

Submission to the US Government Regarding its Proposed National Action Plan on Responsible Business Conduct

7 August 2015

Shift is pleased to submit these recommendations to the US Government as part of the Government's development of a National Action Plan ("NAP") on Responsible Business Conduct. We strongly support the USG's initiative to develop a NAP that will encompass implementation of the UN Guiding Principles on Business and Human Rights ("UN Guiding Principles"), the global standard that sets out the responsibility of companies for respecting human rights throughout their operations and value chains, as well as the related duties of states to protect those rights against abuse by third parties, including companies.

We welcomed the opportunity to contribute to a number of the stakeholder consultations held by the Government as part of the NAP process. This submission builds on the views we have expressed in those sessions. It addresses four points that we believe are particularly important to the development of a robust NAP in the US context. Those are:

1. The importance of considering the state duty to protect against business-related harms at home as well as abroad;
2. Human rights reporting and the critical role of corporate transparency as a driver of better performance and better dialogue;
3. Particular opportunities to advance respect for human rights when the state does business with business;
4. The need for greater attention to state-based forms of remedy.

While we appreciate that the NAP will be positioned in terms of the broader expectations of responsible business conduct set out in the OECD Guidelines for Multinational Enterprises ("OECD Guidelines"), we have focused our comments on the implementation of the UN Guiding Principles in regard to business impacts on human rights. This reflects our particular expertise on the UN Guiding Principles as well as the fact that the OECD Guidelines are directly aligned with them when it comes to human rights impacts.

1. The State Duty to Protect at Home and Abroad

Nothing in the text or the spirit of the UN Guiding Principles restricts their implications for states (or for

business) to companies' overseas operations. Indeed the USG recognizes this in its online FAQ on the NAP process, which states:

“We expect U.S. businesses to uphold high standards, regardless of where they are operating. The guidance set out in the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, two guiding documents to the NAP, apply universally and have both domestic and international implications for US companies.”

However, the FAQ goes on to explain that, in view of limited resources, the Government believes that the NAP can add the greatest value by focusing overseas where the challenges for companies are often greatest.

In our interventions at the USG's stakeholder consultations on the NAP process we have consistently highlighted that it would be untenable for a US NAP to imply that companies must respect human rights only overseas or that US companies can assume that impacts on human rights, particularly severe impacts, will be limited to their overseas activities and value chains. The UN Guiding Principles do not pre-determine which human rights impacts are more or less severe. Severity is assessed in every case using a series of criteria (namely, how grave the impact would be, how widespread, and how hard to remedy). While many of the most severe impacts may indeed occur in states with weak regulation or poor enforcement of standards, or in conflict-prone areas of the world, this is not necessarily the case. In many developed states, including the US, we see that severe human rights impacts can be found from farm fields to nail salons to coal mines, affecting workers, indigenous peoples and poor or otherwise disadvantaged communities.

A number of NAPs have so far been produced by other states that have strong regulatory and rule of law systems, and none has made this distinction between the domestic and overseas activities of companies. There is no basis for doing so in the UN Guiding Principles. Moreover, it makes little sense in terms of giving companies predictability and consistency with regard to what is expected of them.

- *We urge the USG to be clear in the NAP that the Government understands that the UN Guiding Principles (like the OECD Guidelines) apply equally to companies' domestic operations in the US as well as abroad. The NAP should signal what the leading domestic business and human rights issues are within the US and how they are being tackled.*
- *In relation to the operations of US companies abroad, we urge the Government to ensure that the NAP is not just an articulation of what the US is already doing, but reflects ways in which the Government intends to address recognized gaps to improve corporate respect for human rights in overseas operations and value chains.*

2. Human Rights Reporting

As Guiding Principle 3(d) makes clear, in meeting the duty to protect, states should: “Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.” Disclosure requirements can drive accountability and improved performance: they focus senior management minds on what the company is doing, and they provide the information necessary for better shareholder and stakeholder engagement by the company on how it is managing its human rights impacts. But they only do so if the expectations for disclosure are meaningful.

To date, human rights reporting has been by far the weakest area of company reporting. Much reporting is based around anecdotes and a changing array of projects and provides little clarity on how these connect to companies’ core business. This is a key reason why Shift, together with our project partner the international accountancy firm Mazars, led the development over the last two years of the **UN Guiding Principles Reporting Framework** (www.UNGPRreporting.org).

The Reporting Framework is the first comprehensive guidance for companies to report on how they respect human rights in line with the UN Guiding Principles. As Professor John Ruggie stated at its launch, “The business community very strongly endorsed the UN Guiding Principles when they came out, but until today they haven’t had the actual reporting tool that enables them to know and show that they respect human rights”.

The Reporting Framework is designed to help all companies, regardless of size, sector or operating context, to see how far they have progressed in implementing their responsibility to respect human rights and how to communicate that publicly. The Framework is organized according to a phased approach that incentivizes companies to improve over time. It also includes linkages to other broader reporting frameworks and issue and industry-specific initiatives to show how responding to their requirements can help answer questions in the Framework.

We have already seen significant uptake of the Framework since its launch in February 2015. It has been downloaded over 25,000 times; Unilever has piloted the Framework, releasing a stand-alone Human Rights Report in June this year; other companies from diverse sectors, including ABN AMRO, Ericsson, H&M, Nestlé and Newmont, are recognized early adopters; and dozens of other companies in the US and elsewhere report that they are using it as an internal management tool or to improve their external reporting. Importantly, the UNGP Reporting Framework has the support of over 80 investors representing over USD \$4.8 trillion assets under management worldwide, and a number of governments are considering the Reporting Framework in the context of their current NAP processes.

Thought leaders from a range of key institutions in the field of business and human rights, including the OECD, UN Global Compact, International Integrated Reporting Council and the Global Reporting Initiative have made [statements of support](#) for the Reporting Framework. The UN Working Group on business and human rights

supported the development of the Reporting Framework, and commented in its June report to the UN Human Rights Council that it “provides a useful reference to help business understand the practical implications of the corporate responsibility to respect human rights and for Global Compact participant companies to report on progress on the first six principles (covering human and labour rights)”.

There have been several significant developments on human rights reporting in the US context, including the California Transparency in Supply Chains Act, the Dodd-Frank provisions with regard to conflict minerals due diligence, and the State Department’s Myanmar Reporting Requirements. Indeed in the Washington DC stakeholder consultation on the NAP, the utility of the State Department requirements was one of the key points of consensus between business and civil society representatives.¹ It is noteworthy then that the leading examples of company disclosure under the State Department’s requirements closely align with the elements of the UNGP Reporting Framework.

- *We urge the USG to consider the particular relevance of the UNGP Reporting Framework in providing guidance to companies with regard to existing human rights reporting requirements under federal and state laws, and to recommend the use of the UNGP Reporting Framework by US companies more broadly as a tool to help them meet their responsibility to respect human rights under the UN Guiding Principles in their domestic as well as overseas operations.*

3. Particular Opportunities when Doing Business with Business

A number of US departments and agencies have critical roles to play in creating markets for good corporate practices that respect human rights when they engage with businesses as clients or suppliers to the government. Guiding Principles 4 through 6 address some of the ways in which the state can incentivize, support or require business clients and suppliers to pay greater attention to human rights, in particular, through export credit and investment guarantee agencies, development finance institutions and government procurement requirements.

It is essential that the state convey the clear expectation that its business clients and suppliers should carry out human rights due diligence to manage human rights risks in relation to their operations or business relationships. It is just as important that a failure to meet those expectations has consequences in relation to further business with or support from the state. Where this is not the case, the government risks being in the situation of setting an expectation that business in general respect human rights and then rescinding that expectation explicitly or implicitly where the government itself does business with business.

¹ See ICAR and GBI, “Summary Report of Consultation on the US National Action Plan on Responsible Business Conduct”, 2015, p 7.

The last few years have seen a growing awareness among OECD **export credit agencies** (ECAs) and **development finance institutions** (DFIs) of the expectations of the UN Guiding Principles, particularly in relation to the need for heightened human rights due diligence in high-risk circumstances. Through our work with the IFC, as well as various countries' ECAs and DFIs, we have seen a growing number of financial institutions strengthen their existing environmental and social due diligence approaches to incorporate human rights due diligence more directly, in order to better prevent risk to people as well as risk to the investments at issue.

Another critical way in which the state transacts with business is as a **procurer of goods and services**. Just as businesses are expected under the UN Guiding Principles to include their supply chains in their human rights due diligence processes, so too should the government. One evident step would be to require that suppliers demonstrate that they have adequate human rights policies in place as well as the necessary processes to identify and address human rights impacts. Given the large number of suppliers to the government, those suppliers whose sectors, operations, products or services are known to carry particularly significant risks to human rights could be prioritized for scrutiny. It is important for the government to know whether these risks are being adequately addressed by suppliers, as a prerequisite for doing business.

One way of securing essential information for informed procurement decisions would be to require that suppliers – and at least those suppliers associated with significant risks to human rights – should report in line with the UN Guiding Principles Reporting Framework. Using the Reporting Framework and its implementation guidance is also a means for suppliers to check for themselves whether they have the necessary processes in place to understand and address human rights risks. It therefore serves to reinforce their own due diligence processes.

- *We encourage the USG to support a review of the existing approaches of OPIC and the Ex-Im Bank (subject to its continuation) through the lens of human rights due diligence and identifying whether and how they could be strengthened. We also urge the Government to support discussion at the OECD level in relation to updating the 2012 Common Approaches to better align with the UN Guiding Principles.*
- *We urge the USG to ensure it conducts adequate human rights due diligence with regard to companies from which it procures goods and services, and in particular to consider using the UN Guiding Principles Reporting Framework as a means for gathering information from suppliers about the state of their own human rights policies and risk management processes.*

4. Access to Effective State-based Remedy

Guiding Principle 25 affirms the need for effective state-based remedy, both judicial and non-judicial, as the foundation of a wider system of remedy for business-related human rights harms. Guiding Principle 26 identifies common legal and practical barriers to accessing judicial remedy for such harms.

Guiding Principle 26 could only address **barriers to judicial remedy** in very broad terms because their precise nature, and the most appropriate solutions to them, must necessarily be determined at the national level. Doing so requires detailed analysis and review of the existing situation, taking into account broader access to justice considerations that go well beyond the business and human rights sphere, and will necessarily involve difficult judgments. Yet it is essential to meeting the duty to protect in practice. It is therefore very concerning that no existing NAP fully engages with this principle.

In terms of **non-judicial state-based remedy**, it is important that negative findings by such mechanisms are linked to meaningful consequences for the businesses involved. A recent example can be found in the revised Canadian Extractive Sector CSR Policy, which formally links poor corporate performance and refusal to cooperate in various dialogue processes, including those of the Canadian National Contact Point (NCP), to limitations on export credit and other official trade promotion support.²

- *We urge the Government to use the process of developing the NAP to specify concrete steps with regard to reviewing and addressing any gaps in access to state-based remedy, including judicial remedy. We also encourage the Government to consider appropriate consequences for companies that refuse to engage with the US National Contact Point or are subject to negative findings and do not take the necessary steps to address the concerns.*

In closing, we appreciate the opportunity to make this submission and would be pleased to provide any further information that may be of use.

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Shift is the leading center of expertise on the UN Guiding Principles. The Shift team was centrally involved in shaping and writing the UN Guiding Principles, and is chaired by their author, Harvard Professor John Ruggie, the former Special Representative of the UN Secretary-General for Business and Human Rights. Shift works globally with businesses, governments, civil society and international organizations to put the UN Guiding Principles into practice. We share our learning through public materials that help accelerate change globally. For examples of our work please see www.shiftproject.org. Shift is a non-profit organization headquartered in New York with 501(c)(3) status.

² See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> under “Encouraging alignment with CSR guidance and participation in dialogue”.