Bureau of Democracy, Human Rights and Labor

U.S. Department of State

20 April 2014

**Re: U.S. National Action Plan for Responsible Business Conduct**

Dear Coordinators of the U.S. National Action Plan for Responsible Business Conduct,

Thank you for the opportunity to contribute to the drafting of the United States Government’s (the Government’s) National Action Plan (NAP) for Responsible Business Conduct. NomoGaia personnel have been impressed by the level of engagement the Government has sought in drafting the NAP, and we hope that our input, based on experience carrying out corporate human rights due diligence overseas, can add value to the process. The proposals below are applicable to many different government agencies, policies and actions. With certain, clearly specified, exceptions, we have not limited our recommendations to specific government functions or agencies. In general, our recommendations consider opportunities for the Government to *require* companies to act when it has that power, *incentivize* them to act when it does not, and *support* good practices companies are currently pursuing to encourage their improvement and proliferation.

Our recommendations are organized below according to the themes laid out by the Department of State as priority areas for the NAP (Human Rights, Labor Rights, Investment, Procurement, Transparency, and Land Tenure). Where there are overlaps, two or more themes are listed.

1. **Human Rights, Transparency and Procurement: Making Assessments of Human Rights Impacts Public**. The UN Guiding Principles on Business and Human Rights (the “UNGPs”) have not been implemented by companies in the spirit of transparency. Companies keep human rights due diligence secret.[[1]](#footnote-1) While this may seem rational from the point of view of each company, it has a catastrophic effect on the effectiveness of the UNGPs. There is a “First Mover Disincentive” in which fear of criticism and embarrassment causes each company to keep its due diligence confidential, because no other company has led the way. The Government is in a unique position to break this transparency logjam.
	* Within its procurement chain, the Government can require contractors and suppliers to conduct human rights due diligence, the outcomes of which the Government can require to be published, or publish itself, online. We do not recommend that the Government evaluate the sufficiency of the human rights due diligence at this time, but merely catalog and publish it, as it currently does with Burma human rights reporting. Transparency and publicity will create informal “notice and comment,” which, if reasoned, can greatly improve the entire field of human rights due diligence.
	* Where the Government does not have direct control over corporate operations, it can encourage companies to publish human rights due diligence on a Government-run database.
2. **Human Rights, Labor Rights, Transparency: Improving OECD NCP Effectiveness.** The OECD Guidelines for Multinational Enterprises create a limited role for the Government to facilitate access to remedy for victims of corporate abuses through the National Contact Point (NCP) system. Currently, NCP Specific Instance complaints themselves are kept secret, and disclosure of them by a party is grounds for terminating the NCP process. While there are rare instances where the complainant and the respondent have legitimate reasons to keep some aspects (e.g. names of victims of sexual assault) confidential, making the Specific Instance complaint public enhances the usefulness and legitimacy of the entire process. While corporations will prefer and urge secrecy, ultimately they will accept transparency as the norm, as they have done in previous debates, for example, over anti-corruption and environmental reporting. Other OECD members have made specific instance complaints public and have not experienced negative repercussions. The recommendations below reflect the findings of the NCP Stakeholder Advisory Board.[[2]](#footnote-2)
	* The NAP should include modifications to the US NCP complaint system, so that complaints are published when they are filed, unless both parties agree to pursue mediation in private.
	* The NAP should propose increased staffing for the NCP (currently staffed essentially part-time by one person), to enable the more transparent dissemination of its work.
3. **Human Rights, Transparency: A Best Practice Platform for Human Rights Due Diligence.** The Government can create and support a public information base of best practices in human rights due diligence, including impact assessments, grievance mechanisms and rightsholder engagement processes. To be effective, human rights due diligence should investigate and determine the effects companies’ current and future actions have on human rights. This work should be performed by, or in collaboration with, independent human rights experts. The investigation and identification of human rights risks and impacts should draw on objective data and methods to the greatest extent possible. The people potentially affected by corporate action must be engaged directly. Human rights due diligence should be made public, except on rare occasions when there are concrete and reasonable expectations harm to rightsholders resulting from publication.[[3]](#footnote-3) A database of practices that adhere to these basic standards would provide useful guidance to companies.
4. **Investment, Transparency, Anticorruption: Facilitating Improvements at Development Banks.** Development banks that provide credit or insurance to corporations should themselves follow the UNGPs and require that their client corporations do so as well. The Equator Principles (now Equator Principles III), which have been adopted for some forms of financing by 80private banks and national development banks, specifically recognize the UNGPs.
	* Currently it is the Overseas Private Investment Corporation’s (”OPIC’s”) stated policy to “respect” human rights. To demonstrate this, OPIC’s human rights due diligence should be made publicly available (except when publication of human rights due diligence could harm rightsholders, in which case they can be written with some anonymity to protect those threatened).
	* OPIC’s corporate clients should be required to make public their own due diligence related to projects funded or insured by OPIC.
	* Through annual appropriations bills, the Government funds the African Development Bank, Asian Development Bank, Inter-American Development Bank, Overseas Private Investment Corporation, and the International Finance Corporation (as a body within the European Bank for Reconstruction and Development). While these development banks are not under the control of the Government, they derive significant funding from it and may be influenced by the Government on issues of human rights due diligence. US contributions to these institutions can be tied to human rights assessment disclosure, as has been done in the case of World Bank data transparency in past appropriations bills.
5. **Human Rights, Labor Rights, Investment, Land Tenure: Creating Mechanisms for Access to Remedy**. Companies often claim that their existing dispute resolution procedures satisfy the Access to Remedy requirement in the UNGPs, which is not correct. Companies unilaterally control of those processes, which makes them inappropriate and unproductive for many, if not most, significant human rights disputes. For such disputes, claimants need a non-judicial remedy they can trust; one dominated and controlled by the company will never satisfy that need. But, to engage voluntarily, companies also need a forum *they* can trust.
	* The Government could help establish and support a forum or fora for resolution of these disputes. These fora could be industry-specific, to deal with the kind of disputes typical and repeated in a given industry, for example mining, or apparel. They could also be regional, dealing the kinds of disputes typical to a geographic combination of host countries, for example West Africa or Central America.
6. **Human Rights, Procurement: Minimum Standards for Private Security Contractors**. The Unlike the Department of State, the Department of Defense has not made membership in the International Code of Conduct Association (“ICOCA”) a requirement for its private security contractors. This key failing withdraws a fundamental source of support from that new and important organization. The failing is not justified, as the ICOC is a low bar which should be easily met by well-run private security companies.
	* The Department of Defense should make membership in the ICOCA mandatory for its contractors. Because the ICOC specifically requires respect for human rights and recognition of the UNGPs, this requirement would also allow for mandatory transparency of the human rights due diligence for these companies (see comment Number 1, above).

We would welcome the opportunity to discuss these recommendations further, and we congratulate the Government for taking this important first step.

 Sincerely,

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 Executive Director, Nomogaia



Mark Wielga

Director, Nomogaia

1. See, e.g. James Harrison (2013), ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from the Experience of Human Rights Impact Assessment.’ Impact Assessment and Project Appraisal, 31:2, 107-117. Professor Harrison is a recognized authority in human rights assessment and he makes a strong case for the necessity of transparency of Human Rights Impact Assessments, one form of human rights due diligence. He concludes: “Transparency must therefore be a core and overriding principle of the assessment process. Companies who are claiming to undertake impact assessments must as a matter of routine publish both the process and results of their assessment processes. Only then should they be able to lay claim to the credibility that comes with complying with the principle of human rights due diligence.” p. 113. [↑](#footnote-ref-1)
2. Issued in February 2014 http://www.state.gov/e/eb/adcom/aciep/rls/225959.htm [↑](#footnote-ref-2)
3. Examples of actual human rights due diligence which we believe were “done right,” are available at Nomogaia.org. [↑](#footnote-ref-3)