Business for the Rule of Law

CONSULTATION WORKSHOP REPORT

LOCATION:
Canada, Toronto

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HOST/FACILITATOR:
Global Compact Network Canada, LexisNexis, and Baker & McKenzie
Part I: Executive Summary

1. UN Global Compact and Business for the Rule of Law Overview
   - Session participants sought to learn more about the Business for the Rule of Law initiative; engage in a thoughtful discussion; learn how to be involved in supporting the rule of law; and discuss links between climate change, the environment and the rule of law.

2. Business Support for the Rule of Law in Practice
   - [N/A]

3. Business Case for Supporting the Rule of Law
   - Session participants discussed the meaning of the rule of law in Canada and agreed that the rule of law can have a variety of meanings and implications, particularly given the diverse population in Canada. The rule of law in Canada means that corruptions and ‘red tape’ are minimized and that there are predictable set of rules that detail the parameters in which a company must operate; supports prosperity and equity; and is a fluid process that changes as it is put into practice.
   - Session participants shared a variety of business benefits of a strong rule of law: a single set of uniform laws that guide decision making, reputational benefits, minimized risk, certainty, predictability and security.
   - Session participants discussed challenges for business when the rule of law is weak: a rigid rule of law may be viewed as a restriction on business operations, certainty and predictability is limited and dependent on how the rule of law changes and evolves with application, and circumventing laws can seriously impede the creation of a level playing field.

4. Business Actions and Business Examples in Support of the Rule of Law
   - Proposed action#2: There is room to refine the sub-points within the action item. Additionally, business can plan an advocacy role in ensuring an inclusive consultation process in the development of a rule of law. Leading by example is another important way in which business can support the rule of law.
   - Proposed action#3: Access to justice greatly impacts business operations; for example, lengthy, slow and paper-heavy litigation processes are costly for companies, which is why
private arbitration cases are growing. The corporate sector can act as an advocate to improve funding to the justice system.

- **Proposed action #4:** Access to justice is a global issue that legal firms and lawyers help to mitigate. Examples of corporate action include: legal firms providing pro-bono hours, banks developing access to legal services programs, businesses supporting important federal legislation (for example DOMA in the United States), and businesses supporting access to justice in countries where it is limited.

- **Proposed action #5:** Business action in this regard may need to differ depending on different country political and economic environments; for example, conflict affected countries. Examples of business actions may include standardizing contracts on key issues and implementing these contracts uniformly and throughout business operations and the value chain; businesses should support and respect international treaties that have been developed to protect against key issues (i.e. conflict diamonds).

5. **Call to Action (to Business and by Business) to Support the Rule of Law**

- The session participants discussed and suggested several concrete steps that business can take to respect and support the rule of law: business should focus first on enforcing the rule of law internally (mind your own house); business can act as peer-to-peer watchdogs by speaking out when others (competitors included) violate the rule of law; business can train and educate employees and suppliers; business can use marketing tools to support a rule of law culture; business can provide funding to support global rule of law initiatives; business can ensure that it does not bypass the national systems in legal matters, since the application of the rule of law helps to develop the rule of law.

- The session participants discussed additional actions that other actors can take to support the rule of law including supporting the defining of a national rule of law that is in line with international treaties; and informing and considering actions for special country cases such as conflict affected regions.

6. **Mobilizing Business to Support the Rule of Law**

- The session participants discussed potential obstacles that may prevent an organization from supporting the rule of law: where the rule of law is the weakest and there is a distrust for institution is where the biggest challenge will be advocacy and achieving fair outcomes; amorality of demand — there are some markets that are profitable because of they take advantage of amoral demands (i.e. the drug market and war on drugs); national and business related incentive structures may support actions that do not support the rule of law; the rule of law functions only when there is transparency and accountability; enforcement mechanisms need to be in place in order to ensure the development of the rule of law.
• The UN Global Compact was identified as an important actor in galvanizing collective action both nationally and globally on the rule of law. It can also ensure there is a diversity of stakeholder represented in consultations related to the rule of law.

7. Any other comments or questions (including “quotable quotes” that may be included in the Framework)
• Overall, session participants were very pleased with the session and rated the experience highly.
Part II: Workshop Report

1. UN Global Compact and Business for the Rule of Law Overview
   - What do some of the participants want to get out of the session?
   - Participants want to: learn more about the Business for the Rule of Law initiative; engage in a thoughtful discussion; learn how to be involved in supporting the rule of law; discuss links between climate change, the environment, and the rule of law.

2. Business Support for the Rule of Law in Practice [Explained]

3. Business Case for Supporting the Rule of Law
   a. What does the rule of law mean in this country? [Canada]
      - Avoiding and mitigating ‘Red tape’ and corruption: “Red tape” (i.e. high levels of bureaucracy or regulations) can be a form of law that is contrary to good rule of law if it prevents access to justice. Red tape can also be contrary to good business practices. In Canada, the rule of law and judicial independence are well understood and respected.
      - Setting parameters and providing direction: The rule of law sets parameters and provides direction, allowing companies to understand where and how they can and can’t operate. For industry, the benefit of the rule of law is that there is a defined set of rules that all industries must follow. Win or lose, the business is aware of the rules. In Canada we have an established and predictable set of rules. On the other hand, if the rule of law is overly strict in its application or enforcement, it can thereby restrict business.
      - Divergence in understanding and expectations for the rule of law: The rule of law itself may not be sufficient if it is not meeting the expectations of the public. There should be a confluence between the laws and what people expect those laws to do. There shouldn’t be a divergence between public expected outcomes and the legal process. If the rule of law is not meeting the public’s expectations (including corporate expectations), there should be an attempt to align the rule of law with those expectations. Specifically, the participants discussed the example of a company in the UK who came under public scrutiny for paying low corporate taxes relative to its revenues. However, the company was paying the legal amount of taxes. This case demonstrates that it is possible to have a divergence between cultural, political and public expectations, and the process and rule of law.
      - Prosperity and growth: The rule of law should be used as a force for prosperity.
      - Equity: Rule of law in Canada is understood as more equitable, and therefore accessible, than some other countries. Inequitable systems do not offer real justice.
• **Thin and thick conceptions of the Rule of Law:** There is a thin (a more formal understanding) and thick (a more broad understanding) conception of the rule of law. There is more consensus around the meaning of the thin conception - generally, the understanding is that (i) we have a system of laws and everybody is subject to the law; (ii) the exercise of public power has to find its source in law; and (iii) there is a knowable system of law (no secret laws). Under the thin conception of the rule of law, there are formal measures regarding the law and businesses can benefit from them. Connected to that conception is also the idea that there is someone enforcing laws in an independent and judicial manner. On the other hand, under the thick conception of the rule of law, the laws themselves (i.e. the substance of the actual laws) are more contentious. The thin and thick conception of the rule of law can also converge, since historically the application of laws in Canada has changed (i.e. the laws use to not apply equally to all persons, such as women and Aboriginal people). If a court does not recognize a body of people fundamentally, such court’s application of the law is thus not universal and the “rule of law” from the perspective of the disenfranchised person can be oppressive.

• **Fluidity and process:** The rule of law is fundamentally an active process and should not be assumed to be a single, stagnant definition. The use of the rule of law changes the framework of the rule of law. For example, Supreme Court of Canada decisions are often controversial, where people think the court is not only interpreting the law but actually creating the law. There is only so much that can be known about a law before it is applied.

b. **How does business benefit when there is a strong rule of law? Alternatively, what challenges exist for business when the rule of law is weak?**

• Benefits for business of a strong rule of law:
  
  o There is a clear and defined set of rules that business may follow in order to conduct business. A single set of uniform laws that can be applied.

  o Raises the bar for ethical and lawful business operations with ripple effects across borders. For example, American clients have told Canadian legal firms that they will not do business with them unless they honour the human rights codes, particularly as it relates to diversity.

  o The rule of law is not the same as business ethics or managing reputational risk. Having law that is clear and enforced is crucial to business. Exporters are worried about that in their due diligence. Developing published laws and the enforcement system of such laws is crucial to businesses.

  o Provides security and predictability for continued operations. It provides a framework for predicting an outcome or understanding expectations for operating in a country.
o It levels the playing field for business operations, but it is also important to understand whether the emphasis is on the letter of the law or the spirit of the law.

o It provides a basis and framework for decision making. A business leader can use the rule of law to determine whether it will operate in one country versus another.

o If there were more capacity building initiatives taking place (helping countries to achieve rule of law) there would be less need for international arbitration regarding countries' individual application of laws.

o When the rule of law is not transparently applied, there can be a divergence between an expected outcome and how the process changes the outcome. If the expectation and the results differ dramatically enough, business can be affected.

o From a business perspective, implementing and encouraging the rule of law in countries where business is looking to develop offers long term benefits of stability and reduces the risk of unknown laws.

- Challenges for business when the rule of law is weak:
  o A very rigid rule of law from a business perspective may be viewed as restrictions on doing business
  o There is only a certain level of certainty and predictability that comes with the rule of law because it is always evolving and changing through its application.
  o Facilitation and corruption, which circumvent the application of universal laws, are some of the biggest issues impeding the level playing field that the rule of law is meant to supply.

4. Business Action and Business Examples in Support of the Rule of Law

a. Explore the meaning of the business action and how it relates to business.

  - Proposed Action #2: Respect and support the accountability of all persons, institutions and entities, public and private, to laws that are publically promulgated and which are consistent with international norms and standards
    o Adjudication and enforcement
    o Sub-points A, B, and C can be lumped together
    o In terms of the formal law, the most business can do is lead by example, which takes discipline and courage, particularly if competitors are not acting in the same manner.
    o Consultation is an opportunity for advocacy. Advocate for an inclusive public consultation process in the drafting of laws — in which all stakeholders voices are
heard – mitigates the risk that stakeholders will complain or act against the rule of law in the long-run.

- **Proposed Action #3**: Support and encourage the equal enforcement of the law, and independent adjudication of the law, consistent with international norms and standards.
  - Foreign investors in Canada expect fairness of the law when they seek to start up in Canada.
  - Companies should also consider *raising the flag* when countries are not being transparent in their procedures.
  - The rule of law can be weakened when decisions are taken outside of public arbitration. It may be good to have companies participate more in the legal system (more than they currently are), because it helps in the development of the rule of law. However, this is problematic for companies in developing countries where they do not trust the legal and political system.
  - The delay and expense of going through formal litigation process is a barrier for companies. The reality of the present system in emerging markets pushes companies to private arbitration for much larger financial stakes. Courts tend to be paper/process-driven, while companies want a resolution approach that is based on the rule of law, but not the *rules* (i.e. procedural requirements) of law.
  - In certain countries there is strong political influence over disputes brought to local courts (especially for disputes over very large sums of money). Delay and the expense associated with litigating deter companies from using such a court system. Arbitration is preferable because it is a matter of contract: companies deal with a relatively sophisticated entity on both sides. In developing countries, a contract based agreement such as arbitration becomes the law that is trusted.
  - The arbitration example demonstrates the tension between business actions and the rule of law. The justification for choosing private arbitration is that the formal justice system is slow and costly. This affects the access to justice issue surrounding the rule of law: there is a body of arbitration law that is not knowable.
  - Companies can support the rule of law by encouraging governments and other actors to review the resourcing of the court system and demonstrate how it can be improved.
  - The corporate sector can advocate in Canada to improve funding to the justice system, which is heavily weighted toward the criminal system. Due to numerous arbitration cases, there is a backlog in the system which is costly from a business perspective. One proposed course of action is to have a rule of law levy that supports court, legal aid etc. and overall supports access to justice.
Large scale commercial arbitration is driven by time. The backlog in arbitration is due to the fact that courts are paper and process driven. Business is using technology to increase efficiency and overall has found a more business friendly and efficient approach to arbitration via private arbitration. This problem exemplifies an underlying challenge for the core of the rule of law: the rule of law needs to meet the realities of the technology focused time we are living in.

Countries developing a rule of law should focus on establishing a rule of law that respects the rights of people, provides a level of certainty and protection for everyone, creates the rules for engagement, and is culturally sensitive. Countries should avoid creating a paper heavy and slow process.

Encouraging a global rule of law and strengthening the rule of law internally are not mutually exclusive. A global rule of law could encourage nations to strengthen the rule of law internally.

The rule of law should be viewed as a minimum standard for businesses. Clarifying the processes behind a formal set of laws does more than implementing a system of rule of law; in fact, it improves upon such system.

Discretion in the application of laws cannot be entirely removed. Laws themselves may call for an objective or a subjective standard for their application, which requires judicial discretion.

Application of laws can also be uncertain where there are newly enacted laws, such as Canada’s anti-spam legislation, which have not yet been enforced. The enforcement regime for such laws may be unclear until the laws have been in force for some period of time.

Getting approvals for business activities can be an important step. Companies have to be able to know the criteria of a law and how such law will apply. Companies ought to have clarity for what the legal criteria will be in order to obtain approvals necessary for their businesses.

- **Proposed Action #4**: Support initiatives that make justice accessible to all
  - Access to information is a large problem and worldwide phenomenon
  - As lawyers, it is important to look inward first and identify how we can help the access to justice issue.
  - Lawyers need to think about how business can be engaged in access to justice and identify the drivers for business to engage.
  - In some instances, access to information may be lacking more that access to legal services. The legal sector can partner with the business sector to provide solutions (i.e. constructing courthouses, arranging for the training of judges etc.) while being sensitive to perceptions of influence on the judiciary.
• **Proposed Action #5**: Respect applicable contract and property rights.
  o Business can standardize agreements where there is no uniformity
  o Business action may differ depending on the state of the country i.e. highly conflict affected areas
  o Can or would a company decide that it would do business in a country that does not have democratic succession? Without this, property rights and/or contract laws cannot be guaranteed.
  o Business may choose not to engage in a particular country if they’re not guaranteed fair process and security of outcome. However, there are cases nonetheless where businesses do engage in business in countries where neither process nor outcome are guaranteed (i.e. some oil producing countries)

b. **Explore how the business action can be implemented by business by sharing an actual or hypothetical example.**

• **Proposed Action #2**: Respect and support the accountability of all persons, institutions and entities, public and private, to laws that are publicly promulgated and which are consistent with international norms and standards
  o For A, B, and C, business can lead by example
  o For A, B, and C, vision and culture is set by the board and the shareholders
  o For D: advocating for consultations of laws in other countries, so that all voices are heard. This is something business can support.

• **Proposed Action #4**: Support initiatives that make justice accessible to all
  o Access to legal services and the legal professions
  o Many law firms are leading the charge in terms of providing pro-bono services with some setting objectives for their lawyers.
  o Companies are already engaging in capacity building. This can be done specifically around the rule of law.
  o Companies supporting legal services.
  o Example: A large bank has an access to legal profession program. It asks legal suppliers to report on diversity metrics (first company in Canada to do this). It has been a driver for legal suppliers to make changes internally.
  o Example: Many companies signed to support DOMA in the US. Business was playing an activist role here in developing the rule of law.
Example: A multinational mining company supports access to justice especially in emerging markets where there is very limited access to justice.

- Proposed Action #5: Respect applicable contract and property rights.
  - Standardization of corporate dealing: For example, a large multinational company in order to deal with its supply chain and child rights issues has standardized contracts to ensure human rights are observed no matter where a supplier is operating.
  - International treaties: the issue of conflict diamonds has been addressed via international treaties and corporations taking action

c. Are these the correct business actions to include in the Framework?

- The framework does not include any information on how funding will be achieved to support the global framework for the rule of law
- Further concretizing these points would be useful. What specifically are the business actions within each of these areas? What do businesses have to put into place to operationalize these actions? What standardizations or processes must be put in place? Provide examples of policies, internal codes, best practices etc. It is important to make the actions more concrete rather than a declaration of intention.
- The framework doesn’t necessarily account for the drawbacks in the slow pace of court system accessibility. This could be a point included in subset of proposed action #3.
- Business can enhance the ability of the public to engage in discussions on the rule of law through advocating for these conversations.
- One role of business may be to educate or convince, as a client, the changes that are needed in reforming the justice system.
- One business action could point to the need to think about law and the practice of law, as well as how we can improve access.
- The framework could also discuss the need to avoid duplication and replacement of actions that are already happening. The framework should not, or should avoid doing this. There should be more partnership between business and international institutions, without duplication.
- The framework could include a point on lobbying practices and ensuring that companies lobbying practices are consistent with the promotion of the rule of law.

d. Are there business actions that are missing from the Framework that should be included?

In addition to some of the points mentioned above:
Consider the impact of international arbitration and how it impacts national rule of law
Respecting judicial independence and supporting, enhancing, advocating for an impartial judiciary
Business should refuse to remain wilfully blind to bribery
First and foremost, do no harm.
Increase transparency/consistency/alignment between a company’s formal position and its actions.
Regarding equal enforcement of the law and respecting judicial independence, traditionally the respect comes from the government. Respecting the rule of law in this case is not enough: the rule of law and judicial independence should also be actively supported, enhanced and promoted by governments. Similarly, "not engaging in corruption" is not sufficient: companies should also ensure that they do not enable corruption or turn a blind eye to it.
There ought to be rules relating to lobbying: if persons or companies lobby in favour of certain goals, their actions ought to be being consistent with such stated goals.

5. Call to Action (to Business and by Business) to Support the Rule of Law

a. What are some concrete steps business can take to respect and support the rule of law?

- Mind your own house: Companies should first enforce the rule of law internally. Beyond this will be circumstantial and there is no single line defining when to engage and when to not engage. Looking out for circumstances where they can assist others or be an external watchdog for rule of law adherence should be secondary measures.

- Business as peer-to-peer watchdogs: Business should be willing speak out when there is a violation of the rule of law. One of the risks that a business has if not following the rule of law, is that a competitor may bring this to the public. As such, there is a healthy role for watchdog competitors.

- Education, training and policies: Training employees, suppliers and other stakeholders. Examples of actions include: code of business ethics, having employees sign a compliance statement, use the scope of business ethics to promote business values (all forms of education)

- Marketing: Business can use marking tools to influence a culture of abiding by the rule of law.

- Certifications: Certification mark more companies following and supporting the rule of law.
- **Funding:** Companies can provide funding to support global worldwide development.

- **Long-term stability:** Overall, laws help companies think longer-term about accountability. Having more rule of law in place, including accountability, will improve the companies' long-term sustainability.

- **Canadian good practice example:** Canadian law around bribery and corruption. Any Canadian national must avoid engaging in bribery and corruption no matter where their actions have taken place (in Canada or globally)

- **Avoiding the bypassing of national systems:** Ensure that business is not bypassing domestic governance systems that need to be built. In some cases, there may be a need for exceptional cases/egregious matters but, in the long-run it is important to find ways to support developing countries in building domestic capacity. That’s the point of this exercise: how can business help with this process that has already started by international organizations, bilateral programs to promote governance reform, etc. to make them more effective.

- **Imperfections of the rule of law:** Rule of law is not perfect as is — there are pockets of good rule of law in some areas. Supporting rule of law is about supporting the development and the aim to help get there, it is a vision.

b. **What actions can other actors, including Government, academia and civil society take to improve legal institutions, access to justice, equality before the law, capacity building and other such action?**

- **Defining rule of law in terms of existing norms:** It may be important to define the rule of law as being in accordance with human rights/international treaties in principle, even if the laws aren’t identical, so that the principles can be implemented in the host country rather than exporting human rights principles from the businesses home country.

- **Special considerations for conflict affected areas:** The framework should make special considerations for working in conflict affected areas. What does it mean to support the rule of law in this context? What influence does business have in stabilizing an unstable environment? For example, when a company wants to operate honestly in a conflict zone, UNGC has a Business for Peace initiative so companies can be a stabilizing influence. Most sophisticated multinational companies know how to avoid getting dirty in those situations, but the trickier question is how/where to access legal remedies, while avoiding forum shopping concerns.
6. Mobilizing Business to Support the Rule of Law

a. What obstacles, if any, does your organization experience that prevents it from supporting the rule of law in this country or in any other country it has an interest in, such as investments, operations, business relationships?

- **Weak rule of law and distrust:** Where the rule of law is the weakest and there is the biggest distrust for institution is where the biggest challenge will be advocacy and achieving fair outcomes. In some instances if a company is very vocal they may cease to be welcomed as a guest in the country. This means companies need to be subtle in advocating but also ensure that their employees are protected. Companies need to first take care of their own conduct, and then look for opportunities to advocate.

- **Amorality of demand:** Some rule of law issues relate to the demand. For example, the War on Drugs is an issue primarily taking place in developing countries yet it is fed by demands from developed countries. In situations of demand, the company needs to explain, clearly, to its customers the trade-offs that are at play.

- **Incentive structures:** Incentive structures need to be put in place to encourage companies to build better rule of law.

- **Transparency and accountability:** Rule of law at the global level is only as good as transparency, accountability and reporting on the rule of law.

- **Enforcement:** The enforcement of international laws is very important. Unless there is a mechanism to notify an international agency to report breaches of such laws (that may be all they can do), there is no meaningful way for a company or a nation to commit itself to international laws.

b. How can the UN Global Compact, and other actors, support business to take action in support of the rule of law (e.g. information sharing via webinars on specific rule of law topics, in-person events, leveraging online resources, strategic partnerships)?

- **Galvanizing collective action:** There is power in many voices. The UNGC can help develop local collective action so that there is no single entity advocating at the local level — ensuring diversity in voices being heard.

7. Additional Comments, Suggestions or Questions

[Workshop Report End]