

# Assessment of the National Action Plan (NAP) on Business and Human Rights of THE UNITED STATES



February 2017



In December 2016, the United States government launched its first National Action Plan (NAP) on responsible business conduct. In response, the International Corporate Accountability Roundtable (ICAR) conducted a structured assessment of the U.S. NAP, using the NAPs Checklist developed and published by ICAR and the Danish Institute for Human Rights (DIHR).<sup>1</sup> The NAPs Checklist lays out a set of twenty-five criteria that address both the content of NAPs and the process for developing them.

This assessment is part of a larger effort by ICAR to assess all existing NAPs on business and human rights. In November 2015, ICAR and the European Coalition for Corporate Justice (ECCJ) published an updated version of their joint report, *Assessments of Existing National Action Plans (NAPs) on Business and Human Rights*,<sup>2</sup> which systematically assessed the published NAPs from the United Kingdom, the Netherlands, Denmark, Finland, Lithuania, and Sweden. This report was updated in August 2017, in conjunction with both ECCJ and Dejusticia, to include assessments of the Colombian, Norwegian, United States, United Kingdom (second iteration), Italian, and Swiss NAPs.



## Forward by the Executive Director

The International Corporate Accountability Roundtable (ICAR) has long been engaged in the global promotion of National Action Plans (NAPs) on Business and Human Rights. In September 2014, following extensive advocacy by ICAR and other civil society organizations, the U.S. government joined a growing number of countries committed to creating NAPs by announcing its intention to draft a NAP on Responsible Business Conduct.

During the drafting process of the U.S. NAP on Responsible Business Conduct, ICAR spearheaded civil society engagement and interfaced directly with those government entities involved in the drafting to push not only for a transparent and consultative process, but also for strong and meaningful government commitments within the NAP. We also co-hosted one of the four regional dialogues which fed into the NAP process in April 2015 in Washington, D.C.

ICAR also conducted a “shadow” National Baseline Assessment on the implementation of the UN Guiding Principles on Business and Human Rights in the United States and submitted over two hundred specific policy recommendations to the U.S. government for consideration. We also maintain the only independent website focused specifically on the U.S. NAP on Responsible Business Conduct.

The following assessment reveals that while the U.S. NAP presents a thorough overview of existing federal policies and government expectations around the conduct of U.S. companies abroad, there are a number of shortcomings in relation to both the drafting process and the strength of the content of the NAP. The plan fails to adequately address many of the concerns raised by civil society and labor organizations during the consultation process. Additionally, it falls short of providing bold new actions to address the challenges posed by business activity on human rights and prioritizes addressing business conduct occurring abroad over domestic business practices.

While much remains to be done to ensure that U.S. corporations are not committing or linked to human rights abuses at home or abroad, the U.S. NAP does create a starting point from which to address responsible business conduct.

In a time of growing concern over corporate influence on government, the U.S. NAP on Responsible Business Conduct presents itself as an important basis from which civil society can coalesce and collectively work towards a more rights-based and respecting U.S. economy. Only with constructive criticism and open dialogue can we continue to move forward to ensure that U.S. corporations respect human rights wherever they operate.

A handwritten signature in black ink, appearing to read 'Amol Mehra'. The signature is fluid and cursive, written in a professional style.

Amol Mehra  
Executive Director

## ASSESSMENT SUMMARY: UNITED STATES NATIONAL ACTION PLAN

### Introduction

The United States announced its decision to draft a National Action Plan (NAP) on Responsible Business Conduct in September 2014. The White House National Security Council (NSC) was designated to lead and coordinate the U.S. government's efforts to develop the NAP. In addition, sixteen government agencies were involved in the NAPs process. The NAP was officially launched in December 2016.

The U.S. NAP is organized into five "categories of action," including: (1) leading by example; (2) collaborating with stakeholders; (3) facilitating responsible business conduct by companies; (4) recognizing positive performance; and (5) providing access to remedy. It focuses on a number of issues, including human rights, indigenous rights, labor rights, land tenure, anti-corruption, and transparency.

This summary outlines key trends in terms of process and content, as identified through the attached assessment of the U.S. NAP. It is hoped that other States that are considering, beginning, or are in the process of creating a NAP will use this assessment to inform their own processes.

### Process

The positive aspects of the NAP drafting process include: (1) the government entity tasked with overseeing the drafting of the NAP was clearly identified; (2) various entities of the government were involved in the process through inter-governmental working groups; and (3) regional dialogues were held with stakeholders during the NAP drafting process.

As part of the drafting process, the U.S. government created a dedicated email address for written submission where they received stakeholder inputs on a rolling basis for over a year. In addition, U.S. government officials met with a number of stakeholders during four regional dialogues held in New York; Washington, D.C.; Oklahoma; and California. However, the process could have been strengthened through the creation of a multi-stakeholder steering group or advisory committee and the facilitation of participation of disempowered or at risk stakeholders. Additionally, the U.S. government did not release any information or summary documents regarding its deliberation over the content of the NAP, making it difficult to discern the extent to which the government took stakeholder recommendations into consideration.

The NAP process could have been improved with increased transparency around the timeline, resources, and procedure of the drafting stage. While a timeline for initial consultation and terms of reference were provided through the government's online portal early in the drafting

process; beyond that, the U.S. government did not publish a timeline in relation to the rest of the NAP process such as the drafting, review, or publication dates.

The drafting process was undermined by the fact that the U.S. government did not conduct a full national baseline assessment (NBA). By failing to conduct a NBA, the U.S. government missed the opportunity to map the State's unique context in relation to business and human rights and pinpoint the governance gaps that should be addressed in the content of the NAP in order to increase protection for human rights in the context of corporate activities. Additionally, vague monitoring and follow-up provisions and a lack of commitment to revise the NAP in the future also demonstrates a lack of commitment to a comprehensive NAP process.

Furthermore, the U.S. government did not consult around or release a draft NAP; missing a key opportunity to gather stakeholder opinions during a critical phase of the drafting process.

### Content

Overall, the content of the NAP focuses on a set of key thematic issues, namely, anti-corruption, forced and child labor, human trafficking, transparency, and public procurement. The NAP is largely focused on supporting voluntary measures and dialogue, and providing guidance, outreach, and funding for responsible business conduct initiatives. The scope of the NAP is completely extraterritorial, and the content does not address domestic business-related human rights issues.

One positive aspect of the U.S. NAP is that it clearly identifies which U.S. government department or agency is responsible for implementing each action point. However, these action points could be strengthened with additional information relating to the timeline for implementation and the framework for monitoring and reporting on implementation.

One negative aspect of the U.S. NAP is that many of the government action points are overly vague, making it difficult to discern the concrete steps the NAP is committing specific government agencies or ministries to take. This difficulty hampers the ability for stakeholders, including internal government actors, to hold responsible government entities accountable for their commitments.

Moreover, the NAP is strongly lacking in commitments to new regulatory measures. There are no new action points in the NAP that would require human rights due diligence or the disclosure of human rights due diligence activities. However, the NAP does outline some ongoing commitments and initiatives supported by the U.S. government that may incentivize companies to conduct due diligence and ensure their operations do not negatively impact human rights.

Lastly, there is very little attention paid to Pillar III of the UN Guiding Principles on Business and Human Rights on access to remedy. The NAP is heavily skewed towards promoting the Pillar I State duty to protect and Pillar II corporate responsibility to respect, although it does contain

one strong commitment relating to promoting access to remedy, that on improving the performance of the U.S. National Contact Point under the OECD Guidelines.

**ASSESSMENT OF THE UNITED STATES  
NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT**

1. GOVERNANCE AND RESOURCES	COMMENTS
<b>Leadership and Ownership of NAP Process</b>	
1.1. Commitment to the NAP process.	<p>The United States announced its decision to draft a NAP on responsible business conduct in a fact sheet on the U.S. Global Anticorruption Agenda on September 24, 2014.<sup>3</sup> The inclusion of multiple government agencies, creation of interagency working groups, and organization of four regional stakeholder consultations are all positive signs of the United States’ commitment to the NAP process.</p> <p>However, this is undermined by the fact that the U.S. government did not conduct a full national baseline assessment. Additionally, vague monitoring and follow-up provisions and a lack of commitment to revise the NAP in the future also demonstrates a lack of willingness to commitment to a comprehensive NAP process.</p>
1.2. Ensure responsibility for the NAP process is clearly established and communicated.	The White House National Security Council (NSC) was “designated to lead and coordinate the U.S. government’s efforts to develop the NAP.” <sup>4</sup>
1.3. Ensure an inclusive approach across all areas of government.	Sixteen government agencies were involved in the NAP process, including the Departments of Commerce, Homeland Security, Defense, Justice, Labor, State, Treasury, Agriculture, Export-Import Bank of the United States, General Services

	<p>Administration, Office of Management and Budget, Overseas Private Investment Corporation, U.S. Agency for International Development, U.S. Trade Representative, Small Business Administration, and the Environmental Protection Agency.<sup>5</sup></p> <p>The U.S. government also established a number of interagency working groups on the “reinforcing issue areas” of transparency and anti-corruption; investment and trade; labor rights; procurement; human rights; land tenure and agricultural investment.<sup>6</sup></p>
<p>1.4. Devise and publish terms of reference and a timeline for the NAP process.</p>	<p>The U.S. government published terms of reference and a partial timeline for the NAP process. The terms of reference for the NAP process were laid out in a “Frequently Asked Questions” document published in February 2015.<sup>7</sup> In addition, the U.S. government provided a timeline for public consultations/open dialogues in both the FAQ and an announcement of opportunity to provide input into the NAP process.<sup>8</sup></p> <p>However, beyond a timeline for initial consultation, the U.S. government did not publish a timeline in relation to the rest of the NAP process, such as the drafting, review, or publication dates.</p>
<p><b>Adequate Resourcing</b></p>	
<p>1.5. Determine an appropriate budget for the NAP process.</p>	<p>There is no information publicly available on the level of funding provided for the NAP process.</p>

2. STAKEHOLDER PARTICIPATION	COMMENTS
<b>Effective Participation by All Relevant Stakeholders</b>	
2.1. Conduct and publish a stakeholder mapping.	No information on any stakeholder mapping was published.
2.2. Develop and publish a clear plan and timeline for stakeholder participation.	<p>In November 2014, the U.S. government released an “Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct.”<sup>9</sup> This publication outlined the U.S. government’s plan and timeline for consulting with stakeholders.</p> <p>The U.S. government sought to establish a series of open dialogues with multiple stakeholders, including business associations, individual companies, labor unions, civil society, academics, international organizations, and affected communities.<sup>10</sup> However, the extent of participation of these different stakeholder groups is unknown. These dialogues were hosted by different stakeholders and held throughout the United States:</p> <ul style="list-style-type: none"> <li>• New York City: hosted by New York University Stern School of Business’ Center for Business and Human Rights and U.S. Council for International Business;</li> <li>• Berkeley, California: hosted by University of California Haas School of Business’ Center for Responsible Business and the U.S. Network of the</li> </ul>

	<p>UN Global Compact;</p> <ul style="list-style-type: none"> <li>• Norman, Oklahoma: hosted by the University of Oklahoma College of Law; and</li> <li>• Washington, D.C.: hosted by the International Corporate Accountability Roundtable and the Global Business Initiative for Human Rights.<sup>11</sup></li> </ul> <p>The U.S. government created a dedicated email address for written submission, and received submissions on a rolling basis for over a year.<sup>12</sup> In addition, U.S. government officials “met with NGOs, academic institutions, foreign government officials, labor unions, businesses, indigenous peoples, and industry associations to solicit input for the NAP.”<sup>13</sup></p>
<p>2.3. Provide adequate information and capacity-building where needed.</p>	<p>It does not appear that capacity-building measures were included in the NAP process.</p>
<p>2.4. Facilitate participation by disempowered or at-risk stakeholders.</p>	<p>The U.S. government did not thoroughly facilitate participation by disempowered or at-risk stakeholders. The U.S. government did state that it would “look to set up webinars, as well as consider video conferences through certain embassies or consulates” in order to reach the “most vulnerable individuals and communities who may be impacted by the conduct of U.S. companies abroad;”<sup>14</sup> however, it is unclear which, if any, of these steps the government undertook.</p> <p>There is no evidence to suggest that specific efforts were made to seek testimony from rights holders or facilitate opportunities for affected individuals to participate in consultations. It is also unclear whether the U.S. government requested evidence of the impacts of U.S. companies domestically or abroad from impact assessments (either company or community-based). Such evidence</p>

	would have provided insight into the priorities and concerns of affected communities related to company human rights impacts.
2.5. Consider establishing a stakeholder steering group or advisory committee.	No stakeholder steering group or advisory committee was created. Whether the U.S. government considered creating such a group is unknown.

3. NATIONAL BASELINE ASSESSMENT (NBA)	COMMENTS
<b>The NBA as the Foundation for the NAP</b>	
3.1. Undertake a NBA as the first step in the NAP process.	<p>According to the NAP, the U.S. government conducted a “stocktaking of laws and policies implemented to date that support [responsible business conduct].”<sup>15</sup> However, the extent of this stocktaking is unknown.</p> <p>The U.S. government did not conduct a full national baseline assessment (NBA). The U.S. government did “welcome work by others in this area,” including by reflecting on the “shadow” U.S. NBA conducted by the International Corporate Accountability Roundtable, but did not conduct a full NBA due to a number of issues—including the “significant amount of time that would be required to conduct a comprehensive NBA” that covers the large amount of issues discussed in the NAP.<sup>16</sup></p> <p>The U.S. government also relied on existing relevant assessments of current U.S. policies and practices, including the 2013 U.S. government Approach to Business and Human Rights document and the 2013 U.S. Open Government</p>

3. NATIONAL BASELINE ASSESSMENT (NBA)	COMMENTS
	Partnership National Action Plan. <sup>17</sup>
3.2. Allocate the task of developing the NBA to an appropriate body.	Not applicable.
3.3. Fully involve stakeholders in the development of the NBA.	Not applicable.
3.4. Publish and disseminate the NBA.	Not applicable.

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
<b>Scope of NAPs</b>	
4.1. A NAP should address the full scope of the UNGPs.	<p>The NAP is heavily skewed towards voluntary measures, guidance, trainings, outreach, funding, and dialogue, and is severely lacking in commitments to new regulatory measures. Additionally, most of the attention is on Pillars I and II; Pillar III is scarcely addressed.</p> <p>In terms of substantive content, the following four sub-criteria provide insight into the U.S. NAP's coverage of the full scope of the UNGPs without conducting an extensive analysis of the NAP's fulfillment of each UNGP, which is a task to be completed during the national baseline assessment (NBA) process. These four sub-criteria are: (1) positive or negative incentives for business to conduct due diligence, (2) disclosure of due diligence activities, (3) measures which require</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>due diligence as the basis for compliance with a legal rule, and (4) the regulatory mix (i.e. a combination of voluntary and mandatory measures that the State uses to encourage business to respect human rights).<sup>18</sup> These sub-criteria are not an exhaustive list, but have been supported by other researchers and advocacy groups as indicative of a NAP’s adequacy in terms of substantive content. The U.S NAP is unsatisfactory under each of these sub-criteria:</p> <p>(1) <u>Positive and Negative Incentives for Due Diligence</u></p> <p>Generally, the new actions in the NAP do not provide positive or negative incentives for due diligence. One new action that could incentivize human rights due diligence is the commitment on responsible land-based investment. This commitment states that USAID will help the private sector pilot the Analytical Framework for Land-Based Investments in African Agriculture through limited financial assistance and technical assistance.<sup>19</sup> The Analytical Framework provides guidance to companies on human rights due diligence and risk management for land-based investments in agriculture.<sup>20</sup> Arguably, providing funding and technical assistance may incentivize companies investing in land for agriculture to work with USAID to implement the guidance and conduct human rights due diligence.</p> <p>Another “new” action that could incentivize due diligence is the closing of the consumptive demand loophole. Section 307 of the Tariff Act of 1930 has banned the importation of goods produced with forced labor since it was</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>enacted, however, the “consumptive demand loophole” made an exception to this ban, allowing goods produced with forced labor to be imported when domestic production of a good was insufficient to meet domestic demand for that good.<sup>21</sup> In 2015, the Trade Facilitation and Trade Enforcement Act eliminated this exception.<sup>22</sup> This ban could incentivize companies to conduct forced labor due diligence in order to decrease the likelihood that the goods they are exporting to the U.S. are not denied entry. Although this action is listed in the NAP as “new,” it was enacted in February 2016, and therefore is arguably not a new action.<sup>23</sup></p> <p>Similarly, outcome 1.4 of the NAP states, “USAID will develop a social safeguards screening questionnaire that Missions may use as an assessment tool when designing new projects (including public-private partnerships) to ensure due diligence on social and human rights issues.”<sup>24</sup> Though this commitment focuses more on USAID actions, arguably the social safeguards screening tool will act as an incentive for private sector actors engaging in USAID public-private partnerships to conduct human rights due diligence.</p> <p>Some “ongoing commitments and initiatives” outlined in the NAP could potentially incentivize certain companies to conduct due diligence. For example, the NAP mentions Executive Order (EO) 13627 “Strengthening Protections against Trafficking in Persons in Federal Contracts,” which was issued in September 2012.<sup>25</sup> This EO (and implementing regulation) prohibits <i>all</i> federal contractors, their subcontractors, and employees from engaging in certain human trafficking related practices.<sup>26</sup> Additionally, for a sub-set of</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>contractors/subcontractors (those with contracts or subcontracts performed abroad worth over \$500,000), this EO requires implementation of compliance plans and certification that after conducting due diligence no evidence of trafficking related activities has been found, or, if it has, that remedial steps have been taken.<sup>27</sup> This certification must be provided prior to the award of the contract and must be submitted annually during the contract period.<sup>28</sup> Thus, this EO incentivizes due diligence related to human trafficking for some companies because, depending on the size of the contract/subcontract and where it is performed, a company may lose out on obtaining a federal contract if they do not conduct due diligence.</p> <p>Two other examples outlined in the NAP are the Department of Defense and Department of State requirements for their private security contractors (PSCs). Specifically, the Department of Defense requires the PSCs with which it contracts to “demonstrate conformance with standards consistent with the International Code of Conduct for Private Security Providers” (ICoC), and the Department of State requires PSCs to “confirm their conformance” with the ICoC standard and to also have membership in good standing in the ICoC Association as requirements to bid in relation to the Department of State’s Worldwide Protective Services II contract.<sup>29</sup> As the ICoC standard does require due diligence, this may incentivize PSCs to conduct due diligence so that they can meet the Department of Defense and Department of State’s requirements in order to obtain contracts with the agencies.<sup>30</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p data-bbox="926 272 1451 305">(2) <u>Disclosure of Due Diligence Activities</u></p> <p data-bbox="877 363 1892 573">There are no new action points that would require disclosure of human rights due diligence activities. In fact, the NAP explicitly mentions that the Reporting Requirements for Responsible Investment in Burma, which were once mandatory, are now voluntary due to the lifting of sanctions through Executive Order 13742 issued by President Obama in October 2016.<sup>31</sup></p> <p data-bbox="877 634 1906 797">One ongoing commitment that requires disclosure of due diligence activities from some companies that is mentioned in the NAP is Dodd Frank Section 1502. The only new commitment in relation to Section 1502 is to provide guidance and assistance to companies for this reporting.<sup>32</sup></p> <p data-bbox="926 857 1860 932">(3) <u>Measures Requiring Due Diligence as the Basis for Compliance with a Legal Rule</u></p> <p data-bbox="877 992 1913 1377">There are no new action points that would require human rights due diligence as the basis for compliance with a legal rule. Some of the existing regulatory efforts listed in Annex II do require due diligence, but none of them require human rights due diligence. For example, Annex II lists the Bank Secrecy Act, which requires financial institutions to maintain effective anti-money laundering compliance programs, which include conducting due diligence when dealing with senior foreign political figures.<sup>33</sup> Additionally, Annex II lists the final Customer Due Diligence Rule that was announced by treasury, which requires financial institutions to “collect and verify the personal information of the real</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>people (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts.”<sup>34</sup> While information on beneficial ownership is important, collection of this information does not constitute human rights due diligence. Furthermore, the information collected will not be made publicly available. Additionally, according to the rule, financial institutions may rely on the beneficial ownership information supplied by the customer, provided it has no knowledge of facts that would reasonably call into question the reliability of the information.”<sup>35</sup> This requirement is met by the completion of a Certification Form which declares that the information is true “to the best of [the customer’s] knowledge.”<sup>36</sup> This flexibility undermines the strength of the rule, which states that financial institutions must “verify” the identity of beneficial owners.</p> <p>(4) <u>Regulatory Mix</u></p> <p>The regulatory mix of the U.S. NAP is unsatisfactory. Some of the “ongoing commitments and initiatives” outlined in the NAP involve regulation of companies, for example, Dodd Frank 1502 is mentioned in the NAP, and Annex II lists regulations such as the Foreign Corrupt Practices Act, the Bank Secrecy Act, and Executive Order 13627 (which prohibits human trafficking in federal supply chains and creates certain requirements for a sub-set of federal contractors), that the United States says it will continue to enforce.<sup>37</sup> Additionally, Annex II states that the Treasury Department has submitted draft legislation that, if passed by U.S. Congress, would require “companies formed in the U.S. to file adequate, accurate, and current information on its beneficial</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>owners with Treasury,”<sup>38</sup> but no new commitments on this are included in the body of the NAP itself.</p> <p>The new action points in the NAP are almost entirely voluntary. Of the new actions only one clearly involves regulation, and it is arguably not a commitment to new action. This action is the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, which removed the consumptive demand loophole from the ban on the importation of goods produced with forced labor.<sup>39</sup> The consumptive demand loophole created an exception to the ban, meaning goods produced with forced labor could be imported into the United States if domestic production of the good was insufficient to meet domestic demand.<sup>40</sup> While the removal of this loophole is a very positive development, this was enacted in February 2016, and is arguably not a new action.</p> <p>Apart from this one action, the new commitments in the NAP are heavily focused on providing guidance, tools, trainings, and funding; convening and entering into dialogue with other stakeholders; and continuing to implement existing laws and policies. For example, the NAP states that funding may be provided for the development of sector-specific tools to help companies and federal contractors address human trafficking risks in their supply chains; that the Office of Intergovernmental Affairs will facilitate dialogue among state and local government officials and the federal government on promoting human rights through public procurement; and will provide training on responsible business conduct for U.S. embassies.<sup>41</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>While these new commitments are welcome, without pairing these efforts with legal demands and mandatory measures on companies, they are insufficient to drive real change.</p>
<p>4.2. A NAP should address the full scope of the State’s jurisdiction.</p>	<p>The U.S. NAP does not adequately address the full scope of the State’s jurisdiction as it is heavily skewed towards addressing issues of corporate-related human rights abuses abroad. According to the NAP, the plan is developed to “promote responsible business conduct (RBC) by U.S. companies operating abroad.”<sup>42</sup></p>
<p>4.3. A NAP should address international and regional organizations and standards.</p>	<p>The U.S. NAP refers to international and regional organizations and standards extensively. In its new commitments the U.S. commits to developing an outreach plan “to continue its efforts to broaden understanding and implementation of the OECD Guidelines among business,”<sup>43</sup> and to undergo a peer review for the US National Contact Point.<sup>44</sup> The NAP also references the Department of Labor’s funding of an ILO-led Global Business Network on Forced Labor<sup>45</sup> and funding of the ILO’s Better Work program in several countries,<sup>46</sup> and the Department of State’s activities to disseminate and promote the UN Guiding Principles.<sup>47</sup> Other international and regional organizations and standards touched on in the NAP include the 2030 Agenda for the Sustainable Development and its 17 Sustainable Development Goals,<sup>48</sup> the G-7,<sup>49</sup> the Inter-American Convention Against Corruption,<sup>50</sup> the OECD Working Group on Bribery in International Business Transactions,<sup>51</sup> and the International Code of Conduct for Private Security Service Providers.<sup>52</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
<p>4.4. A NAP should address thematic and sector-specific human rights issues.</p>	<p>According to the U.S. government, the NAP focuses on a broad range of issues, including “human rights, the rights of indigenous peoples, labor rights, land tenure and property rights, anti-corruption, and transparency.”<sup>53</sup> The U.S. government also focused the scope of stakeholder consultations based on the “issues of particular relevance to stakeholders in that location,” including the financial and technology sectors, extractive industries, the impact of business on indigenous groups, transparency and reporting, and government purchasing power.<sup>54</sup></p> <p>The content of the NAP focuses heavily on a set of key thematic issues; namely, anti-corruption,<sup>55</sup> forced and child labor,<sup>56</sup> human trafficking,<sup>57</sup> transparency,<sup>58</sup> and public procurement.<sup>59</sup></p> <p>The NAP process was launched under the auspices of the U.S. Global Anticorruption Agenda, and the introduction of the NAP by Secretary of State John Kerry focuses heavily on combating corruption.<sup>60</sup> The NAP focuses on anti-corruption efforts in multiple new actions and ongoing commitments. For example, under Outcome 1.1, the NAP states that the U.S. Agency for International Development “will launch the Global Anti-Corruption Consortium (GACC), a new initiative to support international efforts to expose corruption, raise public awareness, and facilitate action by government, law enforcement, and multilateral organizations.”<sup>61</sup> In Outcome 3.1 under ongoing commitments, the NAP states that the U.S. government will continue to publish information “designed to assist firms in complying with anti-corruption laws.”<sup>62</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>Furthermore, Outcome 3.3 outlines the U.S. government’s commitment to continuing engagement with companies on anti-corruption issues.<sup>63</sup></p> <p>Similarly, the NAP focuses on public procurement through a designation outcome section, Outcome 1.3 “Leverage U.S. Government Purchasing Power to Promote High Standards.”<sup>64</sup></p>
<b>Content of NAPs</b>	
<p>4.5. The NAP should include a statement of commitment to the UNGPs.</p>	<p>The U.S. NAP contains statements that indicate a strong commitment to the UNGPs. The NAP highlights the UNGPs as an international framework that encompasses the principles of responsible business conduct, and makes clear that the UNGPs “apply to all States and business enterprises.”<sup>65</sup> Additionally, the NAP commits the U.S. government to continue promoting and implementing the UNGPs. The second new action under Outcome 1.1 states “the U.S. government, through [the Department of] State, will continue to disseminate the UN Guiding Principles through our bilateral, multilateral, and public diplomacy efforts. State will continue to participate in and host discussions with companies, civil society groups, and other on these Guiding Principles, including through its on-going UN Guiding Principles Workshop Series.”<sup>66</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
<p>4.6. A NAP should comprise action points that are specific, measurable, achievable, relevant, and time-specific.</p>	<p>The vast majority of action points in the NAP, both new and ongoing, have no future timeline associated with them. Only one point in the ongoing commitments, and three in the new actions specify a timetable of any kind; though these timelines also lack specificity, only committing the action to be completed at some point in 2017. For example, the first new action in Outcome 1.1 commits the State Department to develop an outreach plan “in 2017”; similarly, the new action in Outcome 3.2 also commits the State Department to “establish a plan in 2017.”<sup>67</sup> The first new action under Outcome 5.1 provides the most specificity, committing the U.S. National Contact Point to “publish a 2017 outreach plan by early 2017” and to “undergo a peer review in the fall of 2017.”<sup>68</sup></p> <p>In addition, it is sometimes difficult to classify the new actions as specific and measurable commitments as some of these points describe actions that have already been completed. A number of new actions describe completed actions. For example, the new action under Outcome 1.2 is not a commitment to perform a new action, but a summary of an action that has already been taken, as is the second new action under Outcome 1.3.<sup>69</sup> Similarly, the last new action under Outcome 2.1 does not commit the U.S. government to any new actions, and instead describes a recent awards ceremony.<sup>70</sup> Clarity about what actions have already been committed and what actions the U.S. government is committing to complete is important and will help enable more effective monitoring of the commitments outlined in the NAP.</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>A number of new actions described in the NAP lack measurability, because they do not lay out discreet actions, instead committing the U.S. government to vaguely promote or continue supporting business respect for human rights or formulate outreach/action plans whose scope is unknown. For example, the third new action under Outcome 3.1 commits the U.S. government to “welcome and recognize new methods of reporting in support of RBC and create an online resource to that end.”<sup>71</sup> This action point could be improved by specifying what criteria exist in relation to recognizing good versus bad reporting methods, and what type of “online resource” will be created. Similarly, in the first new action under Outcome 4.1, the State Department commits to “foster continued engagement among relevant stakeholders to support ongoing dialogue and collaboration on respecting human rights within the ICT sector.”<sup>72</sup> This action point is vague because it is unclear what steps will constitute “fostering dialogue,” and therefore difficult to measure compliance. Similarly, the first new action under Outcome 1.1 commits the State Department to “develop an outreach plan to continue its efforts to broaden understanding and implementation of the OECD Guidelines among business.”<sup>73</sup> However, this commitment is too vague to allow for effective monitoring of compliance as the scope, depth, and expectations for this outreach plan are unclear.</p> <p>On the other hand, there are number of the new actions described in the NAP are relatively specific, because they commit the U.S. government to continue with actions that are already well-developed/defined. For example, the first new action under Outcome 3.3 commits USAID to “support responsible land-based investments by helping the private sector pilot the Analytical Framework for</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>Land-Based Investments in African Agriculture.”<sup>74</sup> Due to the fact that this project is already developed, the scope of the U.S. government’s support for it is quite well defined.</p> <p>One example of a more specific and measureable new action is the first new action under Outcome 3.1 which commits USAID to “develop and/or update 15 public country-level land governance profiles, which explain the land laws, land use patterns, gender concerns, land administration, and land markets within a given country.” This commitment is measurable because it outlines exactly the quantity and contents of the reports that USAID is expected to produce. However, this action point could be enhanced if it contained a timeline for completion.</p> <p>None of the new actions or ongoing commitments and initiatives made in the NAP appear to be irrelevant to the subject of increasing business respect for human rights or overly ambitious to the point they are not achievable. However, there are a few new actions or ongoing commitments related to the protection of wildlife against illegal hunting or trafficking that appear to be less related to the subject of business respect for human rights.<sup>75</sup></p>
<b>Priorities for NAPS</b>	
<p>4.7. A NAP should prioritize for action the most serious business-related human rights abuses.</p>	<p>Although the NAP does not explicitly prioritize child labor, human trafficking, or forced labor, at least four of the twenty-eight new commitments in the NAP and at least thirteen of the forty-three ongoing commitments and initiatives address these abuses.<sup>76</sup></p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>Beyond human trafficking, forced labor, and child labor, the NAP does not appear to prioritize any human rights abuses over others.</p>
<p>4.8. In line with the HRBA, the NAP should focus on the most vulnerable and excluded groups.</p>	<p>Although the NAP does address children’s rights extensively in relation to existing U.S. government initiatives, the NAP does not give adequate attention to other vulnerable and excluded groups such as indigenous peoples, women, people with disabilities, and human rights defenders.</p> <p>Under ongoing commitments and initiatives the NAP discusses the Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, which applies the procurement of goods by U.S. federal agencies<sup>77</sup>; the Department of Labor’s leadership role on the Child Labor Cocoa Coordinating Group<sup>78</sup>; the Department of Labor’s engagement with the ILO-led Alliance 8.7, which is focused on eliminating the worst forms of child labor, forced labor, and human trafficking<sup>79</sup>; and the Department of Labor’s Child Labor and Forced Labor Reports<sup>80</sup>; among other existing initiatives. However, no new commitments discuss child labor.</p> <p>Furthermore, despite stating that “[t]he NAP focuses on a broad range of issues including but not limited to...the rights of indigenous peoples,”<sup>81</sup> only one new action mentions indigenous peoples. This commitment states that USAID will assist, through technical and limited financial assistance, the private sector to</p>

4. SCOPE, CONTENT, AND PRIORITIES	COMMENTS
	<p>pilot the Analytical Framework for Land-Based Investments in African Agriculture, which the NAP states will “make their investments more responsible and inclusive of local communities, including indigenous peoples.”<sup>82</sup> Furthermore, women are only explicitly mentioned once in the NAP, people with disabilities are not mentioned at all.<sup>83</sup></p>

5. TRANSPARENCY	COMMENTS
<b>Full Transparency With All Stakeholders</b>	
<p>5.1. The NBA and any other significant analyses and submissions informing the NAP should be published.</p>	<p>No NBA was conducted, and the “stocktaking of laws and policies” was not made public. The summary of only one of the four regional dialogues was made public; however it was not published by the U.S. government, but the civil society convener of the dialogue.<sup>84</sup></p> <p>Similarly, the written submissions received through the NAP process’ dedicated email address were not published. Civil society groups, such as the International Corporate Accountability Roundtable (ICAR) and the Business and Human Rights Resource Center compiled and published the written submissions that stakeholders provided to these organizations.<sup>85</sup> However, the full number and content of the written submissions received by the government is unclear.</p> <p>Additionally, the government did not release any information or summary</p>

5. TRANSPARENCY	COMMENTS
	<p>documents regarding its deliberation over the content of the NAP. Thus, it is not clear the extent to which the U.S. government took stakeholder recommendations into consideration during the drafting process, or its reasons for not addressing these recommendations in the NAP’s content. For example, of the 220 specific recommendations made to the U.S. government by ICAR only fifteen are touched upon by either the ongoing commitments or new actions in the NAP.<sup>86</sup> However, it is unclear whether these were included in direct response to ICAR’s recommendations, and whether the government considered the additional recommendations during the drafting process.</p>

6. ACCOUNTABILITY AND FOLLOW-UP	COMMENTS
<b>Holding Duty-Bearers Accountable for Implementation</b>	
<p>6.1. NAPs should identify who is responsible for implementation of individual action points and overall follow-up.</p>	<p>The NAP clearly identifies which U.S. government office is responsible for implementing each action point through a dedicate column entitled “Implementing Department or Agency.”<sup>87</sup> As discussed in the next section, no detail is provided on follow-up, monitoring, or evaluation.</p>
<p>6.2. NAPs should lay out a framework for monitoring of and reporting on implementation.</p>	<p>There is no framework for monitoring or reporting laid out in the NAP. In the Introduction, the U.S. government states that the NAP is an “example of an open dialogue through which the U.S. government will continue to communicate, coordinate, and assess its actions.”<sup>88</sup> The NAP also states that the</p>

6. ACCOUNTABILITY AND FOLLOW-UP	COMMENTS
	U.S. government will continue to accept written “feedback and suggestions” at the dedicated NAP email address. <sup>89</sup> However, the NAP does not present any structured framework, methodology, or timeline for following up with the commitments made in the NAP or monitoring implementation of the NAP.

## ENDNOTES

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- <sup>1</sup> DANISH INSTITUTE FOR HUMAN RIGHTS & INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS ON BUSINESS AND HUMAN RIGHTS (2014).
- <sup>2</sup> INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE & EUROPEAN COALITION FOR CORPORATE JUSTICE, ASSESSMENTS OF EXISTING NATIONAL ACTION PLANS (NAPS) ON BUSINESS AND HUMAN RIGHTS, NOVEMBER 2015 UPDATE (2015).
- <sup>3</sup> The White House, Office of the Press Secretary, *Fact Sheet: The U.S. Global Anticorruption Agenda* (Sept. 24, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda> [hereinafter US NAP Fact Sheet].
- <sup>4</sup> U.S. DEPARTMENT OF STATE, RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA 24 (2016), available at <https://www.state.gov/documents/organization/265918.pdf> [hereinafter U.S. NAP].
- <sup>5</sup> *Id.*
- <sup>6</sup> *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions*, HUMANRIGHTS.GOV, <https://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/> (last viewed Dec. 24, 2016) [hereinafter US NAP FAQ].
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*, Christopher Smart, *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITE HOUSE (Nov. 20, 2014), <https://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->
- <sup>9</sup> *Id.*
- <sup>10</sup> US NAP FAQ, *supra* note 4.
- <sup>11</sup> *Id.*
- <sup>12</sup> U.S. NAP, *supra* note 2 at 24.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* at 25.
- <sup>16</sup> US NAP FAQ, *supra* note 4; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, “SHADOW NATIONAL BASELINE ASSESSMENT (NBA) OF CURRENT IMPLEMENTATION OF BUSINESS AND HUMAN RIGHTS FRAMEWORKS, THE UNITED STATES, PILLAR I (2015), <http://icar.ngo/wp-content/uploads/2015/03/ICAR-Shadow-U.S.-NBA-Pillar-I.pdf>; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, “SHADOW NATIONAL BASELINE ASSESSMENT (NBA) OF CURRENT IMPLEMENTATION OF BUSINESS AND HUMAN RIGHTS FRAMEWORKS, THE UNITED STATES, PILLAR III (2015), <http://icar.ngo/wp-content/uploads/2015/06/US-NBA-Pillar-3-FINAL.pdf>.
- <sup>17</sup> US NAP FAQ, *supra* note 4.
- <sup>18</sup> These sub-criteria are laid out in Kristin Jesnes, *Statens plikt til å beskytte menneskerettighetene: En analyse av nasjonale handlingsplaner for oppfølging av FNs veiledende prinsipper for menneskerettigheter og næringsliv*. (The State Duty to Protect: An Analysis of National Action Plans on Business and Human Rights). Fafo-notat 2014:15 (2014), available at <http://www.fafo.no/pub/rapp/10199/index.html> (currently only available in Norwegian).
- <sup>19</sup> U.S. NAP, *supra* note 2 at 19.
- <sup>20</sup> *Analytical Framework for Responsible Land-Based Agricultural Investments*, NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION, <https://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments> (last visited Dec. 24, 2016).
- <sup>21</sup> Sarah A. Altschuller, *U.S. Congress Finally Eliminates the Consumptive Demand Exception*, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW, Feb. 16, 2016, <http://www.csrandthelaw.com/2016/02/16/u-s-congress-finally-eliminates-the-consumptive-demand-exception/>.
- <sup>22</sup> *Id.*
- <sup>23</sup> U.S. NAP, *supra* note 2 at 9.
- <sup>24</sup> *Id.* at 12.
- <sup>25</sup> *Id.* at 11.

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<sup>26</sup> Hartmann Young & T. Markus Funk, *Significant Questions Remain Regarding Application of Human Trafficking Rules for Federal Contractors*, BLOOMBERG BNA WHITE COLLAR CRIME REPORT (2015), [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/2015/2015shanghai\\_HartmannFunkFinal.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/2015/2015shanghai_HartmannFunkFinal.athcheckdam.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> U.S. NAP, *supra* note 2 at 11.

<sup>30</sup> INTERNATIONAL CODE OF CONDUCT ASSOCIATION, INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (2010), [http://www.icoca.ch/sites/all/themes/icoca/assets/icoc\\_english3.pdf](http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf).

<sup>31</sup> U.S. NAP, *supra* note 2. at 18.

<sup>32</sup> *Id.* at 20.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.* at 28.

<sup>35</sup> 31 C.F.R. Parts 1010, 1020, 1023-24, 1026 (2016).

<sup>36</sup> *Id.* at 1010.230(b)(1).

<sup>37</sup> U.S. NAP, *supra* note 2 at 9-10, 26-29.

<sup>38</sup> *Id.* at 28.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 10-11, 19.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 23.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 8-10.

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Id.* at 24.

<sup>55</sup> *Id.* at 8-10, 14, 18-20.

<sup>56</sup> *Id.* at 9, 11, 15-16, 18-19.

<sup>57</sup> *Id.* at 10-12, 18-20.

<sup>58</sup> *Id.* at 9-10, 14, 20.

<sup>59</sup> *Id.* at 10-11.

<sup>60</sup> US NAP Fact Sheet, *supra* note 1; U.S. NAP, *supra* note 2.

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.* at 18.

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.* at 5, fn 1.

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 8, 19.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.* at 9-10.

<sup>70</sup> *Id.* at 14.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 22.

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<sup>73</sup> *Id.* at 8.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> *Id.* at 14, 21.

<sup>76</sup> For new commitments, see *id.* at 9-11, 14; for old commitments, see, e.g. *id.* at 11, 15-16, 18, 29-22.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *Id.* at 15.

<sup>79</sup> *Id.* at 16.

<sup>80</sup> *Id.* at 18.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.* at 19.

<sup>83</sup> *Id.* at 9.

<sup>84</sup> See, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, GLOBAL BUSINESS INITIATIVE ON HUMAN RIGHTS, HARRISON INSTITUTE FOR PUBLIC LAW AT GEORGETOWN UNIVERSITY LAW CENTER, *Consultation on the U.S. National Action Plan on Responsible Business Conduct* (2015), <http://icar.ngo/wp-content/uploads/2015/07/US-NAP-Consultation-Report-GBI-ICAR-GL-2015.pdf>.

<sup>85</sup> See, International Corporate Accountability Roundtable, *Stakeholder Recommendations*, available at <http://nationalactionplan.us/other-recommendations/>; Business and Human Rights Resource Center, *USA: First Submissions to National Action Plan Consultation*, available at <https://business-humanrights.org/en/usa-first-submissions-to-national-action-plan-consultation>.

<sup>86</sup> INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, "SHADOW" NATIONAL BASELINE ASSESSMENT (NBA) OF CURRENT IMPLEMENTATION OF BUSINESS AND HUMAN RIGHTS FRAMEWORKS, UNITED STATES, PILLAR I (2015), <http://icar.ngo/wp-content/uploads/2015/03/ICAR-Shadow-U.S.-NBA-Pillar-I.pdf>; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, "SHADOW" NATIONAL BASELINE ASSESSMENT (NBA) OF CURRENT IMPLEMENTATION OF BUSINESS AND HUMAN RIGHTS FRAMEWORKS, UNITED STATES, PILLAR III (2015), <http://icar.ngo/wp-content/uploads/2015/06/US-NBA-Pillar-3-FINAL.pdf>.

<sup>87</sup> See generally, U.S. NAP, *supra* note 2.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> *Id.*