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the economic performance of the reporting company? |
| Non-Financial Reporting | Is corporate non-financial reporting required and enforced by the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the performance and operations of the reporting company? |
| Public Consultations | Are there legal requirements for companies to have public consultations before, during, and after the commencement of a major project that may impact local communities? Is there a requirement for the free, prior, and informed consent (FPIC) of impacted communities? Is there a mandatory public release of environmental and social impact assessments by companies? |
| Other Public Communications | Are there any other legal requirements on companies in terms of public communications? |
| Implementation Status | Gaps |
| For coverage of financial reporting , see Sections 1.5 and 2.1. | For coverage of financial reporting , see Sections 1.5 and 2.1. |
| For coverage of non-financial reporting , see Sections 1.5, 2.1, and 7.1 | For coverage of non-financial reporting , see Sections 1.5, 2.1, and 7.1. |

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| 3.4. Guidance and Incentives | |
| Does the State provide guidance and incentives for companies in terms of business respect for human rights? | |
| Indicators | Scoping Questions |
| Guidance based on industry sectors, human rights issues and company size | Has the State developed guidance for businesses on respecting human rights that is appropriate to different industry sectors (for example, high-risk sectors such as extractives), particular human rights issues (for example, working conditions, discrimination), and different types of corporations (for example, MNEs, SMEs)? |
| Guidance on expected outcomes and best practice | Has the State provided indicators of expected human rights outcomes, information regarding relevant national laws and regulations, and examples of best practice and due diligence methods? |
| Incentives | Has the State provided incentives for business respect for human rights, such as favorable treatment following non-mandatory self-reporting by companies of human rights policies and practices? |
| Implementation Status | Gaps |
| <p>Guidance based on industry sectors, human rights issues, and company size</p> <ol style="list-style-type: none"> 1. The Securities and Exchange Commission (SEC) recently issued guidance that clarifies how existing securities regulations may require disclosure of information related to (i) climate change and (ii) cyber-security matters where such information is material to the issuer or any of its business segments.³⁹⁶ Both sets of guidance rely on existing law, and both describe the costs and relevance associated with these types of non-financial reporting areas.³⁹⁷ 2. In terms of sector-specific requirements, the SEC requires disclosure of human rights-impacting issues such as bribery and | <p>Guidance on expected outcomes and best practice</p> <ol style="list-style-type: none"> 1. As mentioned in Section 1.3, one area in which there remain gaps in U.S. government promotion of UNGPs capacity in U.S. embassies is with regard to the “Doing Business” portals on U.S. embassy websites in a number of countries abroad. While such portals provide detailed guidance for companies on doing business in such countries, the UNGPs are rarely, if ever, mentioned on such portals.⁴⁰¹ <p>Incentives</p> <ol style="list-style-type: none"> 1. The United States has seen a developing trend toward U.S. states licensing “benefit” corporations (corporations whose |

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| <p>conflict mineral sourcing by law. The Department of State also required non-financial reporting related to new investments in Burma.³⁹⁸</p> <p>Guidance on expected outcomes and best practice</p> <ol style="list-style-type: none"> HumanRights.gov includes guidance for U.S. companies on specific countries or ongoing international situations, including best practices.³⁹⁹ The “U.S. Government Approach on Business and Human Rights” also includes a section summarizing best practices for companies. <p>Incentives</p> <ol style="list-style-type: none"> The U.S. government provides tax incentives for environmental responsibility. These include efficiency credits for builders, manufacturers, commercial buildings, and vehicle manufacturers. The U.S. government also offers programs that mitigate risks associated with clean energy loans, grants for environmentally sound businesses, partnerships centered on sustainability, and business energy tax credit programs.⁴⁰⁰ | <p>charters enshrine corporate social responsibility). However, there is no federal (tax or other) policy incentivizing such incorporation.</p> |
| 3.5. National Human Rights Institutions (NHRIs) | |
| Has the State formally recognized and supported the role of NHRIs in promoting implementation of the UNGPs? | |
| Indicators | Scoping Questions |
| NHRI Establishment, Recognition, and Support | <p>Has the State established a National Human Rights Institution (NHRI)?</p> <p>If so, how was the NHRI established, and what kind of recognition and support does the State provide for the NHRI?</p> |

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| NHRI Focus on Business and Human Rights | Does the NHRI's mandate include business and human rights? Does the State finance NHRI activities within the field of business and human rights? Does the State support the NHRI in providing guidance on human rights to business enterprises? Does the State support the NHRI in monitoring the national business and human rights situation and to provide access to justice for victims of corporate-related human rights abuses? Has the role of the NHRI in promoting implementation of the UNGPs been formally recognized, and, if so, does the State support the NHRI in that role? |
| Implementation Status | Gaps |
| | <p>NHRI Establishment, Recognition, and Support</p> <p>The United States does not have a National Human Rights Institution (NHRI). In its response to the 2010 Periodic Review, the U.S. government failed to accept recommendations that it institute a NHRI. The United States does, however, have an OECD National Contact Point (for further discussion of the U.S. NCP, see Section 1.3).⁴⁰² Further, the United States does have a Commission on Civil Rights whose mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws. See Section 1.6 for more on the U.S. Commission on Civil Rights.</p> |

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States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

Commentary to Guiding Principle 4

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

4.1. Businesses Owned or Controlled by the State

Does the State exercise special measures to support the human rights performance of State-owned or -controlled business enterprises?

Indicators

Human Rights Due Diligence Requirements

Scoping Questions

What types of human rights due diligence measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and

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| | oversight do such government departments have over these enterprises (for example, inclusion of human rights performance information in management reports to relevant State agencies)? |
| Supply Chain Management Requirements | What types of supply chain management measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective supply chain management is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of supply chain information in management reports to relevant State agencies)? |
| Other Measures | Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises? |
| Implementation Status | Gaps |
| <p>The first indicator and scoping questions consider the existence of human rights due diligence requirements for State-owned or -controlled business enterprises. In addition to having such requirements in place, States should determine whether those requirements are indeed effective, and government departments should provide sufficient oversight. Due diligence requirements are crucial checks that allow businesses to anticipate and prevent human rights abuses in their work.</p> <p>Below is a non-exhaustive list of relevant existing human rights due diligence requirements for State-owned or -controlled business enterprises in the United States:</p> <ol style="list-style-type: none"> 1. The National Railroad Passenger Corporation (Amtrak): <ol style="list-style-type: none"> a. Amtrak is a publicly funded railroad service operated and managed as a for-profit corporation. | <p>Although the U.S. government has adopted measures addressing human rights due diligence and supply chain management for State-owned or -controlled business enterprises, there are gaps in these measures.</p> <p>Below is a brief explanation of some of the gaps in U.S. government activities for human rights due diligence requirements for State-owned or -controlled business enterprises:</p> <ol style="list-style-type: none"> 1. Government Corporation Control Act of 1945 <ol style="list-style-type: none"> a. Unlike individual states in the United States, the federal government has not yet passed a general incorporation statute. Instead, each government corporation is chartered through an act of Congress, creating a legal and organizational framework that varies significantly across government corporations.⁴²² |

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| <ul style="list-style-type: none"> b. In 2001, Amtrak signed an agreement with the Department of Justice to settle claims that it violated the Clean Water Act.⁴⁰³ As part of the settlement, the company agreed to conduct environmental audits of its facilities and undertake other environmental improvements, such as projects to restore wetlands and reduce polychlorinated biphenyls (PCBs) in locomotive transformers.⁴⁰⁴ The agreement also included civil penalties and delegated spending to environmental projects.⁴⁰⁵ Amtrak has been the subject of multiple other lawsuits, including gender and racial discrimination.⁴⁰⁶ c. Amtrak has also worked with the federal government on a more voluntary basis. Since 2012, the company has partnered with the Departments of Homeland Security and Transportation to combat human trafficking “by training more than 8,000 front-line transportation employees and Amtrak police officers to identify trafficking victims and perpetrators and report suspected cases.”⁴⁰⁷ <p>2. Export Import Bank:</p> <ul style="list-style-type: none"> a. The Export Import Bank of the United States (Ex-Im) is an independent agency, providing financing for transactions that would not otherwise take place commercially. In its governing law, Ex-Im is allowed to deny financing based on human rights considerations; however, such determination must be approved by Ex-Im’s President.⁴⁰⁸ Ex-Im also has an Office of Inspector General (OIG) to review certain products and perform investigations.⁴⁰⁹ | <p>Currently, any human rights and due diligence efforts are uncoordinated across corporations, leaving significant gaps.</p> <ul style="list-style-type: none"> b. However, the Government Corporation Control Act of 1945 provides for the standardized budget, auditing, debt management, and depository practices for listed corporations.⁴²³ This model could be used to address human rights due diligence requirements centrally for all federal corporations. <p>2. Centralized oversight:</p> <ul style="list-style-type: none"> a. Within the executive branch, no one agency is responsible for the oversight and supervision of government-owned or -controlled corporations.⁴²⁴ Similarly, there is no central unit charged with designing government corporations from the perspective of central management interests.⁴²⁵ These represent significant gaps in centralized oversight that can be expected to have significant impacts on human rights. b. Neither the House nor the Senate has a single committee with the responsibility to oversee all government corporations. Instead, each corporation is overseen by the committee(s) with jurisdiction over specific its policy area.⁴²⁶ This inhibits coordination and common practices among government corporations, making human rights due diligence standards much more difficult to establish. <p>3. U.S. Import-Export Bank (Ex-Im):</p> <ul style="list-style-type: none"> a. At a total exposure of \$112 billion in 2014 and enabling U.S. exporters to reach the markets of over 178 |
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| <ul style="list-style-type: none"> b. Ex-Im regularly consults the Department of State, including the Bureau for Democracy, Human Rights, and Labor, on human rights concerns as well as other foreign policy considerations.⁴¹⁰ Unfortunately, this has not stopped Ex-Im from financing projects that advocacy groups allege violate human rights on a massive scale.⁴¹¹ <p>3. Fannie Mae and Freddie Mac:</p> <ul style="list-style-type: none"> a. Fannie Mae and Freddie Mac primarily offer mortgage credit. b. After the 2008 economic recession, the Housing and Economic Recovery Act of 2008 placed Fannie Mae and Freddie Mac into government conservatorships, where “audits and evaluations” are still ongoing.⁴¹² c. Fannie Mae has won awards for its employment practices and diversity awareness. It also demands the same from its suppliers, including adherence to its Service Requirements for Contractors and Consultants.⁴¹³ Freddie Mac also has requirements for its suppliers, but they appear to focus only on diversity rather than on human rights more broadly.⁴¹⁴ d. The Broadcasting Board Governors (BBG) is an independent federal agency responsible for all U.S. government and government-sponsored, non-military, international broadcasting.⁴¹⁵ The BBG is comprised exclusively of members assigned by the President of the United States and confirmed by the Senate, as well as the Secretary of State (ex officio). The Board operates through a network of wholly-owned and operated subsidiary companies that are registered as | <p>countries, Ex-Im’s products have serious potential for human rights impacts.⁴²⁷ However, Ex-Im has no non-judicial grievance mechanism dedicated to addressing community complaints, unlike OPIC.⁴²⁸</p> <ul style="list-style-type: none"> b. Establishing an independent accountability mechanism dedicated to community grievances would allow Ex-Im to examine its human rights impacts more directly.⁴²⁹ <p>4. The U.S. government has not conducted a review of all of its wholly-owned and controlled companies, beginning with the companies operated by the BBG, to ensure that the companies fully implement their heightened governmental “duty to protect” their employees and the communities they impact through their broadcasting services, including by ensuring basic protections called for by the UNGPs.</p> <p>Below is a brief explanation of some of the gaps in U.S. government activities for supply chain requirements for State-owned or -controlled business enterprises:</p> <ul style="list-style-type: none"> 1. Specific guidelines for sustainable supply chain management for State-owned or -controlled enterprises do not yet exist in the United States. |
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private entities in the State of Delaware but domiciled outside the United States, including the Voice of America, Alhurra, Radio Sawa, Radio Free Europe/Radio Liberty, Radio Free Asia, and Radio and TV Martí.⁴¹⁶

The second indicator and scoping questions address the existence of **supply chain management requirements** that apply to State-owned or -controlled business enterprises. The scoping questions also address the efficacy and oversight of these requirements. Human rights abuses can occur anywhere along the supply chain, so it is essential for businesses to know and scrutinize every level, from raw materials, to labor, to output.

Below is a non-exhaustive list of relevant and existing **supply chain management requirements**:

1. Federal Prison Industries Competition in Contracting Act
 - a. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.⁴¹⁷ However, neither the United States itself nor a corporation wholly owned by the United States is included in the term “employer” for this purpose.⁴¹⁸
 - b. In addition to having broad implications for government-owned corporations, this has been especially relevant for prison work. Depending on the court circuit, “[p]rison work may or may not be subject to Title VII coverage.”⁴¹⁹ This has led to accusations of unfair labor and competition practices within the U.S.

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prison system.⁴²⁰

2. In 2013, Congress passed the Federal Prison Industries Competition in Contracting Act, designed to establish procurement policies based upon competitive procedures and to impose federal occupational, health, and safety standards to prison work, as well as wage increases.⁴²¹ The procurement policies, however, are more intended to address accusations of unfair competition rather than to establish baseline human rights standards or to make such standards a part of the procurement process.

For a more thorough discussion of supply chain management requirements in other contexts, see Sections 4.2 and 6.1.

4.2. Businesses Receiving Substantial Support and Services from State Agencies

Does the State exercise special measures to support the human rights performance of businesses receiving substantial support and service from State agencies (for example, export credit agencies, public banks, public pension funds, official investment insurance or guarantee agencies, development agencies, or development finance institutions)?

| Indicators | Scoping Questions |
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| Human Rights Considerations | Has the State required that businesses receiving substantial support and services from State agencies take into account human rights considerations? |
| Human Rights Due Diligence Requirements | What types of human rights due diligence measures by State-supported businesses are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these businesses? |
| Other Measures | Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises? |

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| Implementation Status | Gaps |
| <p>The first indicator and scoping question consider human rights considerations required of businesses receiving substantial support and services from State agencies. Though these businesses are not directly controlled by the State, they receive significant investment and support and thus should be held to similar standards in their human rights conduct.</p> <p>The U.S. government provides substantial financial and other support to business enterprises, from providing financial assistance to help establish small businesses through the Small Business Administration to providing direct financing to companies through the Department of Treasury, such as the recent 2008 “bailout” of General Motors.</p> <p>Below is a non-exhaustive list of other relevant and existing measures that require human rights considerations:</p> <ol style="list-style-type: none"> 1. The Overseas Private Investment Corporation (OPIC) <ol style="list-style-type: none"> a. OPIC is the U.S. government’s development finance institution, partnering with the private sector to help U.S. corporations reach emerging markets and support development abroad.⁴³⁰ OPIC is subject to the Federal Property and Administrative Services Act of 1949 (as amended by Competition in Contracting Act of 1984) and by the Federal Acquisition Regulation.⁴³¹ b. OPIC urges its clients to aim to achieve “broad community support for the project.”⁴³² Under Congressional guidance, OPIC took the initial step of establishing an Office of Accountability to receive | <p>Although the U.S. government has adopted the measures discussed under “Implementation Status” to support the human rights performance of businesses receiving substantial support and service from State agencies, there are gaps in these measures.</p> <p>Below is a brief explanation of the gaps in U.S. government activities for human rights considerations:</p> <ol style="list-style-type: none"> 1. The Overseas Private Investment Corporation (OPIC) <ol style="list-style-type: none"> a. Although OPIC established an Office of Accountability, an internal review of the office in September 2014 revealed that OPIC has serious institutional deficiencies and accountability gaps that cause harm on the ground and lead to failed projects.⁴⁵⁵ b. The UN Working Group on Business and Human Rights found that OPIC’s “Office of Accountability and its implementation might not be fully consistent with the criteria for an effective grievance mechanism under Guiding Principle 31,” and recommended that a review be undertaken.⁴⁵⁶ c. OPIC’s Office of Accountability is unable to provide objective and unbiased services to the communities affected by its projects.⁴⁵⁷ While its Operational Guidelines seek objectivity, the Office has built in a significant risk of bias through its practice of having the same person conduct both the problem-solving and compliance review functions for each complaint.⁴⁵⁸ d. Its high procedural requirements for filing complaints effectively bar many affected people from accessing |

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- complaints from people affected by their projects.⁴³³
- c. In addition, its projects are to be screened against standards involving the rights to organize and bargain collectively, minimum age for labor, prohibition of forced labor, and acceptable conditions of work.⁴³⁴
 - d. OPIC identifies a list of twenty-eight high-risk sectors that automatically trigger human rights standards for the recipient business, including protection of worker rights.⁴³⁵ OPIC also uses a “special consideration approach” to assess the risk of these abuses based on five factors:
 - i. Statistical likelihood,
 - ii. A clear history of labor rights abuses,
 - iii. Reliance on sub-contracted, unskilled, temporary, or migrant workers,
 - iv. Adverse impacts on significant numbers of workers, and
 - v. Supply chain considerations with a focus on raw materials.⁴³⁶
 - e. In 2010, OPIC issued the Environmental and Social Policy Statement as well as an Environmental and Social Assessment Procedures Manual and Dam Review Procedures. In it, they pledge that projects receiving OPIC support will be “environmentally and socially sustainable; . . . [r]espect human rights, including the right of workers;” avoid, mitigate, or compensate negative impacts; “[p]rovide timely information regarding its activating to Project Affected People;” and “[a]re undertaken in countries that are taking steps to adopt and implement laws that extend

remedies.⁴⁵⁹ Complaints are ineligible when they are filed after an OPIC loan has been fully paid back or after an insurance contract is terminated, allowing OPIC clients to easily escape review.⁴⁶⁰

- e. Finally, the Office has been completely unstaffed since September 2014.⁴⁶¹ The Office’s Director left OPIC after completing his term and has yet to be replaced.⁴⁶²
- 2. United States Agency for International Development (USAID):
 - a. 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.⁴⁶³ GAO found that USAID focused its monitoring on contractor-provided goods and services, largely neglecting to monitor labor practices, where trafficking is most prevalent.⁴⁶⁴
 - b. 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.⁴⁶⁵
 - c. After reading the report, USAID required its staff to take additional training on anti-trafficking provisions and pledged to create further training on proper monitoring techniques.⁴⁶⁶

Below is a brief explanation of the gaps in U.S. government activities for **human rights due diligence requirements**:

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- Internationally Recognized Workers Rights.”⁴³⁷
- f. The Dam Review Procedures set an even higher threshold, requiring that dams not “significantly and irreversibly cause any” of a list of impacts prior to ever reaching consideration under the general Economic and Social Review. OPIC’s Assessment Procedures include public consultations and disclosure, as well as monitoring and site visits.
 2. United States Agency for International Development (USAID):
 - a. 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.⁴³⁸ It also requires contracting officers to tell the contractor that it must not withhold employee passports or visas without the employee’s permission.⁴³⁹
 - b. This guidance further requires contracting officials to monitor all awards to ensure compliance with these requirements by conducting appropriate site visits and employee interviews.⁴⁴⁰

The second indicator and scoping questions consider **human rights due diligence requirements** for businesses receiving substantial support and services from State agencies. Due diligence is crucial for all businesses connected to a State actor, even if they are not controlled directly.

Below is a non-exhaustive list of other relevant and existing **human rights due diligence requirements**:

1. The Davis-Bacon Act (DBA):

1. Export Credit and Investment Guarantee Agencies:
 - a. The integration of human rights considerations into the policies of export credit and investment guarantee agencies is still very much in its infancy.⁴⁶⁷ A study examining twenty-five publicly held overseas investment insurance agencies found that only four required labor standards of their clients.⁴⁶⁸
 - b. Many of these agencies require that mitigation measures be monitored, establishing covenants and imposing reporting requirements, which are usually fulfilled by the project sponsor.⁴⁶⁹ Failure in these reporting duties and in the implementation of mitigation measures can result in the withdrawal of coverage — a powerful tool in enforcing due diligence requirements.⁴⁷⁰ The study showed, however, that this penalty has hardly ever been implemented in practice, leaving these protections largely toothless.⁴⁷¹
2. OECD Council:
 - a. While the Recommendations discussed under “Implementation Status” are important, the OECD routinely allows high-risk projects to move forward, requiring only that participants report on their compliance semi-annually.⁴⁷²
3. Reporting Requirements for Investment in Burma:
 - a. While these reporting requirements are a step in the right direction, in practice, they could be strengthened. The Department of State can impose civil or criminal penalties under the International Emergency Economic Powers Act if businesses fail to submit the required

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- a. The DBA requires contractors to pay the 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 \$2,000.⁴⁴¹ It also includes a due diligence measure that contractors insert provisions requiring their subcontractors comply with these directives.⁴⁴²
- b. Federal contractors are expected to collect weekly payrolls from their subcontractors and bear ultimate responsibility for their failures.⁴⁴³ The DBA applies to 20% of all construction projects in the United States, affecting more than 25% of all construction workers nationwide at any given time.⁴⁴⁴
2. The International Finance Corporation (IFC):
 - a. IFC, a member of the World Bank Group, holds all of its clients to a due diligence regime composed of eight “Performance Standards” and accompanying “Guidance Notes.”⁴⁴⁵
 - b. IFC’s Performance Standards contain numerous requirements, including environmental protection, land acquisition and resettlement, protection of affected communities and indigenous peoples, security issues, observance of international labor standards, and associated supply chain assessment.⁴⁴⁶
 - c. This due diligence regime contains three steps:
 - i. A pre-approval assessment process,
 - ii. The adoption of policies that conform to IFC’s standards, and
 - iii. Contractual undertakings to comply with these

reports, but companies face no consequences if they file a report, but their policies are lacking or nonexistent.⁴⁷³ Instead, the Department of State suggests that businesses exercise their leverage to mitigate any adverse impact on human rights and, if this cannot be done, it advises that “the enterprise should consider ending the relationship.”⁴⁷⁴

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standards throughout the life of their projects.⁴⁴⁷

- d. The Performance Standards are used by the Multilateral Investment Guarantee Agency, the investment guarantee arm of the World Bank.⁴⁴⁸ Export development agencies in the United States and Canada have also incorporated these standards into their own due diligence regimes.⁴⁴⁹
- 3. OECD Council:
 - a. In June 2012, the OECD Council adopted a Recommendation on Common Approaches for Officially Supported Export Credits and Environment and Social Due Diligence, addressing both environmental and social impacts for the first time.⁴⁵⁰ The Recommendation requires due diligence through the consideration of these impacts and risks as an integral part of the decision-making and risk management process.⁴⁵¹
- 4. Reporting Requirements for Investment in Burma (Myanmar):
 - a. In 2013, the U.S. Department of State established Reporting Requirements for newly authorized investment in Burma (Myanmar) after it eased sanctions with the country.⁴⁵² These standards require that any U.S. person investing in the country over \$500,000 in Burma, or any investment in oil and gas, must report an overview of its operations in Burma, including any policies and procedures it has in place to protect human rights, labor rights, anti-corruption, the environment, property acquisition, arrangements with security providers, and financial transparency.⁴⁵³

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- b. The Department of State expects these disclosures to be shared among companies and used to encourage businesses to develop policies addressing human rights.⁴⁵⁴

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States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

Commentary to Guiding Principle 5

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

5.1. Public Service Delivery

Does the State ensure that human rights are protected in situations where private enterprises provide for government services that may impact upon the enjoyment of human rights?

| Indicators | Scoping Questions |
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| Legislative or Contractual Protections | Has the State adopted legislative or contractual protections for human rights in delivery of privatized services by the central or local government, for example, for the provision of services related to health, education, care-delivery, housing, or the penal system? Do such protections include a State-performed human rights impact assessment of the potential consequences of a planned privatization of provision of public services, prior to the provision of such services? Do public procurement contracts clarify the State's expectation that businesses respect human rights in delivering services and comply with human rights standards? |
| Awareness-Raising | What measures does the State take to promote awareness of and respect for human rights by businesses that the State commercially contracts with? |
| Screening | What kind of screening processes does the State have in place to promote business respect for human rights? Does the State engage in |

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| | selective processes that give preferential treatment to companies that demonstrate respect for human rights? Does the State exclude from the bidding process those companies that have demonstrated poor respect for human rights (such as poor and hazardous working conditions, as well as excessive use of force or maltreatment of individuals receiving care)? |
| Monitoring and Oversight | Do relevant State agencies effectively oversee the activities of the enterprises that provide services on behalf of the State? Does the State provide for adequate independent monitoring and accountability mechanisms of the activities of the private providers? Does the State provide for specific oversight of high-risk services, such as those related to health and security? |
| Other Measures | Is the State a party to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict? If so, how does it incorporate commitments into national laws? Is the State party to the International Code of Conduct for Private Security Providers, and if so, how does it incorporate commitments into national laws and procurement processes? Is the State party to the Voluntary Principles on Security and Human Rights? If so, how does it incorporate commitments into national laws, including around the provision of public security? Has the State put any other measures in place to ensure that public service delivery by private enterprises does not have any negative human rights impacts? |
| Implementation Status | Gaps |
| The first indicator and scoping questions consider legislative or contractual protections adopted by the State to protect human rights in government procurement, including impact assessments and compliance clauses within the contract. These protections are the first line of defense in preventing human rights abuses in government | Although the U.S. government has adopted measures discussed under “Implementation Status” that set out the expectation that federal contractors will respect human rights in their operations, there are gaps in these measures. |

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procurement and contracting.

Below is a non-exhaustive list of other relevant and existing **legislative or contractual protections** to support human rights in government procurement:

1. Executive Order 11246 — Equal Employment Opportunity:⁴⁷⁵
 - a. 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.⁴⁷⁶ 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.”⁴⁷⁷
 - b. The executive order assigns enforcement responsibility for these provisions to the Department of Labor.⁴⁷⁸ In 2014, President Obama amended this executive order to also prohibit discrimination based on sexual orientation and gender identity.⁴⁷⁹
2. Executive Order 13423 — Strengthening Federal Environmental, Energy, and Transportation Management:⁴⁸⁰
 - a. This executive order, issued by President Bush in 2007, requires agency heads to implement sustainable practices for energy efficiency, renewable energy, and water conservation in procurement.⁴⁸¹ It authorizes the heads of agencies to apply this order to activities outside of the United States.⁴⁸²
3. Executive Order 13514 — Federal Leadership in Environmental,

Below is a brief explanation of the gaps in U.S. government activities for **legislative or contractual protections**:

1. Executive Orders:
 - a. While executive orders raising standards in contracting and federal procurement are important tools in protecting human rights, they are limited in their effectiveness. Because there is often no express or implied grant of congressional authority for the President to issue executive orders regarding many of these rights, 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.⁵²⁵
 - b. The presumption against the extraterritorial application of U.S. statutes ensures that most executive orders raising labor or human rights standards — including Executive Orders 11246 and 13673, discussed under “Implementation Status” — only apply domestically.⁵²⁶ In an increasingly global economy, domestic-only application of these standards dramatically limits their impact.
 - c. Executive Order 11246 provides important protections for workers by prohibiting discrimination based on race, color, religion, sex, or national origin. However, it is not clear whether discrimination “in employment” applies beyond hiring and firing (e.g., to wages, promotion, and benefits).⁵²⁷
2. Acts of Congress:
 - a. Through authority provided to the Secretary of Labor

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Energy, and Economic Performance:⁴⁸³

- a. This executive order goes further than Executive Order 13423 to state the policy that “agencies shall prioritize actions based on a full accounting of both economic and social benefits and costs . . .”⁴⁸⁴ However, like Executive Order 13423, this order authorizes agency heads to apply it to activities outside of the United States.⁴⁸⁵
 - b. The order further defines “sustainability” and “sustainable” to “create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations.”⁴⁸⁶
4. Executive Order 13673 — Fair Pay and Safe Workplaces:⁴⁸⁷
- a. This executive order, issued by President Obama in 2014, requires that procurement officers consider a contractor’s record of compliance with certain labor laws when awarding contracts for goods and services over \$500,000.⁴⁸⁸ This effectively makes it more difficult for contractors that have violated labor laws to get a contract with the federal government.
5. The Davis-Bacon Act (DBA):
- a. DBA requires contractors and subcontractors 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 \$2,000.⁴⁸⁹ Prevailing wage and benefits are determined by the Department of Labor, and must be provided by
- by the Walsh-Healey Public Contracts Act, the Department of Labor has issued administrative exemptions for certain items, including an exemption for any item or any piece of any item produced outside of the United States, Puerto Rico, the Virgin Islands, or the District of Columbia.⁵²⁸ The provisions of the Davis-Bacon Act are similarly limited to apply within United States territory.
- d. Walsh-Healey additionally exempts certain items from its coverage: items available in the open market, perishables and agricultural products, and the carriage of freight and personnel.⁵²⁹ Further, the Act applies primarily to prime contractors, though if a subcontractor is found to be performing the work of the prime contractor, it may be found to be a “substitute manufacturer” and thus subject to the Act.⁵³⁰ This is a significant gap in protection, as many contractors rely on a variety of subcontractors in fulfilling a government contract.
3. The Consolidated and Further Continuing Appropriations Act, 2015
- a. U.S. agencies are not required to collect, verify, and publish on a centralized website, beneficial ownership information (including the full name, birth date, city of residence, and nationality of each natural person who, directly or indirectly, exercises substantial control over a corporation or limited liability company or has a substantial interest in or receives substantial economic benefits from the assets of a corporation or limited liability company) for any company, other than a

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| <p>contractors and subcontractors unconditionally, weekly, and without subsequent deductions.⁴⁹⁰</p> <p>b. If a contractor or subcontractor fails to comply with these guidelines, they open themselves up to civil and criminal liability, as well as possible debarment.⁴⁹¹</p> <p>6. The Walsh-Healey Public Contracts Act:</p> <p>a. The Walsh-Healey Public Contracts Act⁴⁹² was enacted by Congress in 1936 in order to require federal contractors to meet certain labor standards, in an attempt to prevent the Federal Government from procuring items from sweatshops.⁴⁹³</p> <p>b. The Act requires federal contracts for supplies in excess of \$10,000 to include stipulations that require contractors to conform to standards regarding minimum wages, maximum hours, child labor and convict labor, and safe working conditions.⁴⁹⁴</p> <p>7. The Consolidated and Further Continuing Appropriations Act, 2015</p> <p>a. 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.⁴⁹⁵</p> <p>8. Federal Funding Accountability and Transparency Act of 2006 (Transparency Act)</p> | <p>publicly listed company, that receives government funds. Companies with hidden owners are one of the most important vehicles for bribery, money-laundering, tax evasion, sanctions busting, drug trafficking, and other forms of crime and corruption around the world.</p> <p>4. Federal Funding Accountability and Transparency Act of 2006 (Transparency Act)</p> <p>a. When the FAR Council promulgated the final rule regarding reporting requirements for subcontracts under the Transparency Act, it limited reporting to the first-tier subcontract awards, contrary to the language of the Act.⁵³¹ Additionally, the regulations exclude long-term vendor agreements for materials or supplies.⁵³²</p> <p>5. The Federal Acquisition Regulation (FAR):</p> <p>a. 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.⁵³³</p> <p>b. 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.⁵³⁴ The FAR's coverage does not yet incorporate the ILO's core labor standards, which include freedom of association and the prohibitions of</p> |
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| <ul style="list-style-type: none"> a. The Transparency Act requires that all recipients of federal funds exceeding \$300,000⁴⁹⁶ 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.”⁴⁹⁷ The Transparency Act applies to commercial items and to contracts performed and products produced both domestically and outside the United States.⁴⁹⁸ 9. Department of Defense (DoD): <ul style="list-style-type: none"> a. 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.⁴⁹⁹ b. DOD also requires that contractors provide employees with a signed copy of their employment contract defining the terms of their employment and compensation.⁵⁰⁰ Contractors must further provide adequate living conditions for their employees, with a minimum of fifty square feet of personal living space per employee.⁵⁰¹ 10. Department of State: <ul style="list-style-type: none"> a. 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.⁵⁰² b. These contracts must ensure that the contractors recruitment practices comply with both U.S. and host State labor laws, that only bona fide recruitment | <ul style="list-style-type: none"> forced labor, child labor, and discrimination with respect to work.⁵³⁵ c. 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.⁵³⁶ This creates a high bar for forced labor, without clear instruction on what might qualify as a threat of serious harm or physical restraint.⁵³⁷ 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.⁵³⁸ 6. Department of Defense (DOD) and Department of State (DOS) contracts: <ul style="list-style-type: none"> a. While DOD and DOS have developed policies and guidance addressing recruitment fees, they neglect to specify what components or amounts of recruitment fees are considered permissible.⁵³⁹ 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 prescriptives.⁵⁴⁰ 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.⁵⁴¹ b. The same GAO report found that DOD and DOS did not specifically monitor their anti-trafficking policies in many of their contracts, hindering their ability to |
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companies will be used, and employees are not charged recruitment fees.⁵⁰³ Contractors must further provide employees with signed copies of their employment contracts, defining the terms of employment and full details about their compensation.⁵⁰⁴

- c. 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.⁵⁰⁵
 - d. Contractors may not destroy, conceal, or confiscate employees' identity documents or passports and must comply with any local labor laws on withholding employee documentation.⁵⁰⁶ Contractors are further responsible for repatriation of their workers imported for contract performance.⁵⁰⁷
 - e. 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,⁵⁰⁸ as the United States is a signatory to the ICoC and founding member of ICoC Association.
11. The Agreement on Government Procurement (GPA):
- a. The World Trade Organization's GPA contains broad categories of obligations that procurement agencies must comply with in soliciting bids and in selecting suppliers.⁵⁰⁹ The GPA includes non-discrimination provisions,⁵¹⁰ as well as limits on conditions for participation⁵¹¹ and technical specifications.⁵¹²
 - b. The GPA specifies that nothing in the agreement shall

detect potential abuses and implement the government's zero tolerance policy.⁵⁴² While DOD and DOS monitored some contractor labor practices, the departments largely focused their efforts on monitoring contractor-provided goods and services.⁵⁴³

- c. Moreover, the U.S. government has not yet coordinated its policies across all departments and agencies regarding international frameworks and initiatives. For example, the policies of DOD and DOS differ regarding the International Code of Conduct for Private Security Service Providers (ICoC).⁵⁴⁴ While DOS has announced that it will require ICoC Association membership for bidders,⁵⁴⁵ the Office of the Deputy Assistant Secretary of Defense stated that "DoD will not require signature to the ICoC or certification and oversight by the ICoC Association as a condition of any [DOD] contracts."⁵⁴⁶ The U.S. government has thus not reformed its policies to make them consistent both internally and with U.S. responsibilities as a signatory to the ICoC and founding member of the ICoC Association. The UN Working Group highlighted in its U.S. site visit report that it should "become government policy across the board to require membership of the code of conduct in relevant contracts."⁵⁴⁷
7. International Trade Agreements:
- a. While the language of U.S. FTAs names specific labor rights agencies may seek to defend, environmental provisions in such FTAs are currently unclear, leaving FTAs in general open to inconsistencies and potentially

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be construed to prevent a State from imposing or enforcing measures: “a) necessary to protect public morals, order or safety; b) necessary to protect human, animal or plant life or health; c) necessary to protect intellectual property; or d) relating to goods or services of person with disabilities, philanthropic institutions or prison labour.”⁵¹³

12. U.S. Free Trade Agreements (FTAs):

- a. The FTAs are another major source of procurement obligations in U.S. trade treaties. Since 2007, each of the four free trade agreements negotiated by the United States has included language allowing for environmental and labor protections.
- b. Specifically, the agreements protect the procuring agency’s ability to promote the conservation of natural resources and the environment and require a supplier to comply with generally applicable workers’ rights laws, minimum wage and work hour provisions, and occupational health and safety standards.⁵¹⁴

13. See Section 1.5 for a discussion of procurement laws and regulations and Section 7 for regulations regarding private security providers.

The second indicator and scoping question address measures taken by the State to raise awareness and respect for human rights through government procurement. Campaigns to raise awareness are a simple step States can take to push businesses to respect human rights on their own accord.

Below is a non-exhaustive list of other relevant and existing **awareness-**

making them more difficult for agencies to implement in practice.

- b. Similarly, the Agreement on Government Procurement offers States crucial leverage in protecting public health and safety, but its vagueness offers little guidance for procuring agencies invoking these protections.

Below is a brief explanation of the gaps in U.S. government **awareness-raising** measures to support human rights in government procurement:

1. Contracting Officers and Interagency Awareness

- a. While the release of the U.S. Government Approach on Business and Human Rights and the associated workshops are important tools to raise awareness of human rights in government procurement, the federal government does not yet reach out to contracting officers on human rights nor spread such information across agencies in a formal manner, such as through policy manuals or specifically designed trainings for contracting officers in charge of agency procurement. The Department of State’s current approach is aimed at a wider public audience, but other government bodies have not targeted federal officials with discretion to change procurement guidelines and promote interagency awareness.

Below is a brief explanation of the gaps in U.S. government activities for **screening processes**:

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raising measures to support human rights in government procurement:

1. In 2013, the Department of State launched the U.S. Government Approach on Business and Human Rights, which illustrates how the federal government approaches business and human rights by providing relevant examples of existing U.S. laws, regulations, and policies.⁵¹⁵ The document also considers business and human rights in international guidelines and foreign policy, new and emerging tools, and best practices for companies.⁵¹⁶
2. Since the launch, the Department of State has convened a series of stakeholder workshops on the UNGPs, including a January 2014 workshop expressly addressing procurement and human rights.⁵¹⁷

The third indicator and scoping questions consider screening processes adopted by the State to promote business respect for human rights, including preferential treatment in or exclusion from the bidding process based on a business' demonstrated human rights record. Robust and uniform screening processes allow various government agencies to streamline their contracting processes through shared information and collaboration.

Below is a non-exhaustive list of other relevant and existing **screening processes** to support human rights in government procurement:

1. Contract by Negotiations:
 - a. Agencies can use negotiated contracts based on various incentives.⁵¹⁸ One of the most flexible

1. Responsible Contractors:
 - a. The standard of contractor responsibility (as discussed under "Implementation Status") only considers limited factors addressing contractors' ethics and integrity. This standard has not typically been employed to evaluate contractors' human rights records. This tool has not yet been expanded to exclude a contractor if they lack necessarily operational controls and safety programs to cope with high risk of human rights violations.⁵⁴⁸
2. Contractor Integrity and Ethics
 - a. 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.⁵⁴⁹ 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.⁵⁵⁰
3. Federal Awardee Performance and Integrity Information System (FAPIS):
 - a. While the FAPIS can be a useful tool for agencies in determining contractor responsibility, it is still a very limited tool, especially with regard to human rights. It includes information on trafficking, but does not address any other human rights violations. The FAPIS has not yet been expanded to include agency or court findings that a contractor has violated another country's domestic law that implements a human right.⁵⁵¹

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negotiation options — available only in dealing with service contractors — empowers agencies to select the bidder that offers the government the “best value.”⁵¹⁹ Agencies must always consider price and quality in assessing the “best value,” but agencies have some discretion to identify other factors, such as capacity to manage a supply chain for human rights compliance.⁵²⁰

2. Federal Awardee Performance and Integrity Information System (FAPIS):

- a. 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, etc.⁵²¹ 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.
- b. 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.⁵²² Congress also included two FAPIS provisions relating to human rights:
 - i. A substantiated allegation in an administrative proceeding for prohibited trafficking activities;⁵²³ and
 - ii. A delegation of authority to the FAR Council to include “other information” for purposes of determining whether a contractor is responsible.⁵²⁴

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The fourth indicator and scoping questions address monitoring and oversight conducted by State agencies to promote business respect for human rights. Ongoing monitoring and oversight throughout the contract is essential to ensure that contract terms and legislative requirements are indeed being carried out in practice.

For a discussion of **monitoring and oversight** provided by State agencies to support human rights in government procurement, see Section 6.1.

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| States should promote respect for human rights by business enterprises with which they conduct commercial transactions. | |
| Commentary to Guiding Principle 6 | |
| States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States—individually and collectively—with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law. | |
| 6.1. Public Procurement | |
| Which types of requirements or incentives to respect human rights can be found in legislative measures or in terms of public procurement? | |
| Indicators | Scoping Questions |
| Planning for Procurement Needs and Risks | Have State agencies decided whether their contractors must comply with specific human rights or protect against defined human rights harms as a contract obligation? If so, have State agencies made an effort to expand the scope of protection and clarify specific human rights definitions to resolve vagueness? |
| Providing Notice During Bid Solicitation | Do State agencies notify potential contractors when there is a significant risk of a human rights violation that undermines fair competition? Does such notice trigger specific disclosure and compliance obligations? |
| Screening and Selection | In addition to evaluating price and capacity, do State agencies evaluate whether potential contractors are responsible, based on integrity and business ethics and on compliance with domestic law that protects the safety and health of workers and communities? Do State agencies engage in selective or targeted public procurement, such as preferential award to discriminated groups (for example, ethnic minorities) or to companies working to achieve specific human right objectives (for example, gender equality)? Do State agencies require contractors to certify that they know their subcontractors, including specific locations of production or supply, and that they have |

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| | management systems to ensure compliance? Do State agencies exclude companies with commercial contracts in high-risk countries or a bad human rights record from public procurement? |
| Award Stage | Do State agencies have criteria and sub-criteria for what constitutes the most economically advantageous tender, including human rights criteria? Have State agencies taken steps to clarify how human rights standards and policies might be used to form part of the award criteria for a particular contract? Do State agencies require contractors to disclose information on their supply chain, including specific subcontractors and the addresses of factories or sites of supply? Do State agencies confirm a contractor's assurances and required development of compliance plans during the award stage? |
| Contract Terms | Is the State taking steps to ensure that human rights requirements, material to the procured good or service, are a part of contractual performance clauses? Have State agencies inserted compliance obligations into contract terms? When a State agency identifies a risk of harm or human rights violations, does it authorize contract officers to insert into the contract an obligation to comply with the domestic law of the country of production or supply? |
| Auditing and Monitoring | Do State agencies have information systems to audit and monitor contractors to ensure that the contractor meets its performance or compliance obligations and does not adversely impact human rights? Do such systems respond to work complaints? Are such systems independent from, yet accountable to, the State? |
| Enforcement of Contract Terms and Corrective Action | Do State agencies dedicate staff to enforcement of the contract terms and provide them with detailed policies? Have State agencies put in place procedures to correct adverse human rights impacts identified, such as financial or other remedies if a contractor violates human rights? Do the procedures favor changing the behavior of the contractor to improve their human rights performance rather than |

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| | simply terminate the relationship? Do State agencies provide for due diligence as both a defense and as a remedy for breach of compliance standards? |
| Other Measures | Have State agencies put any other measures in place to ensure that public procurement complies with human rights protection? |
| Implementation Status | Gaps |
| <p>The first indicator and scoping questions consider the State’s attempts to plan for procurement needs and risks through contract obligations with clear human rights definitions. Such forethought ensures agencies — and the businesses with which they contract— will anticipate situations most ripe for human rights violations and be prepared to prevent them.</p> <p>Below is a non-exhaustive list of other relevant and existing plans for procurement needs and risks provided by State agencies to support human rights in government procurement:</p> <ol style="list-style-type: none"> 1. Federal Acquisition Regulation (FAR): <ol style="list-style-type: none"> a. 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 notably does not provide for protection from life-threatening conditions while working abroad).⁵⁵² b. 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 2014⁵⁵³ to comply with the Executive Order 13627 “Strengthening Protections against Trafficking in | <p>Although the U.S. government has adopted measures discussed under “Implementation Status” that set out the expectation that federal contractors will respect human rights in their operations, there are gaps in these measures.</p> <p>Below is a brief explanation of the gaps in U.S. government activities’ plans for procurement needs and risks:</p> <ol style="list-style-type: none"> 1. The Federal Acquisition Regulation (FAR): <ol style="list-style-type: none"> a. As mentioned previously, the FAR does not provide for contracting officers to consider respect for the freedom of association (e.g., the right to bargain collectively), freedom of expression, the free exercise of religion, the right to dignity, the right to privacy or a prohibition on torture.⁵⁸⁷ Furthermore, its definition of “forced labor” is inconsistent with the ILO’s definition.⁵⁸⁸ b. Though many human rights are protected under U.S. law, federal procurement standards do not hold corporations accountable for compliance with domestic law in the country of production. This is a problem when a contractor sources production through low wage labor abroad, which frequently occurs in a system of lowest price competition.⁵⁸⁹ |

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Persons in Federal Contracts.”⁵⁵⁴

2. Anti-Trafficking Rules and Legislation:

- a. The United States recently increased its focus on anti-trafficking and has strengthened business regulations accordingly. In 2013, the Senate passed the Trafficking Victims Protection Reauthorization Act of 2013. Among other measures, the Act directs U.S. agencies to establish partnerships with private entities, including corporations, to combat trafficking and ensure that corporate actions do not support it. It also amends Racketeer Influenced and Corrupt Organizations Act (RICO) to include fraud in foreign labor contracting as a predicate offense.⁵⁵⁵
- b. Congress passed the Trafficking Victims Protection Act (TVPA) of 2000, which is the first U.S. federal law to address human trafficking. The TVPA was amended in 2013 to include the Ending Trafficking in Government Contracting Act, which prohibits contractors, subcontractors, and their employees from engaging in trafficking or forced labor when performing a U.S. government contract or subcontract.⁵⁵⁶
- c. Congress passed National Defense Authorization Act for Fiscal Year 2013 containing Title XVII, entitled “Ending Trafficking in Government Contracting,” which provides tools to enforce anti-trafficking provisions, further develop internal procedures, further clarify compliance and amend the FAR, among other provisions.⁵⁵⁷
- d. The U.S. Department of Labor also released a “Reducing Child Labor and Forced Labor” toolkit in

- c. Additionally, procurement officers have limited flexibility and discretion to identify or take steps to address possible risks⁵⁹⁰ and the FAR “provides scant guidance to agencies that would prefer to avoid contractors who source production to another country and then fail to pay minimum wage in that country.”⁵⁹¹

Below is a brief explanation of the gaps in U.S. government activities in **providing notice during bid solicitation**:

1. Federal Acquisition Regulation (FAR):

- a. As noted under “Implementation Status,” the FAR requires agencies to notify bidders about compliance requirements and requires special procedures for bidders in certain countries with higher risk of human rights violations. These are important steps; however, these regulations leave gaps in supply chains. For example, the FAR requires only certification of “ignorance of violations” rather than a more affirmative certification from companies stating that they know with whom they subcontract, including the subcontractor’s location and access to management systems that ensure compliance.⁵⁹² Unless a purchasing agency has knowledge that a contractor’s certification is false, the FAR requires the agency to rely on it.⁵⁹³
- b. Another gap is that certification only applies to an “end product” and not the components of the product, even if there is evidence that components were produced with forced child labor.⁵⁹⁴ Contractor

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2012, which includes assessment and training elements and examines best practices.⁵⁵⁸

3. Broad sectoral policies:

- a. 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.⁵⁵⁹ For a discussion of sector risk assessments, see Section 1.6.

The second indicator and scoping questions address the State's efforts to provide notice during bid solicitation when there is significant risk of human rights violations that could undermine fair competition or trigger specific disclosure and compliance obligations. This not only reminds contractors of the State's commitment to human rights, but also offers them a chance to correct their behavior before facing consequences.

Below is a non-exhaustive list of other relevant and existing State attempts to **provide notice during bid solicitation** to support human rights in government procurement:

1. Federal Acquisition Regulation (FAR):
 - a. The FAR requires that agencies notify potential contractors of capacities required of responsible bidders, including compliance obligations or performance standards.⁵⁶⁰ "Special notice" and certification is required for contractors from countries included in the Department of Labor's list of products

certification is not yet required along each step of the supply chain.

Below is a brief explanation of the gaps in U.S. government activities in **screening and selection, award stage, and contract terms**:

1. Federal Awardee Performance Integrity Information System (FAPIS):
 - a. See Section 5.1 for a discussion on FAPIS and gaps in the screening and selection process.
2. Sweatfree Purchasing Consortium:
 - a. These criteria have not yet been adopted and implemented by agencies in their screening and selection processes.
3. Screening and selection:
 - a. Purchasing agencies do not allocate points based on the quality of a competitor's compliance plan for protecting human rights, which could then be integrated into the final evaluation of the award stage.⁵⁹⁵
 - b. In terms of more robust protection, agencies do not yet require that the winning bidder establish a clean supply chain, evaluated with compliance plans similar to those used to control trafficking.⁵⁹⁶
 - c. Also, agencies do not yet require bidders to qualify for pre-award clearance for capacity to protect human rights, similar to that used to prove capacity to prohibit discrimination.⁵⁹⁷
 - d. However, any of these approaches would require the purchasing agency to have authority to require

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and countries of origin where there is significant risk for forced child labor.⁵⁶¹ If the bidder's product is on the DOL list and the contract exceeds a certain dollar value, a bidder must either:

- i. Certify that it will not supply the product from a country on that list or
- ii. 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.⁵⁶²

The third indicator and scoping questions consider screening and selection evaluations conducted by State agencies to promote business respect for human rights — including targeted public procurement, subcontractor certifications, or the exclusion of companies with bad human rights records.

Below is a non-exhaustive list of other relevant and existing **screening and selection** evaluations conducted by State agencies to support human rights in government procurement:

1. Sweatfree Purchasing Consortium:
 - a. 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

compliance with the human right at risk, which would be difficult to implement under the current limitations of the Federal Acquisition Regulation.⁵⁹⁸

4. Federal Acquisition Regulation (FAR):

- a. Unfortunately, the human rights provisions in the FAR's present incarnation are mostly patchwork with major gaps. A major recurring gap is that most compliance obligations only apply within U.S. territory.⁵⁹⁹
- b. While the FAR Council's proposed rule for the Trafficking Executive Order would require contractors to provide compliance plans and would apply to both supplies and services, it would not apply to commercially available off-the-shelf items.⁶⁰⁰ This exclusion is a significant gap, particularly because it denies contract officers authority to request a compliance plan even when the commercial product is on the DOL's list of prohibited products made with forced or indentured child labor or even when there is known evidence that a principal good being purchased was produced with forced labor or trafficking.⁶⁰¹
- c. The FAR does not yet authorize agencies to insert contract clauses that require supply chain transparency and compliance with domestic laws in the host country.⁶⁰² The FAR also does not authorize agencies to incorporate contractors' assurances or compliance plans as contract obligations.⁶⁰³ There appears to be a lack of transparency in agency decision-making processes, and as yet no established policy of human rights integration into contracts or the

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- and prevent future ones, and provide appropriate remedies if their supply chain causes harm.⁵⁶³
2. Federal Acquisition Regulation:
 - a. The FAR appears to be moving in the direction of requiring due diligence by its contractors.⁵⁶⁴
 - b. Under the FAR, agencies may include human rights factors to evaluate potential contractors.⁵⁶⁵ Before awarding a contract, an agency must first determine that a contractor is “responsible”⁵⁶⁶ according to listed standards. However, in practice, agencies have rarely excluded contractors based on this guidance.
 3. The Federal Property and Administrative Services Act of 1949:
 - a. This Act grants the President authority to establish policies to advance the “economy” or “efficiency” of federal procurement.⁵⁶⁷ This authority was most recently invoked in signing the Fair Pay and Safe Workplaces Executive Order on 31 July 2014,⁵⁶⁸ which “sets compliance with domestic labor laws as a basic standard of integrity and business ethics”⁵⁶⁹ and “requires the Secretary of Labor to develop guidance on the weight of violations.”⁵⁷⁰
 4. The Office of Foreign Assets Control (OFAC):
 - a. OFAC is an agency within the U.S. Department of the Treasury charged with administering trade sanctions.⁵⁷¹ OFAC keeps a list of Specially Designated Nationals with whom financial transactions are prohibited, extending to entities that are majority-owned by an individual on the list.⁵⁷²
 - b. In its guidance, OFAC makes clear that it will hold banks responsible for failing to conduct due diligence

training of contracting officers.

5. The Federal Property and Administrative Services Act of 1949:
 - a. This Act’s orders are limited both in authority and in scope.⁶⁰⁴ The 2014 Order does not cover tax, antitrust, environmental, or consumer laws.⁶⁰⁵

Below is a brief explanation of the gaps in U.S. government activities in **auditing and monitoring**, as well as **enforcement of contract terms and corrective action**:

1. The Federal Acquisition Regulation (FAR):
 - a. While the FAR offers crucial corrective actions to remedy human rights abuses, these enforcement mechanisms “[require] considerable investigation and agency resources . . . [and] interrupt the government’s flow of goods, services and downstream work,”⁶⁰⁶ and “require the government to restart the procurement process,” discouraging their use as remedies.⁶⁰⁷ While the FAR does offer less severe remedy options, they are not available for all contract obligations.⁶⁰⁸
 - b. In general, the FAR’s procurement rules were not designed to protect human rights or provide relief to victims, but instead to enable the government to enforce its contracts and protect taxpayer dollars.⁶⁰⁹ The FAR relies on prosecutors, enforcement agencies, and courts that can award damages for negligence to respond if a contractor violates the law or hurts people.⁶¹⁰ The FAR does not yet have an accountability mechanism.
 - c. The FAR provides that due diligence is a defense in a

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on their customers and may even hold intermediary banks responsible for failing to block transactions with blocked persons.⁵⁷³

The fourth indicator and scoping questions address how human rights standards and other criteria are considered by the State in the award stage of federal procurement. States that clearly reward companies with good human rights records will encourage other contractors to follow suit.

Below is a non-exhaustive list of relevant and existing standards designed to support human rights in government procurement at the **award stage**:

1. The Federal Acquisition Regulation (FAR):
 - a. When awarding contracts, the FAR requires most domestic contractors and subcontractors to develop a written affirmative action plan for each of its establishments.⁵⁷⁴ The agency must assure that the contractor has the capacity in place to avoid discrimination,⁵⁷⁵ as well as provide for complaints and investigations.⁵⁷⁶ The FAR also requires special provisions for dangerous work or work in dangerous areas.⁵⁷⁷ Even so, these regulations are limited in scope, as they do not apply on all territories, or to all types of contracts⁵⁷⁸.

The fifth indicator and scoping questions consider contract terms inserted by the State to prevent human rights violations in federal procurement. These protections are essential to ensure that

proceeding for suspension or debarment,⁶¹¹ but does not yet take this one step further — naming due diligence as not only a defense, but also as a contract remedy.⁶¹² This would allow the agency to implement a contract-specific approach to due diligence, rather than having to resort to termination.⁶¹³

- d. The FAR's provisions regarding full or partial termination are specific to certain types of contracts.⁶¹⁴ On the one hand, this flexibility would permit an agency to terminate a contract for violations of human rights compliance, certification, or due diligence — but only if those standards are explicit obligations in the contract.⁶¹⁵ On the other hand, the FAR does not provide any consistent guidance on full or partial termination, leaving it to individual agencies to be proactive on human rights enforcement.
- e. The FAR's mid-range remedies are generally available for violations of contract performance obligations, but not all of these remedies are available for violations of human rights standards.⁶¹⁶ Remedies also vary from one human right to the next.⁶¹⁷ The FAR does not yet clarify that mid-range remedies apply to all contract obligations, including compliance with human rights and domestic laws that implement those rights.⁶¹⁸
- f. Further, Congress reduced the staff capacity at agency procurement offices by well over 50% in the 1990s, leaving agencies with precious few resources to give these tasks the attention they deserve.⁶¹⁹ The enforcement capacity at some agencies is so weak that on many occasions, agencies have awarded contracts

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companies do more than pay lip service to human rights, offering the State a remedy if something goes wrong.

Below is a non-exhaustive list of relevant and existing **contract terms** inserted by State agencies to support human rights in government procurement:

1. Federal Acquisition Regulation
 - a. In 2013, the FAR Council proposed amendments to strengthen the prohibition on trafficking, including greater specificity on prohibited practices and a contract obligation to investigate evidence of trafficking. The proposed rule also requires contractors to provide and publicly post a compliance plan upon request by the contract officer.
 - b. The FAR authorizes agencies to insert an accident prevention clause requiring precautionary measures to control cost and comply with workplace safety standards issued by the DOL in a solicitation and contract for certain construction and demolition projects.⁵⁷⁹ Unfortunately, the clause is limited to work done domestically.⁵⁸⁰

The sixth indicator and scoping questions address whether the State has information systems to audit and monitor contractors to ensure human rights are respected in federal procurement. The seventh indicator and scoping questions consider enforcement of contract terms and corrective action imposed by State agencies to provide for due diligence in federal procurement. Contract terms are meaningless if States do not monitor their contractors' behavior and correct

after another agency excluded the contractor for reasons of fraud, tax evasion, and national security violations.⁶²⁰ A GAO survey suggests that agencies that do the best job at enforcement have three things in common:

- i. A dedicated staff,
- ii. Detailed policies, and
- iii. Willingness and capacity to refer cases for debarment.⁶²¹

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behavior that runs afoul of the contract.

Below is a non-exhaustive list of relevant and existing information systems to **audit and monitor** and then **enforce and correct** contractor compliance with human rights obligations:

1. The Federal Acquisition Regulation (FAR)
 - a. The FAR includes remedies for violation of existing human rights standards such as suspension and debarment, termination and stopping work.⁵⁸¹
 - b. 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.⁵⁸² 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.⁵⁸³
 - c. The FAR also offers some mid-range remedies that do not interrupt an agency's work or require extensive due process, including: suspension, reduction, withholding of payments, reduction of an award fee, and liquidated damages.⁵⁸⁴
2. Foreign Corrupt Practices Act (FCPA): The FCPA allows companies to claim due diligence as a defense, by allowing them to demonstrate the adequacy of their compliance programs as a mitigating factor.⁵⁸⁵ This rule permits the prosecutor to consider the company's due diligence when assessing whether to press charges or what types of penalties to apply.⁵⁸⁶

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| 6.2. Other Commercial Activities Has the State taken measures to promote awareness of and respect for human rights by other enterprises with which the State conducts commercial activities? | |
| Indicators | Scoping Questions |
| Business Partnerships | Does the State take measures to promote respect for human rights among other businesses with which it engages in commercial relationships, such as through business partnerships for economic development and innovation (for example, growth funds, or strategic support for innovation in certain sectors, such as green energy or medical technology)? |
| Implementation Status | Gaps |
| <p>The indicator and scoping question above consider measures the State takes to promote respect for human rights in its business partnerships for economic development and innovation. Any time a State controls, supports or partners with the private sector, it must be sure to honor its commitments to human rights.</p> <p>Below is a non-exhaustive list of relevant and existing measures to protect human rights in federal business partnerships:</p> <ol style="list-style-type: none"> 1. Public Private Alliance for Responsible Minerals Trade: <ol style="list-style-type: none"> a. This public private partnership is “designed to support conflict-free supply chains in the Democratic Republic of the Congo” and to “promote conflict-free sourcing from within the region.”⁶²² 2. Global Entrepreneurship Program: <ol style="list-style-type: none"> a. This program “seeks to empower local people and businesses to become full participants in their | <p>Although the U.S. government has adopted measures promoting awareness of and respect for human rights through its business partnerships, there are gaps in these measures.</p> <p>Below is a brief explanation of some of the gaps in U.S. government activities for business partnerships:</p> <ol style="list-style-type: none"> 1. American Recovery and Reinvestment Act of 2009: <ol style="list-style-type: none"> a. While the Act incorporates the important human rights and labor standards present in most government contracts, it also possesses many of the same gaps in protection explored throughout Sections 4, 5, and 6. The business partnerships supported by the Act are not yet explicitly conditioned upon human rights requirements, including due diligence measures. The Act does add crucial whistleblower protections, enhancing the government’s ability to monitor and |

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economies through entrepreneurship.” The program works with over 100 private partners, ranging from companies to universities to nongovernmental organizations.⁶²³

3. American Recovery and Reinvestment Act of 2009:

- a. As the largest economic stimulus bill since the Great Depression, the American Recovery and Reinvestment Act created a litany of public-private partnerships, including road construction, transit, water and wastewater management, energy infrastructure, broadband deployment, and health information technology development projects.⁶²⁴
- b. The Act provides more than \$45 billion in appropriations for energy programs, mainly for energy efficiency and renewable energy.⁶²⁵ It also contains important whistleblower protections, modeled after existing statutes enforced by the Department of Labor.⁶²⁶ Specifically, the Act prohibits any contractor, subcontractor, or other recipient of stimulus funds from retaliating against an employee who discloses information about a substantial and specific danger to public health, an abuse of authority, or a violation of law, rule, or regulation related to the contract or grant.⁶²⁷

For a discussion of other business partnerships with the U.S. government, see Sections 4.1 and 4.2.

enforce its protections, but such a large spending bill will inevitably have wide-ranging human rights implications. Without robust protection for labor standards, supply chain management, and procurement standards, at least some of that spending is sure to support human rights violations that go against U.S. national ideals.

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Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current practices, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Commentary to Guiding Principle 7

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself—where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas.

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They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

7.1. Guidance

Does the home State play a role in assisting both corporations and host States to ensure that businesses are not involved with human rights abuse in conflict-affected areas?

| Indicators | Scoping Questions |
|--|--|
| Host State relationship | Does the State seek to ensure that it is informed of the role of corporations headquartered within its jurisdiction in conflict-affected areas? Does the home State engage with the host State in ensuring that businesses are respecting human rights? |
| Business Guidance | Does the State provide guidance for companies operating in conflict-affected areas on what specific human rights issues that the companies should be aware of and pay specific attention to in their due diligence process (such as gender and sexual violence, discrimination, and contributing to conflict through finance)? |
| Implementation Status | Gaps |
| This GP inquires about measures the U.S. government is taking to ensure that business enterprises operating in conflict-affected areas are not involved with human rights abuses. This section addresses the U.S. government's interactions with host States as well as its guidance to businesses in conflict-affected areas. Communication with host States and guidance to businesses operating in conflict-affected areas are important to ensure that U.S.-based companies are respecting | <p>Gaps remain in the guidance the U.S. government provides regarding businesses operating in conflict-areas.</p> <ol style="list-style-type: none"> Publicly available guidance focuses heavily on conflict minerals. Despite strengths in target areas like conflict minerals, there appears to be no single overarching law (and therefore no policy or guidance) covering all human rights abuses by all |

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human rights, which are highly vulnerable to abuse during times of conflict.

The first indicator and scoping question look at the **host State relationship**, specifically, whether the U.S. government engages with the host State and seeks to be informed about the activities of U.S.-headquartered companies in the host State. Host State engagement allows the United States to take appropriate action to protect human rights when U.S.-headquartered companies engage in or contribute to human rights abuses.

1. The United States works with local embassies on human rights issues; however, it is unclear to what extent this coordination focuses on business and human rights. The U.S. embassies in Honduras, Burma, and Thailand are examples of efforts specifically devoted to Business and Human Rights.
2. Other embassies contain discussions of human rights but fail to link them explicitly to corporate engagement.⁶²⁸

The second indicator and scoping question address the **guidance** the U.S. government provides to businesses operating in conflict-affected areas regarding potential human rights abuses of which they should be cognizant. Equipping businesses with knowledge about potential issues in conflict-affected areas helps to safeguard human rights as businesses can work this knowledge into their business plans and risk assessments.

The United States has strong policy in target areas, and relevant agencies regularly issue compliance guidance. Measures the U.S. government has developed to help guide businesses to respect human

businesses in all conflict zones.⁶⁴⁰

2. Country-specific commercial guides published by the Department of Commerce and the Department of State's yearly country-specific human rights reports do not contain any significant focus on business and human rights, even in conflict-affected areas. Further, while the U.S. Government Approach on Business and Human Rights report contains a section for best practices for companies, these practices are not tailored to operating in conflict-affected areas.⁶⁴¹
3. A 2013 report by the Center for Strategic and International Studies' (CSIS) Working Group on Private-Sector Development in Fragile States affirmed that more tailored guidance is needed in conflict-affected areas. The CSIS Working Group reported a greater need for inter-governmental cooperation and coordination with businesses:

U.S. businesses also want to see an increase in communication with U.S. government entities in FCV states [countries impacted by fragility, conflict, and violence]. The Department of State can provide counseling to help businesses become familiar with the situation on the ground. They have tools that can assist in fostering entrepreneurship. But overall USAID, the Embassies' Economic Sections, the Department of State, and the Department of Commerce should coordinate more with U.S. businesses in fragile states in both Washington, D.C., and the field."⁶⁴²

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rights in conflict-affected areas include the following:

1. The U.S. Department of Commerce publishes country-specific commercial guides that provide information relevant to conducting business in each country.⁶²⁹ Additionally, the Department of State publishes yearly country-specific Human Rights Reports.⁶³⁰
2. The Office of Commercial and Business Affairs (CBA) coordinates Department of State efforts to support U.S. businesses operating internationally. It provides guidance to companies as well as problem-solving assistance, including “encouraging corporate social responsibility” and informing companies about corruption and bribery.⁶³¹ CBA also coordinates with embassies and consulates, which are all staffed with Commercial Officers versed on business concerns within the country where they are based.⁶³²
3. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) guides U.S. companies in due diligence and reporting with regard to conflict minerals:
 - a. Section 1502 requires companies registered with the Securities and Exchange Commission (SEC) to report on whether they obtain minerals from the Democratic Republic of Congo (DRC) or surrounding countries, and if so, whether those minerals finance armed groups.⁶³³
 - b. Congress, when drafting Section 1502, was concerned with human rights in the DRC and surrounding areas. The preamble to the SEC’s implementing rules, promulgated in 2012, states that Congress, “[t]o accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict, . . . chose to
4. Information not yet available includes the legal and bureaucratic structure of the home state and investment requirements.⁶⁴³ Human Rights, including gender and sexual violence, discrimination, and contributing to conflict through finance, should also be a focus.
5. The CSIS Working Group also recommended that the U.S. government “[could] do more to integrate themselves into the local economy by . . . coordinating with the host government.”⁶⁴⁴
6. As mentioned in “Implementation Status,” the U.S. Department of Commerce published a list in 2014 of conflict mineral processing facilities. While the list provides all known processing facilities for gold, tin, tungsten, and tantalum, it does not specify which facility processes minerals that financially back conflict in the DRC or surrounding countries; the Department of Commerce cited an inability to determine this information.⁶⁴⁵

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use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.”⁶³⁴

4. As required under Section 1502 of the Dodd-Frank Act, the U.S. Department of Commerce published a list in 2014 of “all known conflict mineral processing facilities worldwide.”⁶³⁵
5. Additionally, the U.S. Agency for International Development and the U.S. Department of State joined with private sector actors in the Public-Private Alliance for Responsible Minerals Trade (PPA). The PPA, launched in 2011, pools resources “to assist with the development of pilot supply chain systems that will allow businesses to source minerals from mines that have been audited and certified to be conflict-free.”⁶³⁶
6. OPIC has backed projects in conflict-affected and post-conflict areas, including at least eleven projects in Afghanistan since 2007 and eight in Iraq since 2008.⁶³⁷ To assist companies, OPIC has provided guidance, including posting “Myths about Helping Small and Medium Enterprises in Post-Conflict Countries” on its webpage, which reports on lessons-learned by OPIC in its involvement in post-conflict projects.⁶³⁸ As discussed in Section 1.4, “OPIC projects must meet Congressionally-mandated requirements regarding protection of the environment, social impacts, health, and safety. The guidelines and procedures are based in large part on environmental and social impact assessment procedures applied by organizations such as the World Bank Group, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the U.S. Export Import Bank. Projects that are likely to have significant adverse environmental or social impacts are

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| disclosed to the public for a comment period of 60 days.” ⁶³⁹ For more information about OPIC, see Section 1.4. 7. For further information, see Sections 1.5 (U.S. laws and regulations protecting against business-related human rights abuses), 2.1 (U.S. measures with extraterritorial effects), 3.3 (required reporting by businesses), 3.4 (U.S. guidance and incentives for companies to respect human rights), and 6 (procurement; human trafficking and forced labor). | |
| 7.2. International Frameworks and Initiatives | |
| Has the State officially supported or implemented international frameworks and initiatives on the private sector role in conflict-affected areas? | |
| Indicators | Scoping Questions |
| Promotion of Initiatives | Does the State participate in and/or promote relevant initiatives (for example, the Voluntary Principles or the International Code of Conduct for Private Security Service Providers)? |
| Implementation Status | Gaps |
| <p>This Section asks about the U.S. government’s support for and implementation of international frameworks and initiatives on the private sector role in conflict-affected areas.</p> <p>The indicator and scoping question request information about whether the U.S. government has participated in and promoted relevant initiatives, such as the Voluntary Principles or the International Code of Conduct for Private Security Service Providers. U.S. participation in these measures promotes the protection of human rights worldwide in conflict-affected areas. It communicates a U.S. commitment to respect human rights in business operations and U.S. encouragement to U.S.-based businesses to do the same.</p> <p>The United States is participating in international efforts to further</p> | <p>International frameworks and initiatives on the private sector role in conflict-affected areas are currently being implemented and weaknesses and gaps are surfacing.</p> <ol style="list-style-type: none"> 1. Civil society has questioned the effectiveness of the Voluntary Principles; EarthRights International and the Centre for Environment, Human Rights, and Development reported on the Voluntary Principles’ implementation in Nigeria, concluding that there were significant gaps.⁶⁵³ 2. Academics and civil society have criticized the Kimberly Process for failing to evolve and adequately address the problem of conflict minerals.⁶⁵⁴ 3. Calls for implementation into law, including audits and disclosure,⁶⁵⁵ have been made. |

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address corporate violations in conflict zones, including international efforts to convene states, as well as specifically targeted initiatives.⁶⁴⁶ The United States has **promoted** the following **initiatives**:

1. The United States is participating in the OECD and World Bank work on governance zones and fragile states, as well as the Kimberley Process on conflict diamonds.⁶⁴⁷ Further, in 2012, the Securities and Exchange Commission recognized the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals in its rulemaking pursuant to Section 1502 of the Dodd-Frank Act.⁶⁴⁸
2. The United States also supports the Voluntary Principles on Security and Human Rights. According to the 2013 U.S. Government Approach and Business and Human Rights report, the U.S. government has contributed more than \$1 million dollars in outreach and implementation of these principles.⁶⁴⁹
3. The United States is a founding member of the International Code of Conduct for Private Security Providers Association.⁶⁵⁰ Additionally, the United States has announced that it will require contractors to abide by the International Code of Conduct for Private Security Providers; external oversight mechanisms for U.S. enforcement of this commitment are under development⁶⁵¹.
4. The United States has signed the Montreaux Document on Private Military and Security Companies, a multilateral initiative proposed by the ICRC and Switzerland that was finalized in 2008.⁶⁵²
5. See Section 1.4 for additional information on U.S. participation in standards and initiatives relevant to business and human rights.

The U.S. government also needs to coordinate policies regarding **international frameworks and initiatives**.

1. The policies of the Department of State and the Department of Defense differ regarding the International Code of Conduct for Private Security Service Providers (ICoC).⁶⁵⁶ While the Department of State has announced that it will require ICoC Association membership for bidders,⁶⁵⁷ the Office of the Deputy Assistant Secretary of Defense states that DOD “will not require signature to the ICoC or certification and oversight by the ICoC Association as a condition of any [DOD] contracts.”⁶⁵⁸ Policies are neither consistent across agencies nor with the United States’ responsibilities as both a signatory to the ICoC and a founding member of the ICoC Association.
2. The United States has not promoted other initiatives such as the Tourism Child-Protection Code of Conduct (The Code). The Code protects against the sexual exploitation of children — an issue of heightened concern in conflict-affected areas. The Code is comprised of five voluntary guidelines for businesses and requires annual reporting on the implementation of the guidelines. Thirty-nine U.S. companies had become members of the Code as of December 2014.⁶⁵⁹

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| 7.3. Supportive Measures | |
| Does the State investigate company activities in conflict-affected areas, act upon these investigations, and provide redress? | |
| Indicators | Scoping Questions |
| Investigative Measures | Does the State have a procedure for investigating company activities in conflict-affected areas (for example, through the appointment of a mission that may report to the Parliament or asking the local embassy to investigate in the host State and report to relevant authorities in the home State)? |
| Follow-Up and Remedial Measures | Does the State have a procedure for follow-up on issues identified through the investigative process (for example, through the denial or withdrawal of existing public support or services to business enterprises that are involved in human rights abuse or other crimes)? Has the State developed mechanisms of extraterritorial criminal liability? Is it possible for the State to impose sanctions on persons and entities for example, by seizing equipment or freezing assets? |
| Implementation Status | Gaps |
| <p>This Section inquires about supportive measures taken by the U.S. government with regard to company activities in conflict-affected areas, specifically looking at whether the U.S. government conducts investigations and whether it takes follow-up and remedial measures to address any adverse findings. The potential to be investigated and punished is a powerful deterrent of misconduct. Therefore, it is important that U.S. investigatory and remedial powers over corporations are meaningfully exercised, so that corporate involvement in human rights abuses in conflict-affected areas is curbed.</p> <p>The first indicator and scoping question request information about</p> | <ol style="list-style-type: none"> 1. The United States has not yet expanded its current international engagement in the area of business and human rights to develop a comprehensive approach to engaging with host and peer nations on a practical level, including a comprehensive approach to the work of U.S. embassies abroad. Gaps in regulation and liability may contribute to unpredictability and challenges in the ease of enforcement. 2. The United States does not appear to have country offices devoted to investigating business and human rights issues; regulations tend to require self-reporting. See Section 7.1 for a further discussion of U.S. work with foreign embassies. |

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whether the U.S. government has procedures for investigating company activities in conflict-affected areas. Investigations give teeth to the laws and regulations governing corporate behavior and can help ensure that human rights are being respected by corporations in conflict-affected areas.

Investigative measures that the United States takes include the following:

1. In certain situations, the Department of Justice and the Securities and Exchange Commission can exercise jurisdiction over companies conducting operations internationally, such as under the Foreign Corrupt Practices Act.⁶⁶⁰ This would include conduct occurring in conflict-affected areas.
2. Also, the U.S. United States Department of Treasury's Office of Foreign Assets Control (OFAC) investigates violations of economic sanctions, and "[w]here appropriate, OFAC may coordinate its investigative and enforcement activities with federal, state, local and/or foreign regulators and/or law enforcement agencies."⁶⁶¹

The second indicator and scoping question request information about whether the U.S. government has procedures for follow-up on issues identified through the investigative process, discussed above. Having an effective remedy is a critical component of addressing human rights abuses. When investigations indicate there have been violations, the U.S. government should be able to follow up and hold corporations accountable.

The United States takes the following **follow-up and remedial measures**

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when problems are identified through the investigative process:

1. 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.⁶⁶²
 - a. 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.⁶⁶³ OFAC provides information about settlements and civil penalties on its website.⁶⁶⁴
2. The Securities and Exchange Commission (SEC) and Department of Justice (DOJ), which share enforcement authority of the Foreign Corrupt Practices Act (FCPA), have brought enforcement actions against companies as well as individuals.⁶⁶⁵ 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.⁶⁶⁶

For further discussion of civil and criminal liability, see Sections 1.5, 1.6, and 2.1.

7.4. Gross Human Rights Abuses

Has the State put in place measures for addressing the risk of business involvement in gross human rights abuses?

Indicators

Early-Warning Procedures

Scoping Questions

Has the State put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas?

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| Cross-Unit Cooperation | Has the State put in place efforts with the aim of fostering closer cooperation among its development assistance agencies, foreign and trade ministries, and export finance institutions in its capitals and within its embassies, as well as between these agencies and host State actors? |
| Civil and/or Criminal Liability | Has the State introduced civil or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses, including abuses outside of its territorial jurisdiction, as permitted by the UNGPs and international human rights law? |
| Multilateral Approach | Has the State engaged in multilateral approaches to prevent and address acts of gross human rights abuses? Does the State accept the jurisdiction of the International Criminal Court (ICC)? |
| Implementation Status | Gaps |
| <p>In order to examine the measures the United States takes to address the risk that businesses may be involved in gross human rights abuses, this Section looks at early-warning procedures, cross-unit cooperation, civil and criminal liability, and multilateral approaches taken by the U.S. government with regard to business involvement in gross human rights abuses. It is important that the U.S. government work with other entities and U.S.-based businesses to identify the risk of, and possible corporate involvement in, gross human rights abuse.</p> <p>The first indicator and scoping question request information about whether the U.S. government has put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. Early warning would enable businesses to take immediate steps to ensure that they are not contributing to any abuses, thereby minimizing potential abuse.</p> | <p>Gaps remain in the U.S. approach to ensuring corporations are not involved with the commission of gross human rights abuses.</p> <ol style="list-style-type: none"> 1. Early-warning procedures to alert businesses to these abuses need to be developed. 2. Cross-unit cooperation needs to be clarified and enhanced. The federal government does not have a permanent coordinating body that addresses human rights issues. While some of the agencies addressing human rights are listed on humanrights.gov, information regarding interagency cooperation is not readily available. 3. The need for further criminal accountability measures were noted, for example, by the UN Committee on the Elimination of Racial Discrimination (CERD) in its 2013 Concluding Observations on the United States, after finding that U.S. |

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Early warning procedures worldwide are still under development, and are focused on conflict prevention rather than conflict as it relates to business.

1. The U.S. Department of State issues up-to-date conflict warnings, but they are targeted toward travel rather than business.⁶⁶⁷
2. Refer also to Section 7.1, discussing U.S. guidance to businesses operating in conflict-affected areas and existing gaps.

The third indicator and scoping question request information about whether the U.S. government has introduced civil or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses, including outside of its territorial jurisdiction. Those that commit gross human rights abuses should find no safe harbor; it is important that appropriate civil and criminal penalties are put in place and leveraged against corporations that engage in such abuses.

See Sections 1.5, 1.6, and 2.1 for a discussion of **civil and criminal liability**, including existing gaps.

The fourth indicator and scoping question request information about whether the U.S. government has engaged in multilateral approaches to prevent and address acts of gross human rights abuses. To meaningfully address grave human rights abuse, the expertise and capacities of different entities must be pooled and joint efforts undertaken.

companies had committed human rights abuses against indigenous people's abroad. The CERD Committee recommended that the United States consider developing accountability measures for transnational corporations.⁶⁶⁹

With regard to **criminal liability**, there needs to be a renewed momentum of U.S. involvement in **multilateral approaches** to international criminal matters.

1. The United States was central in the creation of the Rome Statute and became a signatory to the treaty. However, the United States remains a non-State Party. After the passage of the American Members' Protection Act (2002), the United States pursued Bilateral Immunity Agreements to shield U.S. citizens from ICC jurisdiction, which was heavily criticized by civil society.⁶⁷⁰ To date, 122 countries have signed the Rome Statute, thereby accepting jurisdiction with the ICC, making the United States an outlier.⁶⁷¹
2. Further, the United States has not yet clarified its position on corporate extraterritoriality and creating robust regimes, both criminal and civil (perhaps including due diligence requirements, as are currently being considered in France), that hold corporations accountable for grave human rights abuses. Also, it is important that the U.S. government creates more detailed and easily available guidance for corporations on existing law and how it is applicable to their business, as the UK has done.⁶⁷²
3. The SEC has denied companies' requests to exclude genocide-free investing from the proxy ballot,⁶⁷³ thereby promoting concern for human rights abuses by businesses. Disclosure and transparency requirements regarding investments that

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| <p>Regarding the United States' multilateral approach:</p> <ol style="list-style-type: none"> 1. The United States has a history of supporting international criminal justice, including the UN War Crimes Commission, WWII tribunals at Nuremberg and Tokyo, and more recent UN and other international tribunals such as that for the former Yugoslavia. The United States was central in the creation of the Rome Statute and became a signatory to the treaty. 2. The United States has participated as an observer in ICC Assembly of States Parties' meetings since 2009. <p>Further, in 2013, the United States expanded its Rewards for Justice program, which offers rewards for the arrest, transfer, or conviction of fugitives of the ICC.⁶⁶⁸ For more about U.S. criminal liability law, see Sections 1.5 and 7.2.</p> | <p>contribute substantially to the commission of grave human rights abuses have not yet been developed so that stakeholders, including shareholders, can make informed decisions.⁶⁷⁴ One example is the Burma Reporting Requirements for Responsible Investment (2013), discussed in Section 2.1.</p> <p>For additional discussion of existing remedies and gaps, see "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business," a 2013 report published by the International Corporate Accountability Roundtable (ICAR),⁶⁷⁵ as well as the forthcoming Pillar III National Baseline Assessment.</p> |
| 7.5. Role of Export Credit Agencies and Insurance Agencies | |
| Does the State ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse? | |
| Indicators | Scoping Questions |
| Special Measures | Has the State put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse? Are there rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures? |
| Implementation Status | Gaps |

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The indicator and scoping question request information about whether the U.S. government has put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse. People's human rights should not suffer at the expense of projects backed by export credit agencies and insurance agencies. Rather, export credit agencies and insurance agencies should ensure that companies take appropriate measures to protect communities from abuse.

The **special measures** the U.S. government as put in place includes the following:

1. See Section 6 for information on procurement, including auditing and monitoring.
2. The Export Import Act of 1945 regulated the Export-Import Bank (Ex-Im), which is the official export credit agency. The governing Act mentions human rights, but does not set out clear goals or actions (instead, it only lists extraordinary circumstances, such as human rights violations, under which credit can be denied).⁶⁷⁶ While Ex-Im conducts human rights due diligence, little is publicly available about the process.
3. The Overseas Private Investment Corporation (OPIC) utilizes human rights criteria in evaluating and selecting projects to finance, including collective bargaining and organizing rights, minimum age for work, prohibition of forced labor, and acceptable work conditions. Additionally, complaints about the social and environmental impact of OPIC supported projects can be received by OPIC's Office of Accountability.⁶⁷⁷ OPIC is internally audited and investigated by USAID's Office of the

Gaps in progress remain in integrating human rights considerations into **export credit and investment guarantee agencies'** policies.

1. Some Export Credit Agencies (ECAs), such as U.S. OPIC "assess projects in terms of their coherence with the State's other international policies, such as the promotion of sustainable development, human rights and good governance. However, these criteria are not assessed via specific questionnaires administered to exporters or investors applying for insurance."⁶⁸⁰
2. Further, civil society has reported on violations of OPIC policy and a failure to conduct proper due diligence in OPIC-backed projects. For example, Accountability Counsel issued a report on 22 January 2014, in conjunction with the filing of a complaint, alleging human rights abuses in an OPIC-backed project in Liberia.⁶⁸¹ Accountability Counsel reported, among other policy failures, that OPIC and Buchanan Renewables, the company who received the loan, failed to consider the project's potential gender impacts, despite operating in a post-conflict context where the conflict was marked by gender violence.⁶⁸² Unfortunately, there were alleged negative gender impacts; female workers reported sexual harassment and abuse on the job.⁶⁸³ This case highlights the gap that appropriate measures have not yet been put in place to ensure such failures do not occur in projects backed by U.S. export credit agencies and insurance companies.
3. Additionally, the Office of Accountability, which can receive complaints from individuals affected by OPIC-backed projects, has been criticized as lacking objectivity, hindering access to remedy because of high procedural requirements, and being

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Inspector General.⁶⁷⁸

4. See Sections 1.4, 4.1, and 4.2 for additional information on OPIC and Ex-Im, including existing gaps.
5. The United States participates in the OECD, which in 2012 revised its Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, specifically including a text on human rights.⁶⁷⁹

understaffed.⁶⁸⁴ The Office of Accountability has not yet been fully reviewed to ensure that it is operating in accordance with the Guiding Principles.

4. The Export-Import Bank does not have a dedicated grievance mechanism, such as the Office of Accountability in OPIC..⁶⁸⁵

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States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

Commentary to Guiding Principle 8

There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices—including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour—to be informed of and act in a manner compatible with the Governments' human rights obligations.

8.1. Policy Coherence

Have efforts been made within the State to support knowledge and understanding for human rights and business and the State duty?

| Indicators | Scoping Questions |
|----------------------------|---|
| Clear Commitment | Has the State developed a firm written commitment to business and human rights, and has this commitment been communicated to governmental departments? Further, does this commitment help to clarify the role of different departments (for example, labor, business, development, foreign affairs, finance, or justice)? |
| Roles and Responsibilities | Has the State developed a clear division of responsibilities to help coordinate human rights and business issues between and across different government agencies and departments? |

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|---|---|
| Resources | Has the State provided the responsible entity or office with adequate resources in terms of economic funding and political backing, in order for it to work actively in contributing to meeting the duty of the State to protect human rights within individual areas of responsibility and expertise? |
| Guidance and Training | Has the State developed guidance material and training to help clarify the roles of different departments in promoting and protecting human rights with regard to the role of business? Does this guidance include specific information on protection of human rights and how this relates to international and regional obligations and commitments (for example, UN, OECD, and regional obligations and commitments)? Does this guidance include specific information on the protection of human rights in trade, with an emphasis on the role of regional bodies and international organizations (for example, the WTO, IFIs (WB, IFC, etc.), and regional IFIs (EBRD, EIB, etc.))? Further, does the guidance provide information on the roles and responsibilities across ministries or agencies (for example, enterprise, labor, development, foreign affairs, agriculture, environment and climate change, financial sector, health, information society policy, and national financial institutions and funds)? |
| Implementation Status | Gaps |
| In order to assess whether the U.S. government has or has not made efforts to support increased knowledge and understanding of State duty with regard to human rights and business, this section presents information on commitments made by the U.S. government to business and human rights, the division of roles and responsibilities between government agencies and departments, the resources that have been allocated to the responsible entity or office, and guidance and training developed by the U.S. government to help clarify the roles | <p>There are significant gaps in policy coherence in the U.S. government in the area of business and human rights.</p> <ol style="list-style-type: none"> 1. While different U.S. government agencies address business and human rights, it is not the focus of these agencies' mandates, such work is not coordinated across agencies, and it is often framed corporate social responsibility.⁶⁸⁹ 2. The UN Working Group, which visited the United States in |

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of various departments in promoting and protecting human rights with regard to the role of business. The State has human rights obligations and must develop appropriate policies and provide necessary training, including regarding how these obligations apply to businesses, to fulfill these obligations.

The first indicator and scoping question request information about whether the U.S. government has developed a firm written commitment to business and human rights, and, if so, whether this commitment has been communicated to governmental departments as well as whether this commitment helps to clarify the role of different departments. A clear expression of commitment signals to businesses that a consideration of human rights during their operations is expected.

The United States has demonstrated a **clear commitment** to business and human rights, including in the following ways:

1. In 2013, the White House launched a comprehensive effort to promote human rights as related to gender and racial equality across agencies, including the Equality Working Group Initiative.⁶⁸⁶
2. See Sections 1.3 and 3.2 for discussions of the announced U.S. National Action Plan and humanrights.gov.
3. In 2013, the U.S. government expressed its commitment to promoting the consideration of human rights in business in its U.S. Government Approach on Business and Human Rights report. According to this publication, the United States' "approach on business and human rights is intended to . . . promote the human rights of people around the world."⁶⁸⁷ See

2013, recommended that the U.S. government undertake an assessment of the cohesiveness of its policy on business and human rights,⁶⁹⁰ as the U.S. government appears to lack policy coherence in its efforts to address business and human rights issues.

3. There appears to be no central, coordinating office dedicated to creating a cohesive summary of U.S. human rights policy, updating it, or creating guidance for its practical implementation across agencies.
4. Humanrights.gov has a reference section listing agencies and their respective human rights programs (Departments of Health and Human Services, Homeland Security, Justice, Labor, State, USAID and the Middle East Partnership Initiative), but the programs are issue-focused (such as human trafficking and war crimes) rather than shaped by an overarching policy.⁶⁹¹ Business and human rights is not a focus. Other agencies that protected rights included in international frameworks, such as the Environmental Protection Agency, are not mentioned.⁶⁹²
5. The United States also lacks a national human rights monitoring body.⁶⁹³
6. The United States also seems to approach business and human rights as a matter of foreign policy, as evidenced by the Department of State's lead on the issue and the focus on foreign policy in the U.S. Government Approach on Business and Human Rights report.⁶⁹⁴ This limitation is reflected in the White House's announcement of the National Action Plan (NAP) on Responsible Business Conduct, which specifically limits the scope of the NAP to promoting "responsible business conduct abroad."⁶⁹⁵ This limited scope is also reflected, although clarified to reflect a somewhat more flexible

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Section 2.1 for additional discussion of the U.S. Government Approach to Business and Human Rights report and other guidance material and gaps.

The second indicator and scoping question request information about whether the U.S. government has developed a clear division of roles and responsibilities to help coordinate human rights and business issues across different government agencies and departments. Clear information about the different responsibilities within the government allows businesses with questions relating to human rights protections to find the proper point person and encourages greater awareness of and knowledge about respecting human rights in business operations.

The following addresses the **roles and responsibilities** among agencies and departments with regard to business and human rights developed by the U.S. government:

1. See Section 1.3 for information on the Department of State's Internet Freedom, Business, and Human Rights team's efforts.
2. Other U.S. government agencies also address business and human rights, such as the Department of Labor. See Section 1.5 for a discussion of national laws and regulations relating to business and human rights, and Section 1.6 for information regarding the relevant state agencies responsible for law enforcement that address business and human rights.

The third indicator and scoping question inquires about the resources that have been allocated to the responsible entity or office for human rights and business, specifically, whether enough resources have been allocated for it to work actively in contributing to meeting the duty of

approach, in the U.S. Department of State's answers to "Frequently Asked Questions" about the National Action Plan, where it is stated, "While some [domestic] efforts may be highlighted as examples in the NAP, they will not be the focus of our process."⁶⁹⁶

7. The United States has been criticized not only for lacking a comprehensive policy and guidance for federal agencies, but also for state and local agencies attempting to implement international standards. While the United States has sought input regarding U.S. treaty reports and human rights actions from state governments and disseminated human rights treaty and report information, there is no comprehensive approach to implementing international standards on business and human rights.⁶⁹⁷
8. While humanrights.gov refers to the Internet Freedom, Business, and Human Rights team working together with other experts, including the Department of State's Office of International Labor Affairs, additional information clarifying the roles and responsibilities across different agencies and between departments is not forthcoming either on humanrights.gov or in the U.S. Government Approach on Business and Human Rights report.

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the State to protect human rights. Resources demonstrate the level of commitment a government has towards a specific initiative and affects the ability to operate effectively.

As noted above, the Department of State's Internet Freedom, Business, and Human Rights team leads the U.S. government's human rights and business' efforts. Regarding human capital **resources**, staffing information and other additional information on available resources does not appear to be publicly available.

The fourth indicator and scoping question request information about whether the U.S. government has developed guidance material and training to help clarify the roles of different departments in promoting and protecting human rights with regard to businesses. Guidance and training ensures that the government is operating consistently and effectively across departments, minimizing waste and maximizing the potential effect its efforts can have.

The following information addresses U.S. government **guidance and training** to different governmental departments and agencies:

1. For a discussion of the relevant State agencies responsible for law enforcement and how they address business and human rights, including gaps in training, see Section 1.6.
2. The Department of State has hosted several workshops with different stakeholders on the UNGPs, focusing on best practices and challenges to implementation.⁶⁸⁸

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| States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts. | |
| Commentary to Guiding Principle 9 <p>Economic agreements concluded by States, either with other States or with business enterprises — such as bilateral investment treaties, free- trade agreements or contracts for investment projects — create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.</p> | |
| 9.1. Bilateral and Multilateral Investment Agreements and Arbitration of Disputes Has the State put in place policies, guidance, monitoring, and reporting for relevant ministries or agencies with regard to the conclusion of bilateral and multilateral investment agreements and with regard to the arbitration of disputes? | |
| Indicators | Scoping Questions |
| Human Rights Provisions in IIAs and BITs | Has the State worked at promoting the inclusion of specific human rights provisions in International Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs)? |
| Inclusion of Social Issues in IIAs and BITs | Has the State worked at promoting the inclusion of social issues, such as the environment, labor rights, or social rights, in International Investment Agreements and Bilateral Investment Treaties? |
| Stabilization Clauses | Has the State put in place measures to ensure that stabilization clauses do not limit the host government's ability to meet its human rights obligations? |
| Implementation Status | Gaps |

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In order to assess whether the U.S. government has put in place policies, guidance, monitoring, and reporting for relevant departments or agencies with regard to bilateral and multilateral investment agreements and with regard to the arbitration of disputes, this section presents information on the inclusion of human rights provisions, social issues, and stabilization clauses in International Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs).

The first and second indicator and scoping question request information about whether the U.S. government has promoted the inclusion of human rights provisions and social issues in IIAs and BITs. These provisions ensure that the United States is acting in accordance with its human rights obligations.

The inclusion of **human rights provisions and social issues in IIAs and BITs** have been promoted by the United States in the following ways:

1. There is limited information publicly available regarding agency or other guidance targeted at including human rights in IIAs and BITs. However, there is evidence from the agreements and treaties themselves as well as from how disputes are handled.⁶⁹⁸ This shows that the United States has been mindful of the need to include civil and human rights provisions in international agreements for some time, and the United States has also led many countries in doing so and insisted that others match its efforts. Over time, practical experience has shown gaps and inadequacies in the approaches the United States has employed, and the need for both more rigorous and more systematic approaches to including human rights in these mechanisms.

United States can better promote the inclusion of **human rights provisions and social issues in IIAs and BITs**.

1. The BIT program's "basic aims" and "core" BIT principles, listed on the Department of State's Bilateral Investment Treaties and Related Agreements website, reflect neither a concern for human rights nor social issues.⁷¹⁶
2. Similarly, with regard to Trade and Investment Framework Agreements (TIFAs), the Office of the United States Trade Representative provides that "[t]he United States and our TIFA partners consult on a wide range of issues related to trade and investment. Topics for consultation and possible further cooperation include market access issues, labor, the environment, protection and enforcement of intellectual property rights, and, in appropriate cases, capacity building."⁷¹⁷ There is no explicit reference to human rights beyond the related areas of labor and environment.
3. The United States can better provide support for treaties post-conclusion, including technical expertise and additional financial support in relation to human rights protections.⁷¹⁸

Also, **arbitration** in this area is still developing and requires support.⁷¹⁹

1. For example, the U.S. Model BIT does not currently extend its arbitration provisions to Article 13, which addresses labor.⁷²⁰ Rather than arbitrate, "[a] Party may make a written request for consultations with the other

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2. Arbitration bodies are increasingly beginning to turn to international human rights agreements when deciding how to interpret investment and trade provisions, and what protections are owed to parties.⁶⁹⁹
3. NAFTA originally included limited human rights provisions,⁷⁰⁰ but it gives precedence to later-negotiated side agreements on labor and the environment.⁷⁰¹ These later agreements more openly promote sustainable development and increase requirements on parties (as well as options for using more stringent domestic laws), in addition to creating complaint mechanisms (although limited).⁷⁰² Labor is less protected even in the side agreements, with parties retaining most rights to set their own labor standards.⁷⁰³ The North American Development Bank and the Border Environment Cooperation Commission were also formed with the intent to facilitate investment in environmental infrastructure.⁷⁰⁴
4. Since 1994, the OECD has found that the United States (in treaties with Canada and Mexico) has included a significant number of environmental and labor provisions in its international investment treaties.
5. Even more recently, the United States has begun adding anti-corruption language to investment treaties.⁷⁰⁵ 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.⁷⁰⁶
6. Notably, the U.S. Model Bilateral Investment Treaty of 2012⁷⁰⁷ includes explicit and lengthy sections on labor and the environment, as well as health and other societal issues, and this language is now "systematically" included in treaties to which the United States is a party.⁷⁰⁸

- Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution."⁷²¹ This does not give these important labor provisions sufficient strength.
2. The U.S. government has not yet amended the U.S. Model BIT, not only to include additional human rights provisions nor to ensure that these provisions are included in what matters can be arbitrated.
 3. Further, lessons can be drawn from criticisms of current and proposed trade agreements. For example, the United States can reevaluate the controversy surrounding NAFTA and perhaps draw lessons from its failures and successes, to be applied to future agreements. NAFTA has been heavily criticized, especially with respect to labor. Criticism extends not only to specific provisions or lack of them, but to the overall structure and the existence of the agreement itself.⁷²²
 4. Additionally, prominent reports conclude that NAFTA created conditions of less, rather than more, accountability for corporations.⁷²³ Environmental reports argue that the agreement encouraged the development of industries that have been harmful to the environment, such as specific types of farming and mining.⁷²⁴ These reports, mostly concluded in 2014, illuminate the complexity of including human rights in trade agreements, showing that despite stated commitments to standards and even provisions for complaints, trade agreements can alter entire structures and balances of

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7. The United States in fact appears to be leading other nations, which may not include such provisions as regularly as the United States does.⁷⁰⁹ The United States also sometimes includes more specific language in agreements with nations that may warrant specific concern.⁷¹⁰
8. 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 2015.⁷¹¹
9. The Trans-Pacific Partnership (TPP) is also under negotiation. The TPP, like the TTIP, is a proposed multilateral free trade agreement that expands the Trans-Pacific Strategic Economic Partnership. Some areas covered include intellectual property, investment, e-commerce, medicines and health, environment, financial regulation, labor rights and agriculture. The U.S. government publicly states that its negotiating objectives include strengthening areas such as labor rights, environmental protections, and anti-corruption, as well as numerous others.⁷¹²
10. See Section 1.5 for additional information on human rights considerations and existing gaps with preferential trade agreements, including NAFTA and BITs.

The third indicator and scoping question request information about whether the U.S. government has put in place measures to ensure that stabilization clauses do not limit the host State's ability to meet its human rights obligations. U.S. companies should not seek to limit their responsibility and State responsiveness to human rights through

power.⁷²⁵

5. Additionally, "[a] number of human rights groups have raised concerns about the transparency of both the TTIP's and the TPP's negotiations and the resulting lack of transparency of the agreements. Leaked documents have raised further concerns about undue corporate influence."⁷²⁶ Potential cited human rights impacts include:⁷²⁷

limiting freedom of expression and Internet users' privacy, wage losses for workers, increasing income inequalities, decreasing access to medicine and medical treatments, inhibiting development of new drugs and having potentially detrimental effects on the environment. The agreement's proposed investor-state arbitration provision [was also criticized for its] impacts on regulation enacted in the public interest

Further efforts can be made by the U.S. government to discourage the use of **stabilization clauses** in the context of human rights and related concerns.

1. For example, the 2012 Model BIT contains an exception in the performance requirements section that allows the State to regulate measures "necessary to protect human, animal, or plant life or health."⁷²⁸ This same provision was in the 2004 Model BIT, and was a point of concern for some members of the Subcommittee on Investment

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| <p>stabilization clauses in contracts. .</p> <p>Human rights organizations have criticized the use of stabilization clauses to limit human rights protections.⁷¹³</p> <ol style="list-style-type: none"> 1. The United States has made some effort to limit the use of stabilization clauses. For example, the 2012 U.S. Model BIT contains a provision allowing for subsequent laws relating to the environment, without regard to the BIT. 2. Article 12(5) states: “[n]othing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”⁷¹⁴ Such language is contained in NAFTA and a large number of other FTAs to which the United States is a party.⁷¹⁵ | <p>of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty that were reviewing the 2004 Model BIT. They expressed that it was unclear whether this provision applied to the whole BIT, and therefore recommended that the 2004 BIT be amended to include a general exception allowing the State to adopt measures relating to health, safety, the environment, and protection of natural resources.⁷²⁹</p> <ol style="list-style-type: none"> 2. Additionally, Article 12(5) of the 2012 Model BIT, referred to under “Implementation Status” does not allow governments to consider environmental concerns.⁷³⁰ |
| 9.2. Government Agreements | |
| Has the State put in place policies and guidance for relevant ministries and agencies with regard to the conclusion of government agreements? | |
| Indicators | Scoping Questions |
| Human Rights in Government Agreements | Does the State take measures to ensure that human rights considerations are made in agreements between the State and corporations? Are such agreements aligned with the UN’s Principles for Responsible Contracts? ⁷³¹ |
| The Role of the Home State | How does the home State ensure that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States? |

| GUIDING PRINCIPLE 9 | |
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| Implementation Status | Gaps |
| <p>In order to assess whether the U.S. government has put in place policies and guidance for relevant ministries and agencies with regard to the conclusion of government agreements, this section presents information on the consideration of human rights in U.S. government agreements and the role the U.S. government plays to ensure U.S.-based companies respect human rights when contracting with home states.</p> <p>The first indicator and scoping question request information about whether the U.S. government has taken measures to ensure that human rights considerations are made in agreements between the U.S. government and corporations. Contracts entered into by the U.S. government should adhere to high standards of human rights protection and serve as a model to businesses in their private contracts.</p> <p>The consideration by the U.S. government of human rights in government agreements is addressed below:</p> <ol style="list-style-type: none"> 1. See Sections 1.5 and 6 for discussions of procurement. 2. Agency policy sets out recruitment and labor practices for U.S. government contracts, including recruitment; wages, hours, leave, and overtime; housing; access to identity documents; and return travel.⁷³² Policy varies among agencies. For example, the Department of Defense and Department of State provide that contractors must at a minimum provide each employee with fifty square feet of personal living space.⁷³³ USAID, however, does not have specific provisions on housing.⁷³⁴ | <p>Gaps exist in U.S. government policy regarding human rights in government agreements.</p> <ol style="list-style-type: none"> 1. For example, the U.S. Government Accountability Office (GAO) released a report in November 2014 titled “Oversight of Contractors’ Use of Foreign Workers in High-Risk Environments Needs to Be Strengthened.” According to this GAO report, current policies and guidance governing the payment of recruitment fees by foreign workers on certain U.S. government contracts “do not provide clear instructions to agencies or contractors regarding the components or amounts of permissible fees related to recruitment.”⁷⁴² Clear, across-the-board guidelines within such government agreements are needed to protect against human rights violations, such as debt bondage in the case of foreign workers in high-risk environments. 2. See Sections 1.5 and 6 for discussions of gaps in procurement regulations. |

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3. The United States has made efforts to ensure that business and human rights are considered in its contracts. For instance, in 2014 the Department of State hosted a workshop on government procurement and human rights to identify best practices and challenges for agencies in protecting human rights through procurement.⁷³⁵

The second indicator and scoping question request information about whether the home State ensures that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States. Doing so expresses the U.S. government's commitment to respecting business and human rights to other countries, and encourages additional respect for human rights in the corporate context.

The U.S. government's **role as the home State** of companies headquartered within its jurisdiction is as follows:

1. See Section 1.5 for information regarding industry-specific protections and Section 2.1 for a discussion of home State measures with extraterritorial implications.
2. See also Section 7.1's assessment of home State efforts with regard to protecting human rights in a business environment in conflict areas.
3. In addition, U.S. companies doing business abroad remain covered by a large portion of U.S. laws, including Title VII and the Americans with Disabilities Act.⁷³⁶ However, these laws (especially labor and anti-discrimination laws) apply only to U.S. citizens and would not apply to foreign nationals.⁷³⁷
4. Transactions that may implicate U.S. national security

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interests are reviewed by the Committee on Foreign Investment in the United States and are covered by the Foreign Investment and National Security Act of 2007.⁷³⁸

5. The United States sometimes limits corporate transactions with nations and individuals via sanctions regimes. The Office of Foreign Assets Control (OFAC) lists individuals with whom financial transactions are prohibited in its Specially Designated Nationals list.⁷³⁹
6. Additionally, laws such as the Foreign Corrupt Practices Act, which makes it unlawful for U.S.-based or U.S.-registered companies to pay foreign government officials for the purpose of obtaining or retaining business.⁷⁴⁰
7. Criminal and civil penalties may apply when a U.S. corporation violates U.S. laws on foreign soil. Survivors of human rights violations have used the Alien Tort Statute (ATS) to pursue remedies for such violations.
8. After the Universal Periodic Review (UPR) Process of 2010, the United States has also established working groups in thematic areas to oversee implementation of the UPR recommendations, including a working group on Treaties and International Human Rights Mechanisms.⁷⁴¹

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States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Commentary to Guiding Principle 10

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfill their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

10.1. Membership in Multilateral Institutions

How does the State seek to ensure that the institutions it is a member of neither restrain its duty to protect nor hinder the business responsibility to respect?

Indicators

Internal Procedures and Commitment

Scoping Questions

Has the State established procedures and measures to ensure support for business and human rights frameworks, including the UNGPs, in

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| | positions taken internationally and regionally (for example, on human rights screening and documenting of negotiating positions, as well as training of trade and development officials on business and human rights frameworks)? |
| Promotional Activities | Does the State promote its duty to protect and the corporate responsibility to respect in multilateral institutions, including international trade and financial institutions, the UN system, regional institutions, and with business organizations and workers associations? Has the State taken measures to promote awareness of the UNGPs and the broader business and human rights agenda? |
| Implementation Status | Gaps |
| <p>The first and second indicators and scoping questions above request information about State measures to support business and human rights frameworks, including the UNGPs, in positions taken internally and externally in multilateral institutions, including international trade and financial institutions, the UN system, regional institutions, and with business organizations and workers associations. Doing so expresses the U.S. government's commitment to respecting business and human rights across its policies and to other countries, and encourages additional respect for human rights in the corporate context.</p> <p>The U.S. government's internal procedures and commitments are as follows:</p> <ol style="list-style-type: none"> 1. An explicit intention of the "U.S. Government Approach on Business and Human Rights" is to "enhance the effectiveness of international institutions focused on the issue of business and human rights" and to "promote the human rights of | <p>The U.S. government can make further efforts in terms of internal procedures and commitments related to business and human rights concerns.</p> <ol style="list-style-type: none"> 1. The United States Department of State appears to have a robust commitment to human rights generally. However, the specific intersection of business and human rights is not prominently featured nor greatly mentioned in other agencies or departments. In general, business and human rights issues are currently not structurally considered across its operations, including across its various branches and in its engagements with multilateral organizations. 2. Business and human rights issues are also not 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 while neglecting human rights issues during the |

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people around the world.”⁷⁴³ In outlining steps the United States has already taken in aiming to achieve these objectives, the Approach details official U.S. policy on business and human rights, including how business activity impacts the four core aspects of U.S. foreign policy:

- i. The security of the United States, its citizens, and U.S. allies and partners;
- ii. A strong, innovative, and growing U.S. economy in an open international economic system that promotes opportunity and prosperity;
- iii. Respect for universal values at home and around the world; and
- iv. An international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.⁷⁴⁴

2. The steps the United States takes to incorporate these considerations into its foreign policy include:

- i. Support[ing] the innovations and activities of business that help solve global challenges and improve the welfare of people;
- ii. Partner[ing] with business on projects in which business and government have comparative advantages that can be harnessed by working together;
- iii. Promot[ing] the rule of law, respect for human rights, and a level playing field by encouraging responsible business behavior and inviting engagement by business in venues that advance best practices.⁷⁴⁵

bulk of the Summit.⁷⁵⁶

The U.S. government can make further efforts in terms of **promotional activities** related to business and human rights concerns.

1. Some U.S. policy appears to be aimed at promoting American business interests with the exclusion of the UNGPs as a reference point.⁷⁵⁷ Further, the exact procedures for incorporating business and human rights issues into State policy and actions, and their prominence relative to other aspects, are not detailed in the U.S. Approach on Business and Human Rights.
2. In addition, the recent resolution that was passed at the UN Human Rights Council in June 2014 was notably not supported by the U.S. government. As outlined earlier, this resolution established an “open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.”⁷⁵⁸ The resolution passed with the support of twenty Member States. The United States, along with thirteen other countries, voted against the resolution (thirteen countries abstained), has indicated that it will not participate in negotiations around the binding instrument, and has encouraged other States to also refuse to participate in the working group.⁷⁵⁹

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The U.S. government's **promotional activities** around business respect for human rights within multinational contexts are as follows:

1. The U.S. government played a prominent role in the development of the UNGPs and co-sponsored the June 2011 resolution that led to their unanimous adoption.⁷⁴⁶ The United States also regularly engages with the UN Working Group on Business and Human Rights and facilitated a country visit by this group in April 2013.⁷⁴⁷
2. In addition, the United States played a key role in the development of the OECD Guidelines for Multinational Enterprises by participating in the multilateral group of governments that negotiated the guidelines.⁷⁴⁸ The United States has also reinforced the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas through its adoption of Section 1502 of the Dodd-Frank Act (as described above).⁷⁴⁹
3. Within the UN system, the U.S. government has increasingly used its engagement with various UN agencies to push for the integration of business and human rights concerns. For example, the United States supports the International Labor Organization (ILO) through its "Decent Work" agenda and its Fundamental Principles and Rights at Work program by funding specific ILO projects in several countries.⁷⁵⁰ The United States was also a founding government of the ILO's "Better Factories" program in Cambodia.⁷⁵¹
4. The World Health Organization's Framework Convention on Tobacco Control (FCTC) is an international treaty to protect people from "the devastating health, social, environmental

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and economic consequences of tobacco consumption.”⁷⁵²

FCTC is the first international treaty negotiated under the auspices of the World Health Organization and was adopted by the World Health Assembly on 21 May 2003 and entered into force on 27 February 2005. More than 180 governments are party to the Convention. The Convention addresses a wide range of improper and illegal business practices and its impact that characterize the global tobacco industry, including public health effects of smoke, illegal trade in cigarettes, negative impacts on the environment and on farmers. Unique among international treaties, private business enterprises (tobacco producers) are singled out and specifically prohibited from participating in “setting and implementing public health policies with respect to tobacco control,” which governments are obligated to “protect . . . from commercial and other vested interests of the tobacco industry.”⁷⁵³

5. In the information and communications technologies sector, the United States has promoted respect for human rights by helping to found the Freedom Online Coalition, comprised of nineteen governments and supporting the implementation of a set of principles on Internet freedom through corporate and civil society engagement.⁷⁵⁴ The United States also supports the Global Network Initiative (GNI) to engage technology companies to develop human rights policies and procedures, conduct stakeholder engagement, and benchmark industry best practices and progress.⁷⁵⁵

ENDNOTES

- ¹ John Ruggie, Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter Ruggie].
- ² Human Rights Council Res. A/HRC/26/L.1. Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (June 27, 2014) available at <http://www.norway-geneva.org/EFTA1/Statements/26th-Session-of-the-Human-Rights-Council/Item-3-Promotion-and-protection-of-human-rights/Business-and-Human-Rights-Resolution-/#.U63LWGSxPgI>.
- ³ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (October 25, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.
- ⁴ European Parliament, Committee on Foreign Affairs, *Report on the Review of the EU's Human Rights Strategy*, EUR. PARL. DOC. A7-0378/2012 (November 19, 2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0378+0+DOC+PDF+V0//EN>.
- ⁵ Eur. Consult. Ass., *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights* (Apr. 16, 2014), available at <https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM>.
- ⁶ See DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS (2014), available at <http://accountabilityroundtable.org/analysis/napsreport> (summaries of recent business and human rights NAPs developments in Chapter 2 and Annex 2) [hereinafter DIHR & ICAR NAPs Toolkit].
- ⁷ *Launch of the National Action Plans (NAPs) Project*, INT. CORPORATE ACCOUNTABILITY ROUNDTABLE (August 26, 2014), <http://accountabilityroundtable.org/analysis/launch-of-the-national-action-plans-nap-project/>; *National Action Plans on Business and Human Rights*, DANISH INST. FOR HUMAN RIGHTS, <http://www.humanrights.dk/projects/national-action-plans-business-human-rights> (last visited June 10, 2014).
- ⁸ See, e.g., Statement from the Int'l Corporate Accountability Roundtable (ICAR) to U.S. State Dep't on UN Framework and Guiding Principles Implementation (July 31, 2012), available at <http://www.scribd.com/doc/101638952/ICAR-Statement-to-State-Department-on-UN-Guiding-Principles-Implementation>; ICAR et al., Global Civil Society Letter to Governments on the Development and Implementation of National Action Plans (NAPs) on Business and Human Rights (May 1, 2014), available at <http://accountabilityroundtable.org/analysis/global-civil-society-letter-to-governments-on-the-development-and-implementation-of-national-action-plans-naps-on-business-and-human-rights/>; EUROPEAN GROUP OF NATIONAL HUMAN RIGHTS INSTITUTIONS, IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: DISCUSSION PAPER ON NATIONAL IMPLEMENTATION PLANS FOR EU MEMBER STATES (2012), available at http://www.ohchr.org/Documents/Issues/Business/NationalPlans/ClaireMethvenOBrien_EuropeanGroupofNHRIs.pdf [hereinafter European Group of NHRIs Discussion Paper].
- ⁹ DIHR & ICAR NAPs Toolkit, *supra* note 6.
- ¹⁰ *Id.* at Annex 4.

-
- ¹¹ See, e.g., FAO Integrated Food Security Support Service, M&E Technical Advisory Notes Series: Overview of Methods for Baseline Assessments, http://www.ideas-int.org/documents/docs/Methods_Baseline_Assessments.pdf.
- ¹² *Fact Sheet: The U.S. Global Anticorruption Agenda*, WHITE HOUSE (Sept. 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.
- ¹³ *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITE HOUSE (Nov. 20, 2014), <http://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->.
- ¹⁴ *Id.*
- ¹⁵ *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12, 2015), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.
- ¹⁶ Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum 4: Visit to the United States of America ¶ 18, 26th Sess., June 10-27, 2014, A/HRC/26/25/Add.4 (May 6, 2014), *available at* http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/25/Add.4 [hereinafter Working Group U.S. Visit Report].
- ¹⁷ See, e.g., Office of the United Nations High Comm’r for Human Rights, *Professional Training Series No. 10: Handbook on National Human Rights Plans of Action*, U.N. Doc. HR/P/PT/10 (Aug. 29, 2002), *available at* <http://www.ohchr.org/Documents/Publications/training10en.pdf>; European Group of NHRIs Discussion Paper, *supra* note 8; UN WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, DRAFT: GENERIC COUNTRY VISIT TEMPLATE (2013).
- ¹⁸ Ruggie, *supra* note 1, at 6.
- ¹⁹ See generally *Ratification Status for United States of America*, UNITED NATIONS HUM. RTS., http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN (last visited Feb. 16, 2015); *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH (July 24, 2009), http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#_Overview_1.
- ²⁰ *Ratifications for United States*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Jan. 27, 2015).
- ²¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336, 8 I.L.M. 679, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.
- ²² Ruggie, *supra* note 1, at 6.
- ²³ *U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-84 (1992), *available at* <http://www1.umn.edu/humanrts/usdocs/civilres.html>.
- ²⁴ *Id.*
- ²⁵ *U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Cong. Rec. S17486-01 (1990), *available at* <http://www1.umn.edu/humanrts/usdocs/tortres.html>.
- ²⁶ *Id.*

-
- ²⁷ *U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination*, 140 Cong. Rec. S7634-02 (1994), available at <http://www1.umn.edu/humanrts/usdocs/racialres.html>.
- ²⁸ *Id.*
- ²⁹ *U.S. Declarations and Understandings, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 148 Cong. Rec. S5716, S5717 (2002), available at <http://www1.umn.edu/humanrts/usdocs/crc-dec.html>.
- ³⁰ *Id.*
- ³¹ *U.S. Reservation and Understandings, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 148 Cong. Rec. S5717, S5718 (2002), available at <http://www1.umn.edu/humanrts/usdocs/crc-res.html>.
- ³² *Id.*
- ³³ *U.S. Reservations, Declarations, and Understandings, International Convention on the Prevention and Punishment of the Crime of Genocide*, Cong. Rec. S1355-01 (1986), available at <http://www1.umn.edu/humanrts/usdocs/genres.html>.
- ³⁴ *Slavery Convention: Ratifications or Definitive Accessions*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-3&chapter=18&lang=en (last visited Feb. 16, 2015).
- ³⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en (last visited Jan. 27, 2015).
- ³⁶ *Signatories and Ratifications: B-58: Inter-American Convention against Corruption*, OAS, <http://www.oas.org/juridico/english/Sigs/b-58.html> (last visited Jan. 27, 2015).
- ³⁷ See generally *Ratification Status for United States of America*, *supra* note 19; *United States Ratification of International Human Rights Treaties*, *supra* note 19.
- ³⁸ *Id.*
- ³⁹ Ruggie, *supra* note 1, at 6.
- ⁴⁰ *UN Declaration on the Rights of Indigenous Peoples Review*, DOS, <http://www.state.gov/s/tribalconsultation/declaration/> (last visited Jan. 27, 2015); *United States Endorses International Declaration on Indigenous Rights*, ACLU (Dec. 17, 2010), <https://www.aclu.org/human-rights/united-states-endorses-international-declaration-indigenous-rights>.
- ⁴¹ *Binding Treaty*, BUSINESS & HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/binding-treaty> (last visited Feb. 17, 2015).
- ⁴² *Id.*; Statement by the Delegation of the United States of America, Stephen Townley, Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights, Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument (June 26, 2014), available at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>; see also Thalif Deen, *After Losing Vote, U.S.-EU Threaten to Undermine Treaty*, INTER PRESS SERVICE (June 28, 2014), <http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/>.
- ⁴³ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 3 (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf> [hereinafter 2013 U.S. Government Approach].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Daniel Baer, Deputy Assistant Sec’y, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights*, HUMANRIGHTS.GOV (June 16, 2011), <http://www.humanrights.gov/dyn/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights.html>.

⁴⁸ *The White House, Fact Sheet: The U.S. Global Anticorruption Agenda*, HUMANRIGHTS.GOV (Jan 28, 2015), <http://www.humanrights.gov/dyn/fact-sheet-the-u.s.-global-anticorruption-agenda>.

⁴⁹ U.S. Dep’t of State, *UN Guiding Principles on Business and Human Rights*, HUMANRIGHTS.GOV (Dec. 3, 2012), <http://www.humanrights.gov/dyn/un-guiding-principles-on-business-and-human-rights.html>.

⁵⁰ *Id.*

⁵¹ 2013 U.S. Government Approach, *supra* note 43, at 9.

⁵² *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12. 2017), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.

⁵³ 2013 U.S. Government Approach, *supra* note 43, at 9.

⁵⁴ *Id.*

⁵⁵ *Direct Line Program*, U.S. DEP’T STATE, <http://www.state.gov/e/eb/directline/> (last visited Feb. 23, 2015).

⁵⁶ Patrick F. Kennedy, Under Sec’y for Mgmt., Under Secretary Kennedy Remarks at Government Procurement and Human Rights Workshop (Jan. 15, 2014), *available at* <http://www.humanrights.gov/root/hri-import/under-secretary-kennedy-remarks-at-government-procurement-and-human-rights-workshop.html>.

⁵⁷ 2013 U.S. Government Approach, *supra* note 43, at 7.

⁵⁸ *Id.*

⁵⁹ *Workshop on Government Procurement and Human Rights: Media Note*, DOS (Jan. 16, 2014), <http://www.state.gov/r/pa/prs/ps/2014/01/219938.htm>.

⁶⁰ Amb. Eileen Chamberlain Donahoe, U.S. Ambassador Representative to the UN Human Rights Council, Cluster ID: Working Group on the Issue of Human Rights and Transnational Corporation and other Business Enterprises and the Special Rapporteur on Freedom of Assembly and Association, Geneva, Switzerland, May 30, 2013, *available at* <http://www.humanrights.gov/root/hri-import/cluster-id-working-group-on-the-issue-of-human-rights-and-transnational-corporation.html>.

⁶¹ *Id.*

⁶² PRESIDENT’S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *PROGRESS IN COMBATING TRAFFICKING IN PERSONS: THE U.S. GOVERNMENT RESPONSE TO MODERN SLAVERY* (Apr. 2014), <http://www.state.gov/documents/organization/224810.pdf>.

⁶³ U.S. Dep’t of State, *Responsible Investment Reporting Requirements Frequently Asked Questions*, HUMANRIGHTS.GOV (Sept. 23, 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions/>; *Business and Human Rights*, HUMANRIGHTS.GOV, <http://www.humanrights.gov/dyn/issues/business-and-human-rights.html>.

⁶⁴ *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12. 2017), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.

⁶⁵ Working Group U.S. Visit Report, *supra* note 16, at ¶¶ 12-15.

⁶⁶ *Id.*

⁶⁷ *Id.* at ¶ 15.

⁶⁸ *Id.* at ¶ 58.

⁶⁹ *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITE HOUSE: NAT'L SECURITY COUNCIL (Nov. 20, 2014), <http://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->.

⁷⁰ *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12, 2017), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.

⁷¹ Working Group U.S. Visit Report, *supra* note 16, at ¶ 36.

⁷² *See, e.g., Doing Business in China*, EMBASSY OF THE UNITED STATES: BEIJING, CHINA, <http://beijing.usembassy-china.org.cn/business.html>.

⁷³ EXPORT.GOV, <http://www.export.gov/> (last visited Feb. 24, 2015).

⁷⁴ *Id.*

⁷⁵ *Id.* at ¶ 29.

⁷⁶ *U.S. National Contact Point*, DOS, <http://www.state.gov/e/eb/oecd/usncp/us/> (last visited Jan. 27, 2015).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2013 ANNUAL REPORT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS INITIATIVE (Apr. 10, 2014), *available at* <http://www.state.gov/j/drl/rls/vprpt/2013/224673.htm>.

⁸⁰ International Code of Conduct for Private Security Service Providers, ICoC, <http://www.icoc-psp.org/> (last visited Jan. 27, 2015).

⁸¹ 2013 U.S. Government Approach, *supra* note 43, at 8.

⁸² Patrick F. Kennedy, Under Secretary for Management, Under Secretary Kennedy Remarks at Government Procurement and Human Rights Workshop (Jan. 15, 2014), *available at* <http://www.humanrights.gov/root/hri-import/under-secretary-kennedy-remarks-at-government-procurement-and-human-rights-workshop.html>; *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>.

⁸³ *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.

⁸⁴ 2013 U.S. Government Approach, *supra* note 43, at 8.

⁸⁵ *EITI Countries*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/countries> (last visited Jan. 27, 2015).

⁸⁶ GLOBAL NETWORK INITIATIVE, 2013 ANNUAL REPORT: PROTECTING AND ADVANCING FREEDOM OF EXPRESSION AND PRIVACY IN INFORMATION AND COMMUNICATION TECHNOLOGIES (2013), *available at* <https://globalnetworkinitiative.org/sites/default/files/2013%20Annual%20Report.pdf>; Michael Posner, Assistant Sec., Michael Posner: Global Internet Freedom and the Rule of Law, Part II (Mar. 2, 2010), *available at* <http://www.humanrights.gov/root/hri-import/michael-posner-global-internet-freedom-and-the-rule-of-law-part-ii.html>.

-
- ⁸⁷ *About: What is the Open Government Partnership?*, OPEN GOV'T PARTNERSHIP, <http://www.opengovpartnership.org/about> (last visited Jan. 27, 2015).
- ⁸⁸ *What is the Open Government Partnership?*, OPEN GOV'T PARTNERSHIP, <http://www.opengovpartnership.org/about>.
- ⁸⁹ *Principles for Responsible Agriculture and Food Investments are Approved*, FAO, <http://www.fao.org/news/story/en/item/260518/icode/> (last visited Feb. 16, 2015).
- ⁹⁰ *Global Principles for Responsible Agricultural Investments Endorsed*, USAID LAND TENURE & PROPERTY RIGHTS PORTAL (Oct. 17, 2014), <http://usaidlandtenure.net/content/global-principles-responsible-agricultural-investments-endorsed>.
- ⁹¹ See Working Group U.S. Visit Report, *supra* note 16, at ¶ 31.
- ⁹² *Id.* at ¶ 32.
- ⁹³ *Id.* at ¶ 33.
- ⁹⁴ *Id.* at ¶ 61.
- ⁹⁵ *Id.* at ¶ 33.
- ⁹⁶ Working Group U.S. Visit Report, *supra* note 16, at 13-14.
- ⁹⁷ Columbia Ctr. on Sustainable Investment, Letter to President Barack Obama re: U.S. National Action Plan on Responsible Business Conduct (Jan. 12, 2015), <http://nationalactionplan.us/wp-content/uploads/2014/11/Columbia-Center-on-Sustainable-Investment-Memo-on-US-National-Action-Plan-1.pdf>.
- ⁹⁸ U.S. CONST. amend. I.
- ⁹⁹ U.S. CONST. amend. IV.
- ¹⁰⁰ U.S. CONST. amend. V.
- ¹⁰¹ U.S. CONST. amend. VI.
- ¹⁰² U.S. CONST. amend. VIII.
- ¹⁰³ U.S. CONST. amend. XII.
- ¹⁰⁴ U.S. CONST. amend. XIV.
- ¹⁰⁵ U.S. CONST. amends. XV, XIX.
- ¹⁰⁶ 29 U.S.C. § 8 (1938).
- ¹⁰⁷ *Summary of the Major Laws of the Department of Labor*, DOL, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Jan. 27, 2015).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ 5 U.S.C. § 81 (1916).
- ¹¹¹ 33 U.S.C. § 18 (1927).
- ¹¹² 42 U.S.C. § 84 (XVI) (2000).
- ¹¹³ 29 U.S.C. § 18 (1974).
- ¹¹⁴ 29 U.S.C. § 28 (1993).
- ¹¹⁵ *National Labor Relations Act*, NLRB, <http://www.nlrb.gov/resources/national-labor-relations-act>.
- ¹¹⁶ 40 U.S.C. § 3141 (1931).

¹¹⁷ 41 U.S.C. § 353(a) (1965).

¹¹⁸ 41 U.S.C. §§ 35 *et seq.* (1936).

¹¹⁹ *Summary of the Major Laws of the Department of Labor*, DOL, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Jan. 27, 2015).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 29 U.S.C. § 15 (1970).

¹²⁸ 40 U.S.C. § 3141 (1931).

¹²⁹ Exec. Order No. 11246, 30 FR 12319 (1965).

¹³⁰ 18 U.S.C. § 874 (1934).

¹³¹ 42 U.S.C. §2000e.

¹³² *Laws Enforced by EEOC*, EEOC, <http://www.eeoc.gov/laws/statutes/> (last visited Jan. 27, 2015).

¹³³ 18 U.S.C. § 1581 *et seq.*

¹³⁴ 18 U.S.C. § 1589.

¹³⁵ 18 U.S.C. § 1593A.

¹³⁶ 2013 U.S. Government Approach, *supra* note 43, at 14.

¹³⁷ Working Group U.S. Visit Report, *supra* note 16, at ¶ 50.

¹³⁸ *Id.*

¹³⁹ 42 U.S.C. § 4321.

¹⁴⁰ MARK B. TAYLOR ET AL., ICAR, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES, 2013 PROGRESS REPORT 20-21 (2013), *available at* <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/> [hereinafter ICAR Due Diligence Report 2013 Update].

¹⁴¹ *U.S. Environmental Laws*, NRDC, <http://www.nrdc.org/reference/laws.asp> (last visited Jan. 27, 2015).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

-
- ¹⁴⁸ *Id.*
- ¹⁴⁹ *Id.*
- ¹⁵⁰ PROF. OLIVIER DE SCHUTTER, PROF. ANITA RAMASASTRY, MARK B. TAYLOR & ROBERT C. THOMPSON, ICAR, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES 20-21 (Dec. 2012), available at <http://accountabilityroundtable.org/analysis/hrdd/> [hereinafter ICAR Due Diligence Report].
- ¹⁵¹ U.S. CONST. amend. V.
- ¹⁵² See generally Restatement of the Law Third (Mortgages) (2000); Restatement of the Law Third, Property (Wills and Other Donative Transfers) (1999-2003).
- ¹⁵³ Definition of “Indian Country”, NRCS, available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf (last accessed Jan. 27, 2015).
- ¹⁵⁴ *Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last accessed Jan. 27, 2015).
- ¹⁵⁵ 42 U.S.C. § 4332 (2012).
- ¹⁵⁶ *Regulatory Impact Analyses*, EPA, <http://www.epa.gov/ttnecas1/ria.html> (last updated Dec. 17, 2014).
- ¹⁵⁷ *Id.*
- ¹⁵⁸ *Id.*
- ¹⁵⁹ 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.
- ¹⁶⁰ *Id.*
- ¹⁶¹ *History and Mission of OSHA*, DUKE U., http://www.law.du.edu/thomson/AdminWiki/Labor_OSHA/EC77011AD85ABB5F713115C2C60D9CE9.html (last visited Jan. 28, 2015).
- ¹⁶² *We Can Help*, DOL, <https://www.osha.gov/workers.html> (last visited Jan. 27, 2015).
- ¹⁶³ *Mine Safety and Health*, DOL, <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT1.HTM> (last visited Jan. 27, 2015).
- ¹⁶⁴ 30 U.S.C. Ch. 35.
- ¹⁶⁵ *Workplace Safety & Health*, DOL, <http://www.dol.gov/dol/topic/safety-health/> (last visited Jan. 27, 2015).
- ¹⁶⁶ *Id.*
- ¹⁶⁷ *Id.*
- ¹⁶⁸ Dodd-Frank, Pub. L. No. 111-203, § 1502 (2010).
- ¹⁶⁹ *Id.* at § 1504.
- ¹⁷⁰ INT’L CORPORATE ACCOUNTABILITY ROUNDTABLE (ICAR), “KNOWING AND SHOWING”: USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE 8 (2013), available at <http://accountabilityroundtable.org/about/publications/#securities> [hereinafter ICAR Knowing and Showing Report].
- ¹⁷¹ *Foreign Account Tax Compliance Act*, IRS, <http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-FATCA> (last updated Jan. 13, 2015).
- ¹⁷² 26 U.S.C. § 1471 (2012).
- ¹⁷³ 19 U.S.C. §§ 2641 *et seq.*
- ¹⁷⁴ See *Trade Preference Programs*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ilab/trade/preference-programs/> (last visited Feb. 25, 2015).
- ¹⁷⁵ 19 U.S.C. §§ 2461, 2463; see 19 USC § 2461(1); see also General Systems of Preferences Renewal Act of 1984, P.L. 98-573, 98 Stat. 3019.

-
- ¹⁷⁶ General Systems of Preferences Renewal Act of 1984, P.L. 98-573, 98 Stat. 3019.
- ¹⁷⁷ *Id.*
- ¹⁷⁸ *Id.*
- ¹⁷⁹ International Labor Rights Forum, Testimony of Brian Campbell submitted to House of Representatives, Sub-committee on Trade, 12/1/2009, *available at* <http://digitalcommons.ilr.cornell.edu/globaldocs/424/>.
- ¹⁸⁰ *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Mar. 2, 2015).
- ¹⁸¹ *Id.*
- ¹⁸² *Id.*
- ¹⁸³ North American Free Trade Agreement (NAFTA), Chp. 11, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289, *available at* <http://www.sice.oas.org/trade/nafta/chap-111.asp>; *id.* art. 1139.
- ¹⁸⁴ OFFICE OF THE U.S. TRADE REPRESENTATIVE, BI-PARTISAN AGREEMENT ON TRADE POLICY (May 2007), *available at* https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf
- ¹⁸⁵ 19 U.S.C. § 1307.
- ¹⁸⁶ *China Diesel Imports v. U.S.*, 855 F. Supp. 380, 386 (CIT 1994)
- ¹⁸⁷ 19 C.F.R. § 12.42(e).
- ¹⁸⁸ 19 CFR § 12.42(g). Regulations require that the importer submit a certificate of origin for the imported product that identifies: (1) the foreign seller or producer of the product; (2) the complete chain of custody of the product from the producer to the importer; and (3) a statement that forced labor was not used at any stage in the production process of the good, or any of its components. 19 C.F.R. § 12.43(a). The importer must also submit a statement by the ultimate consignee of the merchandise that “show[s] in detail that he had made every reasonable effort to determine the source of the merchandise and of every component thereof . . . and the character of labor used in the production of the merchandise and each of its components.” 19 C.F.R. § 12.43(b). The statement must also contain the full results of the consignee’s investigation, and his/her opinion on the use of forced and child labor at any stage of the production of the merchandise or any of its components. *Id.*
- ¹⁸⁹ *China Diesel Imports*, 855 F. Supp. at 386 (upholding exclusion order after importer challenged the validity on the grounds that Customs never inspected the facility prior to making its determination.)
- ¹⁹⁰ 2012 U.S. Model Bilateral Investment Treaty, *available at* <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; Francisco Pascual Vives, *Developing Coordination Techniques Between Public Interests and International Investment Law*, ORDINE INTERNAZIONALE E DIRITTI UMANI 500 (2014), *available at* http://www.rivistaoidu.net/sites/default/files/Vives_0.pdf.
- ¹⁹¹ *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).
- ¹⁹² 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>.
- ¹⁹³ 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/>.
- ¹⁹⁴ *Id.*

-
- ¹⁹⁵ *Id.*
- ¹⁹⁶ 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>.
- ¹⁹⁷ *Id.*
- ¹⁹⁸ *Id.*
- ¹⁹⁹ 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/>.
- ²⁰⁰ 15 U.S.C. §§ 78dd-1 *et seq.*
- ²⁰¹ *The Whistleblower Protection Programs*, OSHA, <http://www.whistleblowers.gov/> (last visited Jan. 27, 2015).
- ²⁰² *Id.*
- ²⁰³ *Id.*
- ²⁰⁴ 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.
- ²⁰⁵ 5 U.S.C. § 552 (2012).
- ²⁰⁶ *U.S. Treasury Exempts Sanctions on Payments for Technology for Iranians*, INT’L CAMPAIGN FOR HUM. RTS. (Feb. 10, 2014), <http://www.iranhumanrights.org/2014/02/sanctions-exemptions/>.
- ²⁰⁷ *Id.*
- ²⁰⁸ *Id.*
- ²⁰⁹ Samuel Rubinfeld, *U.S. Treasury Allows Personal Communication Exports to Sudan*, WALL ST. J. (Feb. 18, 2015), <http://blogs.wsj.com/riskandcompliance/2015/02/18/u-s-treasury-allows-personal-communication-exports-to-sudan/>.
- ²¹⁰ 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.
- ²¹¹ See Foreign Assistance Act of 1961, PL 87-195 at § 101(a)(2).
- ²¹² *Id.* at § 102 (emphasis added).
- ²¹³ See American Federation of Labor & Congress of Industrial Organizations (AFL-CIO), First Submission on the United States National Action Plan (Jan. 15, 2015), *available at* <http://nationalactionplan.us/wp-content/uploads/2014/11/AFL-CIO-NAP-submission-1.pdf>.
- ²¹⁴ See Working Group U.S. Visit Report, *supra* note 16.
- ²¹⁵ *U.S. Labor Law for Farmworkers*, FARMWORKER JUSTICE, <http://www.farmworkerjustice.org/advocacy-and-programs/us-labor-law-farmworkers> (last visited Jan. 27, 2015); INT’L LABOR RIGHTS FORUM, A MATTER OF URGENCY: U.S. COMPLIANCE WITH ILO CONVENTION NO. 182 CONCERNING THE PROHIBITION AND IMMEDIATE ELIMINATION OF THE WORST FORMS OF CHILD LABOR (June 2010), *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1531&context=globaldocs>.
- ²¹⁶ *U.S. Labor Law for Farmworkers*, *supra* note 215; INT’L LABOR RIGHTS FORUM, *supra* note 215.
- ²¹⁷ See Working Group U.S. Visit Report, *supra* note 16, at ¶ 41.
- ²¹⁸ *Id.* at ¶ 41.

²¹⁹ *Id.* at ¶¶ 42-43.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at ¶ 45.

²²³ *Id.* at ¶ 51.

²²⁴ 2013 U.S. Government Approach, *supra* note 43, at 14.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Letter to Michael A. Posner et al. from the Int’l Corporate Accountability Roundtable (ICAR) on the Consultative Guidelines (Aug. 7, 2012) (on file with ICAR).

²²⁹ Int’l Indian Treaty Council, Initial Written Submission for the U.S. National Action Plan on Business and Human Rights 1 (Jan. 14, 2015), *available at* <http://nationalactionplan.us/wp-content/uploads/2014/11/IITC-Submission-to-the-U.S.-National-Action-Plan.pdf>.

²³⁰ United Nations Human Rights Committee, Concluding observations on the fourth report of the United States of America, CCPR/C/USA/CO/4 (April 23, 2014); *see also id.*

²³¹ STEPHEN CORNELL AND MIRIAM JORGENSEN, INDIGENOUS LAND MANAGEMENT IN THE UNITED STATES: CONTEXT, CASES, LESSONS 6, GROGAN CORNELL (2011), *available at* https://nnidatabase.org/db/attachments/text/2011_CORNELL_jorgensen_Indigenous_Land_Management_US.pdf.

²³² See, e.g., Chris McGreal, *U.S. should return stolen land to Indian tribes, says United Nations*, GUARDIAN (May 4, 2012, 18:46), <http://www.theguardian.com/world/2012/may/04/us-stolen-land-indian-tribes-un>; Michael McAuliff, *Congress Raids Ancestral Native American Lands With Defense Bill*, HUFFINGTON POST (Dec. 3, 2014, 5:35 PM), http://www.huffingtonpost.com/2014/12/03/ndaa-land-deals_n_6264362.html.

²³³ Int’l Indian Treaty Council, *supra* note 229.

²³⁴ Michael McAuliff, *Congress Raids Ancestral Native American Lands With Defense Bill*, HUFFINGTON POST (Dec. 3, 2014, 5:35 PM), http://www.huffingtonpost.com/2014/12/03/ndaa-land-deals_n_6264362.html.

²³⁵ See *id.* (describing how the U.S. government granted 2,400 acres of Native American land to Rio Tinto).

²³⁶ PATRICIA JUREWICZ, *THE IMPACT OF DODD-FRANK 1502 ON CONFLICT MINERALS: U.S. SUSTAINABLE AND RESPONSIBLE INVESTORS RESPOND*, RESPONSIBLEINVESTOR.COM (JAN. 23, 2015), HTTPS://WWW.RESPONSIBLE-INVESTOR.COM/HOME/ARTICLE/1502_RES/PO/.

²³⁷ Working Group U.S. Visit Report, *supra* note 16, at ¶¶ 20-21.

²³⁸ See *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (ICSID 2000), *aff’d in part*, 2001 BCSC 664 (2001); Jameson Acos, Vanessa Archambault & Abigail Hernandez, *Metalclad v. Mexico*, UC BERKELEY, http://are.berkeley.edu/courses/EEP131/old_files/studentpresentations05/Metalclad%20v.%20Mexico.pdf (last visited Jan. 27, 2015); Rachel D. Edsall, *Note, Indirect Expropriation Under Nafta and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. REV. 931, 934 (2006), *available at* <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/EDSALL.pdf>.

-
- ²³⁹ E.g., *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.
- ²⁴⁰ E.g., *id.*
- ²⁴¹ *See id.*
- ²⁴² *Id.*
- ²⁴³ Int'l Labor Rights Fund v. U.S., 391 F. Supp. 2d 1370 (CIT 2005).
- ²⁴⁴ 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>.
- ²⁴⁵ PROF. ROBERT STUMBERG, PROF. ANITA RAMASASTRY, & MEG ROGGENSACK, ICAR, TURNING A BLIND EYE?: RESPECTING HUMAN RIGHTS IN GOVERNMENT PURCHASING 24 (Sept. 2014), available at <http://accountabilityroundtable.org/analysis/procurementreport/> [hereinafter ICAR Procurement Report].
- ²⁴⁶ *Id.*
- ²⁴⁷ *Id.*
- ²⁴⁸ *Id.*
- ²⁴⁹ See Sara Blackwell & Katie Shay, *The Role of National Action Plans on Business and Human Rights in Protecting Human Rights Defenders*, International Service for Human Rights (Nov. 15, 2014), available at <http://www.ishr.ch/news/role-national-action-plans-business-and-human-rights-protecting-human-rights-defenders>.
- ²⁵⁰ Peace Brigades Int'l, Letter to President Obama re: National Action Plan on Responsible Business Conduct (Oct. 10, 2014), http://www.mypbi.net/fileadmin/user_files/projects/colombia/files/press_kits/1410_PBI_Letter_US_NAP.pdf.
- ²⁵¹ 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>.
- ²⁵² Summary: H.R.491 — 113th Congress (2013-2014), CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/491> (last visited Feb. 3, 2015).
- ²⁵³ Major Actions: H.R.491 — 113th Congress (2013-2014), CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/491/actions> (last visited Feb. 3, 2015).
- ²⁵⁴ Working Group U.S. Visit Report, *supra* note 16, at ¶¶ 90-91.
- ²⁵⁵ Kate Westmoreland, *Are Some Companies 'Yes Men' When Foreign Governments Ask For User Data?*, CTR. INTERNET & Soc'y (May 30, 2014), <http://cyberlaw.stanford.edu/blog/2014/05/are-some-companies-yes-men-when-foreign-governments-ask-user-data>.
- ²⁵⁶ *Id.*
- ²⁵⁷ Craig Timberg, *For Sale: Systems that Can Secretly Track Where Cellphone Users Go Around the Globe*, WASH. POST (Aug. 24, 2014), http://www.washingtonpost.com/business/technology/for-sale-systems-that-can-secretly-track-where-cellphone-users-go-around-the-globe/2014/08/24/f0700e8a-f003-11e3-bf76-447a5df6411f_story.html.
- ²⁵⁸ Kat Greene, *Cisco Ducks Claims its Spy Systems Led to Chinese Torture*, LAW 360 (Sept. 5, 2014, 10:26 PM), <http://www.law360.com/articles/574751/cisco-ducks-claims-its-spy-systems-led-to-chinese-torture>.

-
- ²⁵⁹ John Napier Tye, Opinion, *Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans*, WASH. POST (July 18, 2014), http://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html.
- ²⁶⁰ *Id.*
- ²⁶¹ *Missing from the EO 12333 Discussion: Its Classified Annex Michael Hayden Revised on March 11, 2004*, EMPTYWHEEL (Aug. 29, 2014), <https://www.emptywheel.net/2014/08/29/missing-from-the-eo-12333-discussion-its-classified-annex-michael-hayden-revised-on-march-11-2004/>.
- ²⁶² *Executive Order 12,333 — FOIA Lawsuit*, ACLU, <https://www.aclu.org/national-security-technology-and-liberty/executive-order-12333-foia-lawsuit> (last visited Jan. 27, 2015).
- ²⁶³ Office of the Dir. of Nat’l Intelligence, *Section 702 of the Foreign Intelligence Surveillance Act*, IC ON THE RECORD, <http://icontherecord.tumblr.com/topics/section-702> (last visited Mar. 2, 2015).
- ²⁶⁴ *Id.*
- ²⁶⁵ Access Policy Team, *PCLOB Report Fails to Consider the Rights of Non-U.S. Persons or Promote Legislative Reform*, ACCESS BLOG (July 2, 2014, 2:01 PM), <https://www.accessnow.org/blog/2014/07/02/pclob-report-fails-to-consider-the-rights-of-non-u.s.-persons-or-promote-le>.
- ²⁶⁶ HEATHER J. CLAWSON ET AL., NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS (2003), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/202469.pdf>; NEIL A. WEINER ET AL., MEASURING HUMAN TRAFFICKING: LESSONS FROM NEW YORK CITY (2008), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/224391.pdf>.
- ²⁶⁷ U.S. Dep’t of State, *Responsible Investment Reporting Requirements Frequently Asked Questions*, HUMANRIGHTS.GOV (Sept. 23, 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions/#RiskPrevention>.
- ²⁶⁸ *List of Products Produced by Forced or Indentured Child Labor*, DOL, <http://www.dol.gov/ilab/reports/child-labor/list-of-products/> (last visited Jan. 27, 2015).
- ²⁶⁹ *Findings on the Worst Forms of Child Labor*, DOL, <http://www.dol.gov/ilab/reports/child-labor/findings/> (last visited Jan. 27, 2015).
- ²⁷⁰ *List of Goods Produced by Child Labor or Forced Labor*, DOL, <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/> (last visited Jan. 27, 2015); FACT SHEET: REPORTS ON INTERNATIONAL CHILD LABOR AND FORCED LABOR, DOL, *available at* <http://www.dol.gov/ilab/reports/pdf/Reports%20Fact%20Sheet.pdf> (last visited Jan. 27, 2015).
- ²⁷¹ ILAB TECHNICAL COOPERATION PROJECT SUMMARY: GLOBAL RESEARCH ON CHILD LABOR MEASUREMENT AND POLICY DEVELOPMENT (MAP), *available at* http://www.dol.gov/ilab/projects/summaries/GlobalResearchMAP_FY13.pdf; DEP’T OF LABOR, FACT SHEET: ILAB PROGRAMMING TO COMBAT CHILD LABOR INTERNATIONALLY, *available at* <http://www.dol.gov/ilab/reports/pdf/ILAB%20Programming%20Fact%20Sheet.pdf> (last visited Jan. 27, 2015); *Reducing Child Labor & Forced Labor: A Toolkit for Responsible Businesses*, DOL, <http://www.dol.gov/ilab/child-forced-labor/index.htm> (last visited Jan. 27, 2015).
- ²⁷² 2013 U.S. Government Approach, *supra* note 43, at 14.
- ²⁷³ CATHOLIC RELIEF SERVICES, INDEPENDENT FINAL EVALUATION OF COMBATING TRAFFICKING OF WOMEN IN MOLDOVA: MOLDOVA EMPLOYMENT AND TRAINING ALLIANCE (2009), *available at* http://www.dol.gov/ilab/projects/summaries/Moldova_Trafficking_feval.pdf.
- ²⁷⁴ BUREAU OF INT’L LABOR AFFAIRS, DEP’T OF LABOR, PARTNERSHIP TO REDUCE CHILD LABOR AND FORCED LABOR IN IMPORTED AGRICULTURAL PRODUCTS: NOTICE OF AVAILABILITY OF FUNDS AND SOLICITATION FOR COOPERATIVE AGREEMENT APPLICATIONS (2012), *available at* <http://www.dol.gov/ilab/grants/sga12-04-usda-solicitation-for-grants-final-web.pdf>; BUREAU OF INT’L LABOR AFFAIRS, DEP’T OF LABOR, TECHNICAL COOPERATION PROJECT SUMMARY: CONSOLIDATING AND DISSEMINATING EFFORTS TO COMBAT FORCED LABOR

-
- IN BRAZIL AND PERU (2012), *available at* http://www.dol.gov/ilab/projects/summaries/RegionalBrazilPeru_ForcedLabor.pdf; BUREAU OF INT’L LABOR AFFAIRS, DEP’T OF LABOR, TECHNICAL COOPERATION PROJECT SUMMARY: ÑAUPAQMAN PURIY KEREIMBA: COMBATING EXPLOITIVE CHILD LABOR THROUGH EDUCATION IN BOLIVIA (2010), *available at* http://www.dol.gov/ilab/projects/summaries/Bolivia_CECL_FY2010.pdf.
- ²⁷⁵ *Combating Human Trafficking*, DHS (Jan. 15, 2015), <http://www.dhs.gov/topic/human-trafficking>.
- ²⁷⁶ *Human Trafficking Training Program*, FED. L. ENFORCEMENT TRAINING CENTERS, <https://www.fletc.gov/human-trafficking-training-program> (last visited Jan. 27, 2015).
- ²⁷⁷ U.S. DEP’T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), *available at* http://www.dhs.gov/xlibrary/assets/pso_cat_ice.pdf.
- ²⁷⁸ U.S. DEP’T OF LABOR, OSHA’S FIELD OPERATIONS MANUAL (FOM) (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf#page=222.
- ²⁷⁹ OSH Act of 1970, Section 17, 29 U.S.C. § 666(e)-(g) (2012).
- ²⁸⁰ *Enforcement Under the Fair Labor Standards Act*, DOL, <http://www.dol.gov/elaws/esa/flsa/screen74.asp> (last visited Jan. 29, 2015).
- ²⁸¹ *Id.*
- ²⁸² 29 C.F.R. § 578 (2015), *available at* http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.33&idno=29#se29.3.578_14.
- ²⁸³ *Enforcement Basic Information*, EPA, <http://www2.epa.gov/enforcement/enforcement-basic-information> (last visited Jan. 29, 2015).
- ²⁸⁴ *Examples of Money Laundering Investigations — Fiscal Year 2014*, IRS (Oct. 20, 2014), <http://www.irs.gov/uac/Examples-of-Money-Laundering-Investigations-Fiscal-Year-2014>.
- ²⁸⁵ *Id.*
- ²⁸⁶ 106 Stat. 73.
- ²⁸⁷ *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).
- ²⁸⁸ 18 U.S. Code § 1595.
- ²⁸⁹ 28 U.S. Code § 1350.
- ²⁹⁰ 18 U.S.C. § 1091.
- ²⁹¹ 18 U.S.C. § 2441.
- ²⁹² 18 U.S.C. § 2340A.
- ²⁹³ 18 U.S.C. § 2442.
- ²⁹⁴ *Human Rights and Special Prosecutions Section*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/hrsp/> (last visited Feb. 25, 2015).
- ²⁹⁵ 18 U.S.C. § 2.
- ²⁹⁶ 18 U.S.C. Ch. 77.
- ²⁹⁷ *Specific Instance Process*, DOS, <http://www.state.gov/e/eb/oecd/usncp/specificinstance/index.htm> (last visited Jan. 29, 2015).
- ²⁹⁸ *U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, DOS, <http://www.state.gov/e/eb/oecd/usncp/index.htm> (last visited Jan. 29, 2015).
- ²⁹⁹ Steven Groves, *U.S. National Human Rights Institution: A Bad Idea*, HERITAGE FOUND. (Nov. 15, 2013), <http://www.heritage.org/research/reports/2013/11/us-national-human-rights-institution-a-bad-idea>.

-
- ³⁰⁰ *Id.*
- ³⁰¹ 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].
- ³⁰² *See id.*
- ³⁰³ Working Group U.S. Visit Report, *supra* note 16, at ¶ 33.
- ³⁰⁴ *Id.* at ¶ 61.
- ³⁰⁵ *Id.* at ¶ 33.
- ³⁰⁶ Groves, *supra* note 299.
- ³⁰⁷ *Id.*
- ³⁰⁸ *Id.*
- ³⁰⁹ *Treasury and Department of States Should Investigate Reports of Sanctions-Busting Russian Banks*, HUM. RTS. FIRST (Oct. 31, 2013), <http://www.humanrightsfirst.org/press-release/treasury-and-state-departments-should-investigate-reports-sanctions-busting-russian>.
- ³¹⁰ *Corporate Social Responsibility*, DOS, <http://www.state.gov/e/eb/eppd/csr/> (last visited Jan. 29, 2015).
- ³¹¹ 2013 U.S. Government Approach, *supra* note 43.
- ³¹² Foreign Assistance Act 1961 (22 U.S.C. § 2151); Trade Act 1974 (19 U.S.C. Ch. 12).
- ³¹³ *Human Rights Reports*, DOS, <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Jan. 29, 2015).
- ³¹⁴ ICAR Due Diligence Report, *supra* note 150, at 53.
- ³¹⁵ Foreign Investment and National Security Act of 2007, Pub. L. 110-49 (July 26, 2007).
- ³¹⁶ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 *et seq.*; *Summary of U.S. Laws Governing the International Business Activities of U.S. Companies*, ORRICK, HERRINGTON & SUTCLIFFE LLP (Apr. 2009), *available at* <http://www.orrick.com/Events-and-Publications/Documents/1778.pdf>.
- ³¹⁷ Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261 (2012)).
- ³¹⁸ *Id.*
- ³¹⁹ 18 U.S.C. 7(9) Section 104; Pub. L. 107-56, 115 Stat. 272.
- ³²⁰ 18 U.S.C. § 1350.
- ³²¹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *U.S. Supreme Court Greatly Restricts Scope of Alien Tort Claims; Holds Statute Does Not Apply Extraterritorially*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Apr. 23, 2013), <https://www.skadden.com/insights/us-supreme-court-bars-extraterritorial-application-alien-tort-statute-rejects-claims-allege>.
- ³²² *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
- ³²³ ICAR Third Pillar report, *supra* note 301, at 67.
- ³²⁴ Timothy G. Nelson, *BRIDAS v. Government of Turkmenistan: U.S. Courts Uphold an Arbitrator's Power to Hold A Foreign Sovereign Liable for the Acts of its State-Owned Enterprise*, 24 ASA BULLETIN 584 (2006), *available at* http://www.skadden.com/sites/default/files/publications/Publications1185_0.pdf.

-
- ³²⁵ Eric Engle, *U.S. Corporate Liability for Torts of (Foreign) Subsidiaries 2*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1655983 (published in 23 CORP. COUNS. REV. 15 (May 9, 2004)).
- ³²⁶ *Id.* at 21.
- ³²⁷ 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>.
- ³²⁸ *Specialized Corporate Disclosure*, SEC, <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (last modified May 30, 2013).
- ³²⁹ *Id.*
- ³³⁰ *Id.*
- ³³¹ *Reporting Requirements*, EMBASSY OF THE U.S. RANGOON BURMA, <http://burma.usembassy.gov/reporting-requirements.html> (last visited Jan. 2, 2015).
- ³³² 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>.
- ³³³ *Id.* at 4.
- ³³⁴ 15 U.S.C. §§ 78dd-1 *et seq.*
- ³³⁵ *Greenhouse Gas Reporting Program*, EPA (last visited Feb. 27, 2015).
- ³³⁶ *Global CSR Disclosure Requirements*, INITIATIVE FOR RESPONSIBLE INVESTMENT, <http://hausercenter.org/iri/about/global-csr-disclosure-requirements> (last visited Jan. 2, 2015).
- ³³⁷ GARY SHORTER, CONG. RESEARCH SERV., R42544, SEC CLIMATE CHANGE DISCLOSURE GUIDANCE: AN OVERVIEW AND CONGRESSIONAL CONCERNS (Aug. 26, 2013), *available at* <http://fas.org/sgp/crs/misc/R42544.pdf>; SEC, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 82 (Feb. 2, 2010), *available at* <http://www.sec.gov/rules/interp/2010/33-9106.pdf>.
- ³³⁸ *See Morrison v. National Australia Bank*, 561 U.S. 247 (2010); *see also* Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9 UTRECHT L. REV. 68 (2013), *available at* <http://www.ilsa.org/jessup/jessup14/Prosecutions%20of%20Extraterritorial%20Criminal%20Conduct%20and%20the%20Abuse%20of%20Rights%20Doctrine,%20Danielle%20Ireland-Piper.pdf>.
- ³³⁹ H.R. 2136 (112th) — Civilian Extraterritorial Jurisdiction Act of 2011 (112th Congress, 2011-2012).
- ³⁴⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).
- ³⁴¹ *Id.* at 1660; Marco Simons, *After Kiobel, Extraterritoriality is Not a Question of Subject Matter Jurisdiction Under The Alien Tort Statute — And Neither is Corporate Liability*, CONCURRING OPINIONS (May 13, 2013), <http://www.concurringopinions.com/archives/2013/05/after-kiobel-extraterritoriality-is-not-a-question-of-subject-matter-jurisdiction-under-the-alien-tort-statute-and-neither-is-corporate-liability.html>.
- ³⁴² *Daimler AG v. Bauman*, 134 S.Ct. 746, 761 (2014) (internal quotations omitted).
- ³⁴³ *Id.* at 67.
- ³⁴⁴ Working Group U.S. Visit Report, *supra* note 16.

-
- ³⁴⁵ *Oxfam America Sues SEC for Failure to Issue New Transparency Rules Required by Dodd-Frank 1504*, EARTHRIGHTS INT’L (Sept. 18, 2014), <http://www.earthrights.org/media/oxfam-america-sues-sec-failure-issue-new-transparency-rules-required-dodd-frank-1504>.
- ³⁴⁶ *Reporting Requirements*, *supra* note 331.
- ³⁴⁷ INST. FOR BUS. & HUMAN RIGHTS & GLOBAL BUS. INITIATIVE ON HUMAN RIGHTS, STATE OF PLAY: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN BUSINESS RELATIONSHIPS 80-81 (2012), *available at* <http://www.ihrb.org/publications/reports/state-of-play.html>.
- ³⁴⁸ *Universal Periodic Review*, DOS, <http://www.state.gov/j/drl/upr/> (last visited Feb. 2, 2015); UNIVERSAL PERIODIC REVIEW PROCESS: UNITED STATES IMPLEMENTATION OF ACCEPTED RECOMMENDATIONS, *available at* <http://www.humanrights.gov/wp-content/uploads/2012/03/usimplementationprocess-2010-upr.pdf>.
- ³⁴⁹ Report of the Working Group on the Universal Periodic Review: United States of America ¶ 22, 16th Sess., A/HRC/16/11 (Jan. 4, 2011) (noting the concerns raised by India), *available at* <http://www.state.gov/documents/organization/158198.pdf>.
- ³⁵⁰ Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Statement upon adoption of Universal Periodic Review Report (Mar. 18, 2011), *available at* <https://geneva.usmission.gov/2011/03/18/us-upr-adoption/>.
- ³⁵¹ *Id.*
- ³⁵² REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT ¶ 25 (Mar. 10, 2011), *available at* <http://www.state.gov/j/drl/upr/archive/157986.htm>.
- ³⁵³ *Id.* at ¶ 28; Koh, *supra* note 350.
- ³⁵⁴ Koh, *supra* note 350.
- ³⁵⁵ Working Group U.S. Visit Report, *supra* note 16, at ¶ 7, 13-14.
- ³⁵⁶ Draft Resolution: Promotion and Protection of Human Rights in Business, 44th Sess., June 3-5, 2014, AG/doc.5452/14 rev. 1 (June 4, 2014), *available at* <http://business-humanrights.org/en/doc-draft-resolution-promotion-and-protection-of-human-rights-in-business>.
- ³⁵⁷ Working Group U.S. Visit Report, *supra* note 16, at ¶¶ 95, 102.
- ³⁵⁸ “In the United States, all fifty States, the District of Colombia, Puerto Rico, Guam, and the Virgin Islands, have Consumer Protections Laws based on the U.S. Federal Trade Commission Act’s prohibition against deceptive and unfair methods of competition in or affecting commerce.” ICAR Due Diligence Report, *supra* note 150, at 41.
- ³⁵⁹ Pub.L. 90-321, 82 Stat. 146.
- ³⁶⁰ 15 U.S.C. § 1692(1977).
- ³⁶¹ 15 U.S.C. § 1681.
- ³⁶² 15 U.S.C. ch. 41 § 1601.
- ³⁶³ 15 U.S.C. § 1601.
- ³⁶⁴ 12 U.S.C. ch. 29 §§ 2801-2811.
- ³⁶⁵ 12 U.S.C. § 4901 et seq.
- ³⁶⁶ Part of the Banking Act of 1933, Pub. L. 73-66 Stat. 162.
- ³⁶⁷ Pub.L. 106-102 113 Stat. 1338 (1999).
- ³⁶⁸ Pub.L. 111-203 H.R. 4173 (2010).

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- ³⁶⁹ Pub.L. 111-148 H.R. 3590 (2010).
- ³⁷⁰ Rev.Stat. ch. 121 1/2 § 311 et seq.
- ³⁷¹ The Organic Food Production Act of 1990, 7 U.S.C. §§ 6501 *et seq.* (2014); 7 CFR 205 (Dec. 21, 2000).
- ³⁷² Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385; 50 C.F.R. §§ 216.91 and 216.92.
- ³⁷³ U.S. Dept. of Agriculture, Guidelines for Eliminating Child and Forced Labor in Agricultural Supply Chains, 76 FR 20305 (April 12, 2011), *available at* <http://www.dol.gov/ilab/issues/child-labor/fcea.htm>.
- ³⁷⁴ Sam Frizell, *Google Is Making it Harder for the NSA to Grab Its Data*, TIME (June 7, 2014), <http://time.com/2843295/google-nsa-data/>.
- ³⁷⁵ 18 U.S.C. § 2510) (1986).
- ³⁷⁶ Hearing on The Location Privacy Protection Act of 2014 Before the Subcomm. On Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 113 Cong. (June 2014) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* <http://www.judiciary.senate.gov/imo/media/doc/06-04-14pmLeahyStatement.pdf>; Hearing on The Location Privacy Protection Act of 2014 Before the Subcomm. On Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 113 Cong. (June 2014) (statement of Cindy Southworth, Vice President of Development and Innovation and Founder of the Safety Net Technology Project at National Network to End Domestic Violence, representing the National Network to End Domestic Violence and the Minnesota Coalition for Battered Women), *available at* <http://www.judiciary.senate.gov/imo/media/doc/06-04-14SouthworthTestimony.pdf>; John Eggerton, *Franken Introduces Info Collection Transparency Bill*, BROADCASTING & CABLE (Aug. 1, 2013, 11:41 AM), <http://www.broadcastingcable.com/news/washington/franken-introduces-info-collection-transparency-bill/61691>; SEN. AL FRANKEN, SUMMARY OF THE SURVEILLANCE TRANSPARENCY ACT OF 2013, *available at* <http://www.franken.senate.gov/files/documents/130801TransparencySummary.pdf> (last visited Feb. 2, 2015); SEN. AL FRANKEN, THE LOCATION PRIVACY PROTECTION ACT OF 2014—SUMMARY, *available at* <http://www.franken.senate.gov/files/documents/140327Locationprivacy.pdf> (last visited Feb. 2, 2015); The Location Privacy Protection Act of 2014, Subcomm. on Privacy, Technology and the Law, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/meetings/the-location-privacy-protection-act-of-2014> (last visited Feb. 3, 2015); *Summary: S.607 — 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/607> (last visited Feb. 3, 2015) (Electronic Communications Privacy Act Amendments Act of 2013); *Subcommittees*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/subcommittees#privacy> (last visited Feb. 2, 2015).
- ³⁷⁷ United States v. Jones, 132 S. Ct. 945 (2012); Riley v. California, 134 S. Ct. 2473 (2014).
- ³⁷⁸ CF Disclosure Guidance: Topic No. 2: Cybersecurity, SEC (Oct. 13, 2011), <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>.
- ³⁷⁹ 42 U.S.C. § 18001.
- ³⁸⁰ 31 U.S.C. § 5318(a)(i).
- ³⁸¹ 18 U.S.C. 7(9) Section 104; Pub.L. 107-56, 115 Stat. 272.
- ³⁸² Steven J. Markovich, *Backgrounders: The Dodd-Frank Act*, COUNCIL ON FOREIGN RELATIONS (Dec. 10, 2013), <http://www.cfr.org/united-states/dodd-frank-act/p28735>; *Can Dodd-Frank Work?*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/oral-history/financial-crisis/tags/can-dodd-frank-work/> (last visited Feb. 2, 2015); CONSUMER FED’N OF AM., A SIX-POINT CONSUMER AGENDA TO CLOSE GROWING GAPS IN MARKETPLACE PROTECTIONS, *available at* <http://www.consumerfed.org/pdfs/consumer6pointagenda.pdf> (last visited Feb. 2, 2015).

³⁸³ Michael Ollove, *Is Affordable Care Act really affordable for all?*, USA TODAY (Jan. 14, 2014, 1:43 PM), <http://www.usatoday.com/story/news/nation/2014/01/14/stateline-obama-health-care/4471957/>; Margot Sanger-Katz, *Is the Affordable Care Act Working?*, N.Y. TIMES, Oct. 26, 2014, http://www.nytimes.com/interactive/2014/10/27/us/is-the-affordable-care-act-working.html?_r=0.

³⁸⁴ Working Group U.S. Visit Report, *supra* note 16.

³⁸⁵ Somini Sengupta, *No U.S. Action, So States Move on Privacy Law*, N.Y. TIMES, Oct. 30, 2013, http://www.nytimes.com/2013/10/31/technology/no-us-action-so-states-move-on-privacy-law.html?pagewanted=all&_r=0.

³⁸⁶ S.607 - ELECTRONIC COMMUNICATIONS PRIVACY ACT AMENDMENTS ACT OF 2013, 113TH CONGRESS (2013-2014).

³⁸⁷ S.1452 — Surveillance Transparency Act of 2013, 113th Congress (2013-2014).

³⁸⁸ S.2171 — Location Privacy Protection Act of 2014, 113th Congress (2013-2014).

³⁸⁹ FINANCIAL ACTION TASK FORCE (FATF), INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS (2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

³⁹⁰ Layne E. Kruse et al., *U.S. to develop Business and Human Rights National Action Plan*, NORTON ROSE FULBRIGHT (Oct. 2014), <http://www.nortonrosefulbright.com/us/knowledge/publications/122012/us-to-develop-business-and-human-rights-national-action-plan>; Letter from Amol Mehra, Dir., Int'l Corporate Accountability Roundtable, to The Honorable Barack H. Obama (Sept. 29, 2014), *available at* <http://accountabilityroundtable.org/analysis/icar-letter-to-president-obama-on-launch-of-u-s-national-action-plan-on-responsible-business-conduct/>.

³⁹¹ U.S. GOV'T, THE OPEN GOVERNMENT PARTNERSHIP: SECOND OPEN GOVERNMENT NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/us_national_action_plan_6p.pdf [hereinafter Second Open Government NAP].

³⁹² Press Release, White House, United States G-8 Action Plan for Transparency of Company Ownership and Control (June 18, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/18/united-states-g-8-action-plan-transparency-company-ownership-and-control>.

³⁹³ For examples of civil society concerns in relation to the U.S. National Action Plan on Responsible Business Conduct, *See* Int'l Corporate Accountability Roundtable (ICAR), <http://nationalactionplan.us/>.

³⁹⁴ U.S. GOV'T, THE OPEN GOVERNMENT PARTNERSHIP: NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2011), *available at* http://www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf.

³⁹⁵ Second Open Government NAP, *supra* note 391; Press Release, *supra* note 392.

³⁹⁶ ICAR Knowing and Showing Report, *supra* note 171, at 19.

³⁹⁷ *Id.*

³⁹⁸ CF Disclosure Guidance, *supra* note 378; ICAR Knowing and Showing Report, *supra* note 170, at 17, 19.

³⁹⁹ For example, *see* U.S. Dep't of State, *United States Government Recommendations on Best Practices for Companies with Operations in Bangladesh*, HUMANRIGHTS.GOV (Mar. 11, 2013), <http://www.humanrights.gov/dyn/united-states-government-recommendations-on-best-practices-for-companies-with-operations-in-bangladesh.html>.

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- ⁴⁰⁰ *Federal Tax Credits for Energy Efficiency*, SBA, <http://www.sba.gov/content/federal-tax-credits-energy-efficiency> (last visited Feb. 2, 2015); *Federal Programs and Incentives for Business*, SELECT USA, <http://selectusa.commerce.gov/investment-incentives> (last visited Feb. 2, 2015).
- ⁴⁰¹ *See, e.g., Doing Business in China*, EMBASSY OF THE UNITED STATES: BEIJING, CHINA, <http://beijing.usembassy-china.org.cn/business.html>.
- ⁴⁰² *OHCHR and NHRIs*, OHCHR, <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (last visited Jan. 29, 2015); *U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, DOS, <http://www.state.gov/e/eb/oecd/usncp/index.htm> (last visited Jan. 29, 2015).
- ⁴⁰³ *U.S. Reaches Clean Water Agreement with Amtrak*, EPA (June 28, 2001), <http://yosemite.epa.gov/opa/advpress.nsf/b1ab9f485b098972852562e7004dc686/e07fdb1bd7a0129d85256a79006d9e19?OpenDocument>.
- ⁴⁰⁴ *Id.*
- ⁴⁰⁵ *Id.*
- ⁴⁰⁶ AMTRAK REFORM COUNCIL, A SUMMARY OF CURRENT LEGISLATIVE PROVISIONS PRESCRIBING THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) (Dec. 4, 2000), *available at* <http://govinfo.library.unt.edu/arc/materials/legsum.pdf>. Sample Environment and Sustainability Summary: AMTRAK, 2012 ENVIRONMENT AND SUSTAINABILITY SUMMARY, *available at* http://www.amtrak.com/ccurl/883/945/Amtrak%202012%20Environment%20and%20Sustainability%20Summary_Final.pdf. *Suits: Amtrak to Pay \$171,483 to Settle EEOC Sex/Wage Discrimination Suit*, EEOC (Nov. 10, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/11-10-11a.cfm>; Cheryl Hurd, *Amtrak Employees Sue for Alleged Racial Discrimination*, NBC BAY AREA (Mar. 8, 2013, 22:33 PM), <http://www.nbcbayarea.com/news/local/Amtrak-Discrimination-Lawsuit-142025833.html>. Amtrak non-discrimination policy: *Non-Discrimination Policy*, AMTRAK, <http://www.amtrak.com/non-discrimination-policy> (last visited Feb. 2, 2015).
- ⁴⁰⁷ Jerry Seper, *Feds team up with Amtrak to fight human trafficking*, WASH. POST (Oct. 4, 2012), <http://www.washingtontimes.com/news/2012/oct/4/feds-team-up-with-amtrak-to-fight-human-trafficking/>.
- ⁴⁰⁸ 12 U.S.C. § 635(b)(1)(B)(ii) (2012).
- ⁴⁰⁹ Letter from Kindra Mohr, Policy Dir., Accountability Counsel, to The Honorable John Kerry, Sec’y of State 9 (Jan. 15, 2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/1.15.2015-Accountability-Counsel-NAP-submission.pdf> [hereinafter Mohr Letter].
- ⁴¹⁰ EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO THE U.S. CONGRESS ON THE EXPORT-IMPORT BANK OF THE UNITED STATES AND GLOBAL EXPORT CREDIT COMPETITION 137 (2014), *available at* <http://www.exim.gov/about/library/reports/competitivenessreports/upload/Ex-Im-Bank-2013-Competitiveness-Report-to-Congress-Complete.pdf>.
- ⁴¹¹ *New Report Details Human Rights Violations Surrounding Ex-Im Bank-Financed Coal Plant*, SIERRA CLUB (Oct. 20, 2014) <http://content.sierraclub.org/press-releases/2014/10/new-report-details-human-rights-violations-surrounding-ex-im-bank-financed>.
- ⁴¹² *Id.*
- ⁴¹³ *Suppliers*, FANNIEMAE, <http://www.fanniemae.com/portal/about-us/suppliers/index.html> (last visited Jan. 29, 2015); FANNIEMAE, SERVICE REQUIREMENTS FOR CONTRACTORS AND CONSULTANTS, *available at* <http://www.fanniemae.com/resources/file/aboutus/pdf/supplier-requirements.pdf>.
- ⁴¹⁴ *Our Diverse Suppliers*, FREDDIE MAC, <http://www.freddiemac.com/corporate/vendors/> (last visited Feb. 2, 2015).
- ⁴¹⁵ Foreign Affairs Reform and Restructuring Act of 1998, PL 105-277.

⁴¹⁶ The Czech Supreme Court upheld a lower court decision designating the BBG's wholly-owned subsidiary, Radio Free Europe/Radio Liberty, as a "State Owned Enterprise" of the United States Government even though it is incorporated as a private company in the State of Delaware. As a result, RFE/RL is governed by Czech Public Law #87/1963, which grants special status to foreign government owned business enterprises that are domiciled in the Czech Republic. Among the special privileges granted by the law, RFE/RL was exempted from having to comply with Czech labor laws and regulations and free to treat all non-American/non-Czech employees different from American and Czech employees. U.S. citizens working for the U.S. government and U.S. companies abroad are protected by U.S. statutory laws and court jurisdiction, including those at RFE/RL. Czech nationals employed by RFE/RL have employment contracts that are governed by Czech labor laws. Non-U.S./non-Czech employees of RFE/RL are barred from seeking legal remedy in U.S. Courts⁴¹⁶ and are not covered by any legally-binding employment contract enforceable in Czech Courts. Czech law has delegated legal authority to the United States Government to protect the basic legal rights of RFE/RL employees. The U.S. Government has an obligation to act on its duty to protect the rights of RFE/RL employees. As an agency of the U.S. Government, BBG must strive to exercise this duty as well. Though RFE/RL has human resources policies that guide employment decisions by management, non-Czech/non-American employees at RFE/RL have none of the basic legal protections afforded under the labor laws of either the Czech Republic or the United States. As a result, foreign nationals working for RFE/RL in Prague are placed in a precarious position relative to their Czech and American colleagues: being dependent on RFE/RL for their work visas while at the same time denied basic legal protections provided for by the laws of the Czech Republic, where the business operates, or the U.S., where the company's board of directors is located.

⁴¹⁷ 42 U.S.C. § 2000e-2.

⁴¹⁸ *Id.* at § 701.

⁴¹⁹ Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048 (2011), available at http://columbialawreview.org/wp-content/uploads/2012/07/111-5_Kirklin_J.pdf.

⁴²⁰ Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1415841011-2UVYiWZCKtjjVH0VDq5Vuw.

⁴²¹ *Summary: H.R.2098 — 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/2098> (last visited Feb. 4, 2015).

⁴²² KEVIN R. KOSAR, CONG. RESEARCH SERV., FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW (June 8, 2011), available at <http://fas.org/sgp/crs/misc/RL30365.pdf>.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ Mohr Letter, *supra* note 409.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 9.

⁴³⁰ Mohr Letter, *supra* note 409.

⁴³¹ *Id.*

⁴³² See OVERSEAS PRIVATE INV. CORP (OPIC), ENVIRONMENTAL AND SOCIAL POLICY STATEMENT ¶ 5.7, available at http://www.opic.gov/sites/default/files/consolidated_esps.pdf ("5.7 For those projects with the potential for significant adverse impacts on Project Affected

People, OPIC will confirm prior to project approval that: (1) the Applicant has engaged the affected groups and communities as required under Performance Standard 1 and (2) there is Broad Community Support (See Glossary) for the Project.”) (emphasis in the original).

⁴³³ Mohr Letter, *supra* note 409.

⁴³⁴ ICAR Due Diligence Report, *supra* note 150, at 34.

⁴³⁵ ICAR Procurement Report, *supra* note 245, at 26.

⁴³⁶ *Id.*

⁴³⁷ OPIC, ENVIRONMENTAL AND SOCIAL POLICY STATEMENT § 4.8, Appendix B, & Appendix D (Oct. 15, 2010), *available at* http://www.opic.gov/sites/default/files/consolidated_esps.pdf.

⁴³⁸ 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>.

⁴³⁹ *Id.* at 47.

⁴⁴⁰ *Id.* at 21.

⁴⁴¹ ICAR Due Diligence Report, *supra* note 150, at 32.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 28.

⁴⁴⁶ *Id.* at 29.

⁴⁴⁷ *Id.* at 28.

⁴⁴⁸ *Id.* at 29.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 33.

⁴⁵¹ *Id.* at 34.

⁴⁵² ICAR Due Diligence Report 2013 Update, *supra* note 140, at 8.

⁴⁵³ U.S. DEP'T. OF STATE, REPORTING REQUIREMENTS ON RESPONSIBLE INVESTMENT IN BURMA 3, *available at* <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>.

⁴⁵⁴ ICAR Due Diligence Report 2013 Update, *supra* note 140, at 9.

⁴⁵⁵ Mohr Letter, *supra* note 409.

⁴⁵⁶ Working Group U.S. Visit Report, *supra* note 16.

⁴⁵⁷ Mohr Letter, *supra* note 409.

⁴⁵⁸ *Id.* at 6.

⁴⁵⁹ *Id.* at 5-6.

⁴⁶⁰ *Id.* at 6.

⁴⁶¹ *Id.* at 7.

⁴⁶² *Id.*

⁴⁶³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 20.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 23.

⁴⁶⁶ *Id.* at 32.

⁴⁶⁷ ICAR Due Diligence Report, *supra* note 150, at 34.

⁴⁶⁸ Bonnie Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities*, International Labour Office [ILO], Working Paper, No. 95.

⁴⁶⁹ ICAR Due Diligence Report, *supra* note 150, at 35.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 34.

⁴⁷³ ICAR Due Diligence Report 2013 Update, *supra* note 140, at 9.

⁴⁷⁴ U.S. Dep't of State, *Responsible Investment Reporting Requirements Frequently Asked Questions*, HUMANRIGHTS.GOV (Sept. 23, 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions/#Question2>.

⁴⁷⁵ 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).

⁴⁷⁶ ICAR Procurement Report, *supra* note 245, at 7.

⁴⁷⁷ Executive Order 11246, *supra* note 475.

⁴⁷⁸ *Id.*

⁴⁷⁹ 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-employment> (last visited Jan. 23, 2015).

⁴⁸⁰ Executive Order — Strengthening Federal Environmental, Energy, and Transportation Management (March 29, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/procurement/green/eo13423_instructions.pdf (last visited Feb. 13, 2015).

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ Executive Order 13514 — Federal Leadership in Environmental, Energy, and Economic Performance (Oct. 5, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-200900783/pdf/DCPD-200900783.pdf> (last visited Feb. 13, 2015).

⁴⁸⁴ *Id.* (emphasis added)

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

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- ⁴⁸⁷ 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> (last visited Jan. 23, 2015).
- ⁴⁸⁸ *Id.*
- ⁴⁸⁹ ICAR Due Diligence Report, *supra* note 150, at 32.
- ⁴⁹⁰ *Id.*
- ⁴⁹¹ *Id.*
- ⁴⁹² 41 U.S.C. § 65; PL 74-846; 49 Stat. 2036.
- ⁴⁹³ 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.*
- ⁴⁹⁴ *See* 41 U.S.C. § 6502. The section states that it covers contracts “for the manufacture or furnishing of materials, supplies, articles, or equipment,” which is to be distinguished from contracts for services, which are not covered by the act. *Id.*
- ⁴⁹⁵ *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).
- ⁴⁹⁶ 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).
- ⁴⁹⁷ *Id.* § 2(b)(1)(D).
- ⁴⁹⁸ 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).
- ⁴⁹⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 46.
- ⁵⁰⁰ *Id.*
- ⁵⁰¹ *Id.* at 47.
- ⁵⁰² *Id.* at 46.
- ⁵⁰⁵ *Id.* at 47.
- ⁵⁰⁶ *Id.*
- ⁵⁰⁷ *Id.*
- ⁵⁰⁸ *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>.
- ⁵⁰⁹ The English text of the GPA is provided here: http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.
- ⁵¹⁰ Revised GPA art. IV.
- ⁵¹¹ Revised GPA art. VIII.
- ⁵¹² Revised GPA art. X.
- ⁵¹³ Revised GPA art. III.
- ⁵¹⁴ United States-Panama Free Trade Agreement art. 9.7.
- ⁵¹⁵ 2013 U.S. Government Approach, *supra* note 43, at 46.

⁵¹⁶ *Id.*

⁵¹⁷ *Workshop on Government Procurement and Human Rights*, DOS (Jan. 16, 2014,) <http://www.state.gov/r/pa/prs/ps/2014/01/219938.htm>.

⁵¹⁸ *See* FAR 16.101 (General, *et seq.* (Part 16 — Types of Contracts)).

⁵¹⁹ FAR 15.302 (Source selection objective); FAR 15.303(5) (Responsibilities) (10 U.S.C. § 2305(b)(4)(B) and 41 U.S.C. § 253b(d)(3)).

⁵²⁰ ICAR Procurement Report, *supra* note 245, at 29-30.

⁵²¹ FAR 14.408-2(a) (Responsible bidder — reasonableness of price).

⁵²² 41 U.S.C. § 2313(b) (Persons covered).

⁵²³ 41 U.S.C. § 2313(c)(1)(E)(ii) (Information included).

⁵²⁴ 41 U.S.C. § 2313(c)(6) (Information included).

⁵²⁵ ICAR Procurement Report, *supra* note 245, at 19.

⁵²⁶ *Id.* at 20.

⁵²⁷ *Id.* at 27.

⁵²⁸ 41 C.F.R. § 50-201.603(b).

⁵²⁹ 41 U.S.C. § 6505.

⁵³⁰ STEVEN W. FELDMAN, *GOVERNMENT CONTRACT GUIDEBOOK*, 4TH ED., §8:26. WALSH-HEALEY ACT.

⁵³¹ Federal Acquisition Regulation; Reporting Executive Compensation and First-Tier Subcontract Awards, 77 Fed. Reg. 44047 (July 26, 2012). *See also* FAR 4.1401(b) (2014); FAR 52.204-10 (2014).

⁵³² FAR 52.204-10(a).

⁵³³ ICAR Procurement Report, *supra* note 245, at 25.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Id.* at 26-27.

⁵³⁷ *Id.* at 27.

⁵³⁸ *Id.*

⁵³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 10.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 20.

⁵⁴³ *Id.*

⁵⁴⁴ *NYU Stern Center for Business and Human Rights Lays Out Next Steps on National Action Plan for Responsible Business Conduct*, NYU STERN (Oct. 2, 2014), <http://www.stern.nyu.edu/experience-stern/news-events/cbhr-national-action-plan>.

⁵⁴⁵ *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>.

⁵⁴⁶ *Private Security Companies (PSCs)*, OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE, http://www.acq.osd.mil/log/PS/psc_25Aug2014.html (last visited Jan. 23, 2015).

⁵⁴⁷ Working Group U.S. Visit Report, *supra* note 16, at ¶ 102(c).

⁵⁴⁸ ICAR Procurement Report, *supra* note 245, at 30.

⁵⁴⁹ *Id.* at 30-31.

⁵⁵⁰ *Id.* at 31.

⁵⁵¹ *Id.* at 34.

⁵⁵² *Id.* at 24.

⁵⁵³ FAR 22.17 (Combating trafficking in persons).

⁵⁵⁴ 77 Fed. Reg. 60029 (Oct. 2, 2012) (“Strengthening Protections Against Trafficking in Persons in Federal Contracts”).

⁵⁵⁵ Public Law 113-4 (March 7, 2013), *available at* <http://www.protectionproject.org/wp-content/uploads/2010/09/TVPR-2013-VAWRA1.pdf>.

⁵⁵⁶ 2013 U.S. Government Approach, *supra* note 43, at 13.

⁵⁵⁷ National Defense Authorization Act for Fiscal Year 2013, H.R. Res. 4310, 113th Cong. (2013).

⁵⁵⁸ ILAB TECHNICAL COOPERATION PROJECT SUMMARY: GLOBAL RESEARCH ON CHILD LABOR MEASUREMENT AND POLICY DEVELOPMENT (MAP), *supra* note 271.

⁵⁵⁹ ICAR Procurement Report, *supra* note 245, at 25.

⁵⁶⁰ FAR 9.104-7 (Solicitation provisions and contract clauses); FAR 14.201-3, 14.201-5(a) (Representations and instructions); FAR 15.203 (Requests for proposals); FAR 15.204-3 (Contract clauses); FAR 15.204-5 (Representations and instructions).

⁵⁶¹ 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).

⁵⁶² 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).

⁵⁶³ *Id.* at 35.

⁵⁶⁴ *Id.* at 37.

⁵⁶⁵ ICAR Procurement Report, *supra* note 245, at 29.

⁵⁶⁶ FAR 14.408-2(a) (Responsible bidder—reasonableness of price).

⁵⁶⁷ Federal Property and Administrative Services Act, 40 U.S.C. §§ 101, 121; VANESSA K. BURROWS & KATE M. MANUEL, CONG. RESEARCH SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS 3 (2011), *available at* <http://fas.org/sgp/crs/misc/R41866.pdf>.

⁵⁶⁸ 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> (last visited July 31, 2014) [hereafter EO on Labor Compliance].

⁵⁶⁹ *Id.*

⁵⁷⁰ ICAR Procurement Report, *supra* note 245, at 33.

⁵⁷¹ ICAR Due Diligence Report, *supra* note 150, at 23.

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ 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).

⁵⁷⁵ FAR 22.805(4).

⁵⁷⁶ FAR 22.808 (Complaints); FAR 22.806 (Inquiries).

⁵⁷⁷ ICAR Procurement Report, *supra* note 245, at 37.

⁵⁷⁸ *Id.* at 38.

⁵⁷⁹ FAR 36.513 (Accident prevention).

⁵⁸⁰ FAR 52.236-13 (Accident prevention); FAR 36.513 (Accident prevention).

⁵⁸¹ ICAR Procurement Report, *supra* note 245, at 38-39.

⁵⁸² FAR Subpart 9.4 (Debarment, suspension); FAR 9.405 (Effect of listing).

⁵⁸³ FAR 9.406-2 (Causes for debarment); FAR 9.407-2 (Causes for suspension).

⁵⁸⁴ ICAR Procurement Report, *supra* note 245, at 40-41.

⁵⁸⁵ ICAR Due Diligence Report, *supra* note 150, at 16.

⁵⁸⁶ *Id.*

⁵⁸⁹ ICAR Procurement Report, *supra* note 245, at 16.

⁵⁹⁰ *Id.* at 17.

⁵⁹¹ *Id.* at 25.

⁵⁹² *Id.* at 33.

⁵⁹³ 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).

⁵⁹⁴ *Id.* at 28.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ Dep't of Def. (DoD), Gen. Services Admin. (GSA), & Nat'l Aeronautics & Space Admin. (NASA), Federal Acquisition Regulation; Ending Trafficking in Persons, 78 Federal Register 59319, 59321-25 (Sept. 26, 2013) [hereinafter FAR Council, Proposed Rule of Sept. 2013].

⁶⁰¹ *See* Int'l Labor Rights Forum & Sweatfree Purchasing Consortium, Comments on FAR Case 2013-001, Strengthen protections against trafficking in persons, 2-3 (December 20, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FAR-2013-0001-0019>; Scott H. Amey, POGO comments on FAR Case

2013-001, at 2 (Dec. 20, 2013), *available at* <http://www.pogo.org/our-work/letters/2013/pogo-implores-government-to-strengthen-zero-tolerance-policy.html> (last visited July 30, 2014).

⁶⁰² *Id.*

⁶⁰³ *Id.*

⁶⁰⁴ *Id.* at 19.

⁶⁰⁵ *Id.* at 32.

⁶⁰⁶ *Id.* at 39.

⁶⁰⁷ *Id.* at 40.

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at 24.

⁶¹⁰ *Id.*

⁶¹¹ FAR 9.406 (Debarment); FAR 9.406-1 (General).

⁶¹² ICAR Procurement Report, *supra* note 245, at 40.

⁶¹³ *Id.*

⁶¹⁴ *Id.* at 39.

⁶¹⁵ See FAR 22.406-11 (Contract terminations); FAR 52.222-12 (Contract termination—debarment); FAR 14.201-5(a) (Contract clauses (fixed price contracts)); FAR 15.204-5 (Representations and instructions (contracting by negotiation)); FAR 52.209-5 (Certification regarding responsibility matters); FAR 22.1503(f) (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor); FAR 22.1504(b) (Violations and remedies).

⁶¹⁶ ICAR Procurement Report, *supra* note 245, at 41.

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., DOD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACT 7, 17-20 (2000), *available at* <http://dodig.osd.mil/audit/reports/00-088.pdf> (insufficient staff to manage requirements, insufficient contract surveillance); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 671-672 (Feb. 2001).

⁶²⁰ ICAR Procurement Report, *supra* note 245, at 42.

⁶²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-707T, SUSPENSION AND DEBARMENT—CHARACTERISTICS OF ACTIVE AGENCY PROGRAMS AND GOVERNMENT-WIDE OVERSIGHT EFFORTS 3 (2013).

⁶²² 2013 U.S. Government Approach, *supra* note 43, at 7.

⁶²³ *Id.*

⁶²⁴ Krieg DeVault, *Public-Private Partnerships for Energy, Infrastructure, and Health Information Technology Under the American Recovery and Reinvestment Act of 2009* (Feb. 2009), <http://www.kriegdevault.com/news/132-public-private-partnerships-energy-infrastructure-health-information>.

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- ⁶²⁵ FRED SISSINE ET. AL, CONGRESSIONAL RESEARCH SERVICE, ENERGY PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (2009), *available at* <http://www.acs.org/content/dam/acsorg/policy/acsonthehill/briefings/electricity/crs-report-energy-provisions-in-the-american-reinvestment-recovery-act.pdf>.
- ⁶²⁶ Proskauer Rose LLP, *New Expansive Whistleblower Protection Contained in American Recovery and Reinvestment Act of 2009*, MONDAQ, (Mar. 12, 2009), <http://www.mondaq.com/unitedstates/x/76000/employee+rights+labour+relations/New+Expansive+Whistleblower+Protection+Contained+In+American+Recovery+And+Reinvestment+Act+Of+2009>.
- ⁶²⁷ *Id.*
- ⁶²⁸ *The United States Embassy in Honduras*, EXPORT.GOV, <http://export.gov/honduras/u.s.embassyinhonduras/index.asp> (last visited Jan. 22, 2015); *U.S. Government Approach on Business and Human Rights*, EMBASSY OF THE U.S. RANGOON, BURMA, <http://burma.usembassy.gov/business-and-human-rights.html> (last visited Feb. 3, 2015); Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *U.S. Government Approach on Business and Human Rights*, EMBASSY OF THE U.S., BANGKOK, THAILAND (May 1, 2013), http://bangkok.usembassy.gov/business_and_human_rights.html. *See, e.g., Articles on Human Rights*, EMBASSY OF THE U.S., BEIJING, CHINA, <http://beijing.usembassy-china.org.cn/humanrights.html>; Bureau of East Asian and Pacific Affairs, *U.S. Relations with Indonesia*, DOS (Feb. 3, 2014), <http://www.state.gov/r/pa/ei/bgn/2748.htm>.
- ⁶²⁹ *Information for Exporters of U.S. Goods and Services*, EXPORT.GOV, http://export.gov/worldwide_us/index.asp (last updated Oct. 17, 2013).
- ⁶³⁰ *Human Rights Reports*, DOS, <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Jan. 16, 2015).
- ⁶³¹ *Doing Business in International Markets*, DOS, <http://www.state.gov/e/eb/cba/> (last visited Jan. 22, 2015).
- ⁶³² *Doing Business Abroad*, DOS, <http://www.state.gov/e/eb/cba/faq/176.htm> (last visited Jan. 22, 2015).
- ⁶³³ *Specialized Corporate Disclosure*, SEC, <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>.
- ⁶³⁴ Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 (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>.
- ⁶³⁵ DEPARTMENT OF COMMERCE, DEPARTMENT OF COMMERCE REPORTING REQUIREMENTS UNDER SECTION 1502(D)(3)(C) OF THE DODD-FRANK ACT: WORLD-WIDE CONFLICT MINERAL PROCESSING FACILITIES, *available at* <http://www.ita.doc.gov/td/forestprod/DOC-ConflictMineralReport.pdf> (last visited Jan. 22, 2015).
- ⁶³⁶ *Public-Private Alliance for Responsible Minerals Trade: Fact Sheet*, DOS (Nov. 15, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/177214.htm>.
- ⁶³⁷ *All Project Descriptions*, OPIC, <http://www.opic.gov/opic-action/all-project-descriptions> (last visited Jan. 21, 2015); SADIKA HAMEED & KATHRYN MIXON, CSIS, PRIVATE-SECTOR DEVELOPMENT IN FRAGILE, CONFLICT-AFFECTED, AND VIOLENT COUNTRIES: CSIS WORKING GROUP ON PRIVATE-SECTOR DEVELOPMENT IN FRAGILE STATES 6-7, *available at* http://csis.org/files/publication/130617_Hameed_PrivateSecDevel_WEB.pdf.
- ⁶³⁸ *Myths about Helping Small and Medium Enterprises in Post-Conflict Countries*, OPIC (May 23, 2012), <http://www.opic.gov/blog/small-business/myths-about-helping-small-and-medium-enterprises-in-post-conflict-countries>.
- ⁶³⁹ *FAQs*, OPIC, <http://www.opic.gov/media-events/faqs> (last visited Jan. 22, 2015).
- ⁶⁴⁰ Working Group U.S. Visit Report, *supra* note 16, at ¶¶ 24-25.
- ⁶⁴¹ 2013 U.S. Government Approach, *supra* note 43, at 16-18.
- ⁶⁴² HAMEED & MIXON, *supra* note 637, at 8.
- ⁶⁴³ *Id.* at 9.

⁶⁴⁴ *Id.*

⁶⁴⁵ DEPARTMENT OF COMMERCE, *supra* note 635.

⁶⁴⁶ *Nations join forces with UN to stamp out rights abuses in conflict zones*, UN NEWS CTR. (Oct. 22, 2009), <http://www.un.org/apps/news/story.asp?NewsID=32680&Cr=&Cr1=#.VLf9XXuzljN>; Sasha Lezhnev, *U.N. Throws Weight Behind Effort to Curb Conflict Minerals*, ENOUGH (Dec 1, 2010), <http://www.enoughproject.org/blogs/un-throws-weight-behind-effort-curb-conflict-minerals>.

⁶⁴⁷ DOS, BUREAU OF ECONOMIC, ENERGY AND BUSINESS AFFAIRS, KIMBERLEY PROCESS FOR ROUGH DIAMONDS (Jan. 2010), *available at* <http://www.state.gov/documents/organization/105827.pdf>;

⁶⁴⁸ *Id.*; *Nations join forces with UN to stamp out rights abuses in conflict zones*, UN NEWS CTR. (Oct. 22, 2009), <http://www.un.org/apps/news/story.asp?NewsID=32680&Cr=&Cr1=#.VLf9XXuzljN>; *The Voluntary Principles on Security and Human Rights*, DOS, <http://www.state.gov/j/drl/vp/> (last visited Jan. 16, 2015); Sasha Lezhnev, *U.N. Throws Weight Behind Effort to Curb Conflict Minerals*, ENOUGH (Dec 1, 2010), <http://www.enoughproject.org/blogs/un-throws-weight-behind-effort-curb-conflict-minerals>; *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD, <http://www.oecd.org/daf/inv/mne/mining.htm> (last visited Jan. 16, 2015).

⁶⁴⁹ 2013 U.S. Government Approach, *supra* note 43, at 8; *The Voluntary Principles on Security and Human Rights*, DOS, <http://www.state.gov/j/drl/vp/> (last visited Jan. 16, 2015).

⁶⁵⁰ Ambassador King's Remarks at the Launch Ceremony for the International Code of Conduct for Private Security Service Providers (ICoC) Association, MISSION OF THE U.S. GENEVA, SWITZERLAND (Sept. 19, 2013), *available at* <https://geneva.usmission.gov/2013/09/19/icoc/>.

⁶⁵¹ U.S. DEP'T OF STATE, THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, *available at* <http://www.humanrights.gov/wp-content/uploads/2013/08/icoc-fact-sheet.pdf> (last visited Jan. 28, 2015); *International Code of Conduct for Private Security Service Providers (ICoC) - A Process Aimed at Companies*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://business-humanrights.org/en/conflict-peace/special-initiatives/initiatives-on-private-military-security-companies/international-code-of-conduct-for-private-security-service-providers-icoc-a-process-aimed-at> (last visited Jan. 21, 2015); *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>; *International humanitarian law and private military/security companies*, ICRC (Oct. 12, 2013), <https://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm>; Working Group U.S. Visit Report, *supra* note 16, at ¶ 28.

⁶⁵² *Private Military and Security Companies*, FOREIGN DEPARTMENT OF FEDERAL AFFAIRS, <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies.html> (last updated June 27, 2014).

⁶⁵³ ASSESSING AND IMPROVING THE VOLUNTARY PRINCIPLES ON SECURITY & HUMAN RIGHTS: LESSONS FROM THE NIGERIAN EXPERIENCE, EARTHRIGHTS INTERNATIONAL (May 2013), *available at* <http://www.earthrights.org/publication/assessing-and-improving-voluntary-principles-security-human-rights>.

⁶⁵⁴ *Why we are leaving the Kimberley Process - A message from Global Witness Founding Director Charmian Gooch*, GLOBAL WITNESS (Dec. 5, 2011), <http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch>; *NYU Stern Center for Business and Human Rights Lays Out Next Steps on National Action Plan for Responsible Business Conduct*, NYU STERN (Oct. 2, 2014), <http://www.stern.nyu.edu/experience-stern/news-events/cbhr-national-action-plan>.

⁶⁵⁵ *Why we are leaving the Kimberley Process - A message from Global Witness Founding Director Charmian Gooch*, GLOBAL WITNESS (Dec. 5, 2011), <http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch>.

-
- ⁶⁵⁶ *NYU Stern Center for Business and Human Rights Lays Out Next Steps on National Action Plan for Responsible Business Conduct*, NYU STERN (Oct. 2, 2014), <http://www.stern.nyu.edu/experience-stern/news-events/cbhr-national-action-plan>.
- ⁶⁵⁷ *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>.
- ⁶⁵⁸ *Private Security Companies (PSCs)*, OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE, http://www.acq.osd.mil/log/PS/psc_25Aug2014.html (last visited Jan. 23, 2015).
- ⁶⁵⁹ Letter from Camelia Tepelus, Advisor, & Michelle Guelbart, Dir. of Private Sector Engagement, ECPAT-USA, to the U.S. Gov't, White House Nat'l Action Plan on Responsible Bus. Conduct, *available at* http://nationalactionplan.us/wp-content/uploads/2014/11/ECPATUSA_input-for-US-Govt-NAP-1.pdf.
- ⁶⁶⁰ Sean Hecker & Margot Laporte, *Should FCPA "Territorial" Jurisdiction Reach Extraterritorial Proportions?*, 42 INT'L LAW NEWS (2013), ABA, *available at* http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html; OPIC, ANTI-CORRUPTION POLICIES AND STRATEGIES HANDBOOK (2006), *available at* <http://www.opic.gov/sites/default/files/docs/opicanticorruptionhandbook0906.pdf>.
- ⁶⁶¹ Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,594 (Nov. 9, 2009), *available at* http://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.
- ⁶⁶² *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).
- ⁶⁶³ *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>.
- ⁶⁶⁴ *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).
- ⁶⁶⁵ *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>.
- ⁶⁶⁶ *SEC Enforcement Actions: FCPA Cases*, SEC, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Dec. 22, 2014).
- ⁶⁶⁷ *The Global Regime for Armed Conflict, Council on Foreign Relations*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/peacekeeping/global-regime-armed-conflict/p24180> (last updated June 19, 2013); Micah Zenko, Douglas Dillon Fellow & Rebecca R. Friedman, *UN Early Warning for Preventing Conflict*, 18 INTERNATIONAL PEACEKEEPING 21-37 (2011), *available at* <http://www.cfr.org/international-organizations-and-alliances/un-early-warning-preventing-conflict/p23896>; *U.S. Passports & International Travel*, DOS, <http://travel.state.gov/content/passports/english/passports.html> (last visited Jan. 21, 2015).
- ⁶⁶⁸ *The U.S.-ICC Relationship*, ABA-ICC PROJECT, <http://www.aba-icc.org/the-us-icc-relationship/> (last visited Jan. 21, 2015); *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference*, DOS (June 15, 2010), http://web.archive.org/web/20120112210935/http://www.state.gov/j/gcj/us_releases/remarks/143178.htm; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf; *International Criminal Court*, DOS, <http://www.state.gov/j/gcj/icc/> (last visited Jan. 21, 2015); Caitlin Lambert, *The Evolving U.S. Policy Towards the ICC*, INT'L JUSTICE PROJECT (Mar. 6, 2014), <http://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/>.

-
- ⁶⁶⁹ Letter from Andrea Carmen, Exec. Dir., Int’l Indian Treaty Council, to U.S. Dep’t of State (Jan. 14, 2015), *available at* <http://nationalactionplan.us/wp-content/uploads/2014/11/IITC-Submission-to-the-U.S.-National-Action-Plan.pdf>.
- ⁶⁷⁰ HRW, BILATERAL IMMUNITY AGREEMENTS (2003), *available at* http://www.hrw.org/sites/default/files/related_material/2003.06_US_Bilateral_Immunity_Agreements.pdf.
- ⁶⁷¹ *The States Parties to the Rome Statute*, ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 21, 2015).
- ⁶⁷² Foreign & Commonwealth Office, *Guidance: Conflict Minerals*, GOV.UK (June 19, 2013), <https://www.gov.uk/conflict-minerals>.
- ⁶⁷³ *SEC Rulings on Genocide-Free Investing*, INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.org/about/resources/sec-rulings-on-genocide-free-investing/> (last visited Jan. 21, 2015).
- ⁶⁷⁴ *Transparency and Disclosure Rules*, INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.org/about/resources/transparency-and-disclosure-rules/> (last visited Jan. 21, 2015); *Statement of Support*, INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.org/about/resources/statement-of-support/> (last visited Jan. 21, 2015).
- ⁶⁷⁵ ICAR Third Pillar report, *supra* note 301.
- ⁶⁷⁶ 12 U.S.C. § 635.
- ⁶⁷⁷ Working Group U.S. Visit Report, *supra* note 16, at ¶ 29; ICAR Due Diligence Report, *supra* note 150, at 34-35.
- ⁶⁷⁸ Letter from Elizabeth L. Littlefield, President and CEO, OPIC, to The Honorable Harry Reid, Senator, et al. (Oct. 29, 2010), *available at* <http://www.opic.gov/sites/default/files/report-2010audit.pdf>; *OIG Oversight: Overseas Private Investment Corporation Overview*, U.S. AID, <http://oig.usaid.gov/node/1662> (last visited Jan. 21, 2015).
- ⁶⁷⁹ Environmental and Social Due Diligence Procedures and Guidelines June 27, 2013 as revised, December 12, 2013, EXPORT-IMPORT BANK OF THE UNITED STATES, *available at* <http://www.exim.gov/generalbankpolicies/environment/Environmental-and-Social-Due-Diligence-Procedures-and-Guidelines.cfm> (last visited Jan. 21, 2015).
- ⁶⁸⁰ ICAR Due Diligence Report, *supra* note 150, at 34-35.
- ⁶⁸¹ ACCOUNTABILITY COUNSEL & GREEN ADVOCATES INT’L, FUELING HUMAN RIGHTS DISASTERS: AN EXAMINATION OF THE U.S. OVERSEAS PRIVATE INVESTMENT CORPORATION’S INVESTMENT IN BUCHANAN RENEWABLES 4-5 (Jan. 22, 2014), *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2013/02/Fueling-Human-Rights-Disasters-smaller-file.pdf>.
- ⁶⁸² *Id.* at 58.
- ⁶⁸³ *Id.* at 46.
- ⁶⁸⁴ Mohr Letter, *supra* note 409.
- ⁶⁸⁵ *Id.* at 8-9.
- ⁶⁸⁶ *Fact Sheet: The Obama Administration’s Comprehensive Efforts to Promote Gender Equality and Empower Women and Girls Worldwide*, THE WHITE HOUSE (Apr. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/04/19/fact-sheet-obama-administration-s-comprehensive-efforts-promote-gender-e>.
- ⁶⁸⁷ 2013 U.S. Government Approach, *supra* note 43.
- ⁶⁸⁸ *UN Guiding Principles on Business and Human Rights Workshop*, DOS (July 31, 2012), <http://www.state.gov/r/pa/prs/ps/2012/07/195901.htm>.

-
- ⁶⁸⁹ *Basics of a Social Compliance System*, DOL, <http://www.dol.gov/ilab/child-forced-labor/Basics-of-a-Social-Compliance-System.htm> (last visited Jan. 21, 2015).
- ⁶⁹⁰ Working Group U.S. Visit Report, *supra* note 16, at ¶ 18.
- ⁶⁹¹ HUMANRIGHTS.GOV, www.humanrights.gov (last visited Feb. 25, 2015).
- ⁶⁹² *U.S. Agencies*, HUMANRIGHTS.GOV, <http://www.humanrights.gov/usagencies.html> (last visited Jan. 21, 2015).
- ⁶⁹³ The United States did not accept 2010 UN Periodic Review recommendations that the United States create a national human rights monitoring body. Report of the Working Group on the Universal Periodic Review: United States of America ¶ 92.72, 16th Sess., A/HRC/16/11 (Jan. 4, 2011), *available at* <http://www.state.gov/documents/organization/158198.pdf>; REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT ¶ 27 (Mar. 10, 2011), *available at* <http://www.state.gov/j/drl/upr/archive/157986.htm>.
- ⁶⁹⁴ 2013 U.S. Government Approach, *supra* note 43; *see also* Working Group U.S. Visit Report, *supra* note 16.
- ⁶⁹⁵ *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITE HOUSE: NAT'L SECURITY COUNCIL (Nov. 20, 2014), <http://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->.
- ⁶⁹⁶ *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV (Feb. 12, 2017), <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.
- ⁶⁹⁷ COLUMBIA LAW SCH. HUMAN RIGHTS INST. & THE INT'L ASSOC. OF OFFICIAL HUMAN RIGHTS AGENCIES, SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE FOR THE LIST OF ISSUES: UNITED STATES 1-2, *available at* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14554_E.pdf; COLUMBIA LAW SCH. HUMAN RIGHTS INST. & THE INT'L ASSOC. OF OFFICIAL HUMAN RIGHTS AGENCIES, FEDERAL OUTREACH AND MECHANISMS TO ENSURE HUMAN RIGHTS IMPLEMENTATION AND THE FEDERAL, STATE AND LOCAL LEVELS: SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW OF THE UNITED STATES OF AMERICA 2-3, *available at* http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/images/state_and_local_upr_report.pdf.
- ⁶⁹⁸ HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 11 (Feb. 2008), *available at* <http://www.oecd.org/investment/globalforum/40311282.pdf>.
- ⁶⁹⁹ Mark Chinen, *Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility*, 25 EUR. J. INT'L L. 703, 712 (2014); Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423 (2013).
- ⁷⁰⁰ However, NAFTA does reference environmental considerations, includes some outright protections, and protects the rights of parties to apply environmental measures, for example, to operations on their sovereign territory. *Id.*
- ⁷⁰¹ David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA and Other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297 (2011), *available at* <http://www.corteidh.or.cr/tablas/usuario/TLC/Labor%20Rights%20and%20Environmental%20Protection%20under%20NAFTA%20and%20Other%20U.S.%20Free%20Trade.pdf>.
- ⁷⁰² *Id.*
- ⁷⁰³ *Id.*
- ⁷⁰⁴ *Id.*

-
- ⁷⁰⁵ 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).
- ⁷⁰⁶ *Id.*
- ⁷⁰⁷ 2012 U.S. Model Bilateral Investment Treaty, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
- ⁷⁰⁸ Gordon, *supra* note 705, at 151.
- ⁷⁰⁹ *Id.* at 144.
- ⁷¹⁰ DEP'T OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS, available at <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf> (last accessed Jan. 28, 2015).
- ⁷¹¹ *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, <http://www.ustr.gov/about-us/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://transatlantic.sais-jhu.edu/transatlantic-topics/Articles/TTIP%20Forum/Compafes_TTIP_paper_final.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).
- ⁷¹² *Trans Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Jan. 22, 2015).
- ⁷¹³ See Sheldon Leader, *A Conversation on Stabilization Clauses*, in AMNESTY INTERNATIONAL, HUMAN RIGHTS, TRADE, AND INVESTMENT MATTER 31-33 (May 2006), available at <http://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf>.
- ⁷¹⁴ 2012 U.S. Model Bilateral Investment Treaty art. 12(5), available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
- ⁷¹⁵ Gordon, *supra* note 705, at 200.
- ⁷¹⁶ *Bilateral Investment Treaties and Related Agreements*, DOS, <http://www.state.gov/e/eb/ifa/bit/index.htm> (last visited Jan. 22, 2015).
- ⁷¹⁷ *Trade & Investment Framework Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements> (last visited Jan. 22, 2015).
- ⁷¹⁸ Gantz, *supra* note 701, at 355-56.
- ⁷¹⁹ MANN, *supra* note 698; *Trade & Development*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development> (last visited Jan. 22, 2015); Investment Protections in U.S. Trade and Investment Agreements: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means, Cong. (2009) (written statement of Franklin J. Vargo, Vice President for International Economic Affairs, National Association of Manufacturers), available at

-
- http://www.nam.org/Issues/Trade/Multilateral-Trade/Written-Testimony-on-Investment-Protections-in-U_S_-Trade-and-Investment-Agreements/; Jeremy W. Peters, *U.S. Senate Passes Russian Trade Bill, With a Human Rights Caveat*, N.Y. TIMES, Dec. 6, 2012, http://www.nytimes.com/2012/12/07/business/global/senate-passes-russian-trade-bill-with-conditions.html?_r=0 (Russia).
- ⁷²⁰ U.S. Model BIT art. 24 (1)(a)(i)(A) & (1)(b)(i)(A) (allowing for arbitration in the event that an obligation set forth in Articles 3 through 10 is breached); *see also* Sharon Hang, Comment, *Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 FORDHAM INT'L L.J. 1215, 1260 (2014).
- ⁷²¹ 2012 U.S. Model Bilateral Investment Treaty art. 13, *available at* <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
- ⁷²² Especially citing skewed power dynamics: Kent Paterson, *NAFTA Linked to Massive Human Rights Violations in Mexico*, CIP AMERICAS PROGRAM (Apr. 3, 2013), <http://www.cipamericas.org/archives/11779>.
- ⁷²³ AFL-CIO Report “NAFTA at 20” Sums Up Trade Deals’ Impact, AFL-CIO (Mar. 27, 2014), <http://www.aflcio.org/Press-Room/Press-Releases/AFL-CIO-Report-NAFTA-at-20-Sums-Up-Trade-Deals-Impact>.
- ⁷²⁴ *New Report Reveals Environmental Costs of North American Trade Agreement*, SIERRA CLUB (Mar. 11, 2014), <http://content.sierraclub.org/press-releases/2014/03/new-report-reveals-environmental-costs-north-american-free-trade-agreement>.
- ⁷²⁵ Investment Protections in U.S. Trade and Investment Agreements: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means, Cong. (2009) (written statement of Franklin J. Vargo, Vice President for International Economic Affairs, National Association of Manufacturers), *available at* http://www.nam.org/Issues/Trade/Multilateral-Trade/Written-Testimony-on-Investment-Protections-in-U_S_-Trade-and-Investment-Agreements/.
- ⁷²⁶ *Trans-Pacific Partnership Agreement (TPP): Background, Commentaries & Media Coverage on Human Rights Concerns*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://business-humanrights.org/en/trans-pacific-partnership-agreement-tpp-background-commentaries-media-coverage-on-human-rights-concerns-0> (last visited Jan. 22, 2015).
- ⁷²⁷ *Id.*
- ⁷²⁸ 2012 U.S. Model Bilateral Investment Treaty art. 8(3)(c)(ii), *available at* <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
- ⁷²⁹ Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes, Section IV.1, *available at* <http://www.state.gov/e/eb/rls/othr/2009/131118.htm>.
- ⁷³⁰ Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes, Section IV.1, *available at* <http://www.state.gov/e/eb/rls/othr/2009/131118.htm>.
- ⁷³¹ John Ruggie, Special Representative of the Sec’y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., Report of the Special Representative of the Secretary-General on the Issue of Human rights and Transnational Corporations and Other Business Enterprises (2011), Addendum: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations: Guidance for Negotiators, U.N. Doc. A/HRC/17/31/Add.3 (2011), *available at* <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>. The UN’s principles for responsible contracts are:
1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.

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2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.
 3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project
 4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations
 5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.
 6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
 7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
 8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
 9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism
 10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications. *Id.*

⁷³² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438, at 46.

⁷³³ This requirement for the DOS applies if the contractor intends to supply housing for a third country national, and is for a contract without a temporary labor camp standard. *Id.*

⁷³⁴ *Id.*

⁷³⁵ *Workshop on Government Procurement and Human Rights*, DOS (Jan. 16, 2014), <http://www.state.gov/r/pa/prs/ps/2014/01/219938.htm>.

⁷³⁶ 42 U.S.C. ch. 126.

⁷³⁷ *See id.*

⁷³⁸ Pub. L. 110-49 (July 26, 2007).

⁷³⁹ ICAR Due Diligence Report, *supra* note 150, at 23.

⁷⁴⁰ 15 U.S.C. § 7dd-1 *et seq.*

⁷⁴¹ *See, e.g., U.S. Announces 2010 UPR Implementation Plan*, USICD.ORG (March 28, 2012), http://www.usicd.org/detail/news.cfm?news_id=736&id=247.

⁷⁴² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-102, *supra* note 438.

⁷⁴³ 2013 U.S. Government Approach, *supra* note 43, at 3.

⁷⁴⁴ *Id.* at 5.

⁷⁴⁵ *Id.* at 5-6.

⁷⁴⁶ *Id.* at 3, 9.

⁷⁴⁷ *Id.* at 9-10.

⁷⁴⁸ *Id.* at 10.

⁷⁴⁹ *Id.* at 12.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² World Health Organization, Framework Convention on Tobacco Control (entered into force Feb. 27, 2005), *available at* http://www.who.int/fctc/text_download/en/ (last visited February 26, 2015).

⁷⁵³ *Id.* art. 5.3

⁷⁵⁴ *Id.*

⁷⁵⁵ *Id.*

⁷⁵⁶ *Human Rights*, DOS, <http://www.state.gov/j/drl/hr/> (last visited Jan. 29, 2015); *U.S. Agencies: Department of State*, HUMANRIGHTS.GOV, <http://www.humanrights.gov/usagencies/department-of-state.html> (last visited Jan. 29, 2015); ROBERTA COHEN, NONRESIDENT SENIOR FELLOW, THE BROOKINGS INST., INTEGRATING HUMAN RIGHTS IN U.S. FOREIGN POLICY: THE HISTORY, THE CHALLENGES, AND THE CRITERIA FOR AN EFFECTIVE POLICY (2008), *available at* http://www.brookings.edu/~media/research/files/speeches/2008/4/human%20rights%20cohen/04_human_rights_cohen.pdf; Ephraim Percy Kenyanito & Peter Micek, *Obama Ignores User Rights with African Investment Plan*, ACCESS (Aug. 7, 2014, 9:52 AM), <https://www.accessnow.org/blog/2014/08/07/obama-ignores-user-rights-with-african-investment-plan>.

⁷⁵⁷ *Id.* at 6.

⁷⁵⁸ *Binding Treaty*, BUSINESS & HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/binding-treaty> (last visited Feb. 17, 2015).

⁷⁵⁹ *Id.*; Statement by the Delegation of the United States of America, Stephen Townley, Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights, Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument (June 26, 2014), *available at* <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>; *see also* Thalif Deen, *After Losing Vote, U.S.-EU Threaten to Undermine Treaty*, INTER PRESS SERVICE (June 28, 2014), <http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/>.