

ISSUE FOCUS

Corporate Accountability in Southeast Asia: National Action Plans for Responsible Business Conduct under International Law

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Beyond transnational litigation which seeks to hold corporations accountable for their misconduct overseas through judicial recourse, the risk of human rights abuses should be mitigated by embedding good practices locally through domestic laws and policies. The United Nations proposed Guiding Principles for transnational and other businesses for this purpose in 2011. It has been suggested that National Actions Plans should give effect, or at the very least policy coherence, to the international standards enshrined in the Guiding Principles. This article argues that, properly devised, such plans are invaluable, and can help to reinforce regional imperatives under international law. In Southeast Asia, particularly, the prospect of corporate accountability should be measured by existing or emergent regulatory norms in ASEAN, a regional bloc that aims to achieve parity of rules and regulations across the ten countries through economic integration.

Keywords

UNGPs, Corporate Social Responsibility, Human Rights, NAPs, Transnational Litigation, ASEAN.

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I. Introduction

Corporate accountability for human rights is often discussed in the light of transnational tort cases in the US Courts concerning allegations of corporate misconduct overseas. It has been referred to as “transnational human rights litigation”¹ or ‘plaintiff’s diplomacy’² pursuant to statutes such as the US Alien Torts Claim Act (“ATCA”). The ATCA case of *Doe v Unocal*,³ which was filed in 1996 and was subsequently settled out-of-court, is regarded as giving rise to the trend of such litigation, and having “expanded the tactical repertoires of grass-roots activists as well as those of litigators.”⁴ In the past, these cases have been cited by international lawyers to illustrate that corporate responsibility for transnational companies to respect human rights extends beyond the domestic legal and regulatory sphere so that they can be adjudicated by international and foreign courts.⁵

Legal barriers, however, can deter legitimate cases involving corporate human rights violations from being addressed. This occurs when, *e.g.*, “the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability; when claimants are denied justice in both their home and host States; and where certain groups are excluded from the same level of legal protection of human rights as others.”⁶ In his speech to the UN Human Rights Council in 2011, Professor John Ruggie, former UN Special Representative for Business and Human Rights, remarked that multilateralism works in finding common ground rules for global action.⁷

¹ S. JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004). *See also* Alien Tort Claims Act, 28 USC, § 1350 (2001). The statute reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

² A.-M. Slaughter & D. Bosco, *Plaintiff’s Diplomacy*, FOREIGN AFF. 102 (2002).

³ *Doe v. Unocal Corp.*, 963 F. Supp. 883-4 (C.D. Cal. 1997), vacated, 403 F.3d 708 (9th Cir. 2005). The European Union has also encouraged encouraging similar routes for access to justice and remedy thorough the courts of its Member States. *See* I. Wuerth, *Kiobel v. Royal Dutch PetroleumCo: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601-3 (2013).

⁴ C. Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 L. & Soc’y REV. 291 (2009).

⁵ J. Drimmer, & S. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 488(2011).

⁶ J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/17/31 (Mar. 21 2011), available at <http://daccess-ods.un.org/TMP/13405.2243083715.html> (last visited on Apr. 17, 2015).

⁷ *Id.*

In 2013, however, Ruggie lamented that, if the respondents' arguments persuaded the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co.*,⁸ its decision may "destroy an entire juridical edifice for redressing gross violations of human rights".⁹ The unanimous US Supreme Court decision in *Kiobel* on April 17, 2013 adjudicated that international claimants could not bring civil suits in the US courts against foreign corporate defendants for alleged egregious human rights violations under international law using ATCA. It is thus necessary to look beyond transnational domestic litigation in order to secure legal accountability for business-related human rights harm, and to consider the role that national action plans ("NAPs") could play.

National and regional action plans in ASEAN should give due regard to issues that are underexplored in the global conversation about business and human rights, such as gender issues and concerns of emerging economies. In the field of business and human rights, a NAP is defined as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (hereinafter Guiding Principles or "UNGPs")."¹⁰ Four criteria are indispensable for effective NAPs.

First, NAPs should be premised upon UNGPs. As an instrument to implement UNGPs, NAPs need to adequately reflect a State's duties under international human rights law to protect against adverse corporate human rights impacts and provide effective access to remedy. A NAP further needs to promote business respect for human rights including through due diligence processes. Moreover, the Plans must be underpinned by the core human rights principles of non-discrimination and equality.¹¹

Second, NAPs need to be context-specific and address the country's actual and potential adverse corporate human rights impacts. Governments should define focused and realistic measures which deliver the impact as influential as possible on preventing and remedying adverse impacts.¹² Third, NAPs need to be developed

⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). See also Supplemental Brief for Respondents at 11-13, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 3127285. The respondents' supplemental brief argued that ATCA does not apply to corporations, including US companies; and that its previous judicial interpretation and application amounted to a violation of international law and comity.

⁹ J. Ruggie, *Kiobel and Corporate Social Responsibility: An Issues Brief*, Sept. 4, 2012, at 6, available at <http://www.ihrb.org/news/kiobel-and-corporate-social-responsibility.html> (last visited on Apr. 20, 2015).

¹⁰ UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS & HUMAN RIGHTS 3 (2014), available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (last visited on Apr. 17, 2015).

¹¹ *Id.* at ii.

¹² *Id.*

in inclusive and transparent processes. Interested stakeholders need to be allowed to participate in the development and update the NAP and their views need to be taken into account. Information needs to be shared transparently at all stages of the process.¹³ Fourth, NAP processes need to be regularly reviewed and updated. They must respond to changing contexts and strive for cumulative progress.¹⁴

This article comprises of four parts in addition to this introductory part. Part II will set out the framework and guiding principles that the UN has posited as an authoritative starting point for the corporate responsibility to respect human rights. Part III will examine key developments in Southeast Asia which highlight the importance of action plans in implementing the above-mentioned UN framework and guiding principles. Part IV will discuss the processes that ASEAN States could undertake in designing a national action plan for business and human rights or responsible business conduct. Drawing on consultations with stakeholders in Southeast Asia as part of a UN-commissioned project, this part will also suggest that how these plans could benefit from, but should not be limited to, corporate accountability in the context of judicial recourse. Finally, as conclusion, Part V of the article, at this liminal stage of devising and implementing NAPs, will ensure that they are not rigid but flexible; that they make room for “a complex array of interdependent and overlapping mechanisms rather than through a vertical hierarchy in which top-down state centred mechanisms and institutions legitimize the activities of regulatory actors.”¹⁵

II. UN Framework and Guiding Principles for “Protect, Respect and Remedy” - Towards Multilateralism -

In 2008, the UN Human Rights Council approved John Ruggie’s proposed framework on business and human rights, otherwise known as the UN’s “Protect, Respect and Remedy” Framework.¹⁶ This framework is based on three pillars, being

¹³ *Id.*

¹⁴ *Id.*

¹⁵ B. MORGAN & K. YEUNG, *AN INTRODUCTION TO LAW AND REGULATION* 11 (2007).

¹⁶ J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary - General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 8th Sess., Agenda Item 3, UN Doc A/HRC/8/5 (Apr. 7, 2008), ¶¶ 51-81 (“Protect, Respect and Remedy Framework”), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (last visited

the duty of States to protect human rights, the responsibility of corporations to respect human rights, and the need to ensure access by victims to remedies where business-related human rights abuses do occur, both judicially and non-judicially.¹⁷

In 2011, UNGP, comprising 31 Guiding Principles, were unanimously adopted by the United Nations Human Rights Council (“UNHRC”) to implement all three pillars of the UN’s “Protect, Respect and Remedy” Framework.¹⁸ According to Ruggie, “the Council’s resolution establishes the guiding principles as the authoritative global reference point for business and human rights.”¹⁹ Impressively, all 28 members of the Council voted for the endorsement.²⁰ The resolution also envisions a multi-stakeholder forum to address and solve challenges and roadblocks encountered while implementing the principles.²¹

Whereas the UN’s “Protect, Respect and Remedy” Framework addressed, in Ruggie’s words, the ‘what’ question: what do States and businesses need to do to ensure business respect for human rights; UNGPs address the ‘how’ question: how we move from concept to practical and positive results.²²

UNGP consists of thirty-one principles, each with commentary elaborating its meaning and implications for law, policy, and practice.²³ UNGPs seek to provide companies with a set of comprehensive standards built upon existing laws. They advise public and private companies on how to conduct their activities based on

on Apr.17, 2015).

¹⁷ *Id.*

¹⁸ See *Human rights and transnational corporations and other business enterprises*, U.N. Doc A/HRC/RES/17/4 (July 6, 2011), available at <http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf> (last visited on Apr. 17, 2015).

¹⁹ *Id.*

²⁰ Additionally, the UNHRC resolution (A/HRC/RES/17/4) has established a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of at least three years.

²¹ *Supra* note 18. Under paragraph 12 of this resolution, the Council resolved to establish a UN Forum on Business and Human Rights under the guidance of the Working Group to: “discuss trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.”

²² M. Mohan & D. Lim, *Securing Human Rights in Business*, BUS. TIMES, June 3, 2011, available at http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1012&context=sol_april (last visited on Apr. 30, 2015).

²³ The “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. See *Guiding Principles on Business and Human Rights*, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited on Apr.17, 2015).

human rights norms. Additionally, the Guiding Principles outline human rights due diligence processes that seek to prevent and deter human rights abuses. Finally, UNGPs take remediation into concern in the event a human rights violation occurs and is attributable to a business entity. UNGPs are a global standard for preventing and addressing the risk of adverse impacts on human rights linked to businesses.

At its 26th session on June 23, 2014, UNHRC noted the “important role that national action plans and other such frameworks on business and human rights can play as a tool for promoting the comprehensive and effective implementation of the Guiding Principles.”²⁴ The UNGPs have gained wide support from States, the private sector, and civil society. They have become a central reference point for efforts to prevent, mitigate and remedy adverse human rights impacts of business activities. The Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter Working Group or “UNWG”), along with other stakeholders, have called upon the governments to engage in processes to develop NAPs as a means to implement UNGPs.²⁵ An increasing number of States from various regions (including ASEAN and others parts of Asia) have begun to engage in such processes.²⁶

III. Key Developments and Perspectives in Southeast Asia

A. Towards a Borderless Economic Community

In 2003, the ASEAN officials outlined a new topography based on three ‘pillars’ that were designed to better illustrate the region’s politico-economic position, competitive advantage and potential as a trading bloc: the ASEAN Political-Security Community (“APSC”), AEC and the ASEAN Socio-Cultural Community (“ASCC”). These ‘pillars’ are meant to withstand the ASEAN’s long-term goal of forming a

²⁴ *Human rights and transnational corporations and other business enterprises*, 26th Sess. UN Human Rights Council, UN Doc. A/HRC/26/L.1 (June 23, 2014), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/26/L.1 (last visited on Apr. 20, 2015).

²⁵ The UNWG in its report to the twenty-third session of the Human Rights Council called upon States to “consider elaborating a national plan of action.” See U.N. Doc. A/HRC/23/32, 23rd Sess. Agenda Item 3, Mar. 14, 2013, at 21, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/23/32 (last visited on Apr. 20, 2015). Furthermore, at its seventh session in February 2014, the UNWG outlined a road map on its activities to promote national action plans. See U.N. Doc. A/HRC/WG.12/7/1 (This document is under embargo as of Apr.15, 2015).

²⁶ See the UNWG’s repository of NAPs, available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited on Apr.17, 2015).

“Borderless Economic Community by 2030.”²⁷

More than a decade later, the ASEAN’s influence has grown and these pillars remain important touchstones for integrated development, especially with 2015 set to see the implementation of AEC. Collectively, the ASEAN represents a market of some 600 million people, with a combined GDP of about USD2.5 trillion and upwards of USD1.5 trillion in trade flowing throughout the region. Increased urbanization has channelled more ASEAN households into the consumer class.²⁸

This growth will demand more than USD7 trillion of investment in core infrastructure, housing and commercial real estate across the ASEAN through 2030.²⁹ The increased connectivity of the ASEAN region could “significantly increase intra-regional trade.”³⁰ In this regard, the ASEAN will need to “tackle restrictions on foreign investment and build a more competitive manufacturing sector as well as critical foundations such as infrastructure, logistics, and workforce skills.”³¹

Despite the ASEAN’s impressive institutions, reforms and growth, if human rights risks continue to be wilfully ignored and if States and businesses fail to institute risk and impact assessments of their operations in such areas, the stability that currently supports investor confidence and economic progress may indeed be short-lived. No systematic assessment is available of overall empirical results of the reception or efficacy of UNGPs in the ASEAN.

Nonetheless, the value of the Guiding Principles must not only be measured in terms of their ability to mitigate such risks, but perhaps even more importantly by the way in which they mutually-reinforce existing or emergent regulatory norms in ASEAN, a regional bloc that aims to achieve parity of rules and regulations across the ten countries through economic integration.³²

This brings Southeast Asia’s bilateral investment treaties and agreements (and the investment chapters of free trade agreements) into sharp relief, as it does regulatory and human rights concerns. In the *Philip Morris Asia Limited v The Commonwealth of Australia* arbitration,³³ e.g., the Hong Kong-based investor, a cigarette and tobacco

²⁷ ADB INSTITUTE, ASEAN 2030: TOWARDS A BORDERLESS ECONOMIC COMMUNITY 222-30 & 242-8 (2014).

²⁸ MCKINSEY INSTITUTE, SOUTHEAST ASIA AT THE CROSSROADS: THREE PATHS TO PROSPERITY (Nov. 21-2, 2014), available at <http://www.amcham.com.my/index.php/news-resource/news-highlights/business-news/687-mckinsey-southeast-asia-at-the-crossroads-three-paths-to-prosperity> (last visited Apr. 17, 2015).

²⁹ *Id.* 21.

³⁰ *Id.* 201.

³¹ *Id.*

³² The ASEAN Economic Community (“AEC”) shall be the goal of regional economic integration by 2015. For details, see ASEAN Economic Community, available at <http://www.asean.org/communities/asean-economic-community> (last visited on Apr. 17, 2015).

³³ See UNCITRAL Rules, Permanent Court of Arbitration Case No. 2012-12 (Procedural Orders), available at <http://>

company, sought to recover from Australia for its losses of potential revenue after Australia introduced plain-packaging legislation in a bid to regulate tobacco sales, even though this legislation was passed based on the World Health Organization's recommendations.³⁴ Philip Morris Asia is challenging the tobacco plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (hereinafter the Hong Kong Agreement).³⁵ This is the first investor-State dispute that has been brought against Australia. Philip Morris Asia argues as follows:

1. Australia's tobacco plain packaging measure constitutes an expropriation of its Australian investments in breach of Article 6 of the Hong Kong Agreement;
2. Australia's tobacco plain packaging measure is in breach of its commitment under Article 2(2) of the Hong Kong Agreement to accord fair and equitable treatment to Philip Morris Asia's investments; and
3. Tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong Agreement, which were rejected by Australia.³⁶

Such cases are prompting States to be circumspect in their trade and investment treaty negotiations, and to comprehensively review their treaties. Indonesia's recent decision to depart from all of its existing bilateral investment treaties may seem, at first glance, to be a cancellation of its treaty commitments, and of the protection that such treaties afford.³⁷ Some have claimed that it is "likely to be seen as a backward step."³⁸ Others astutely observe that these BITs "tend to only contain provisions protecting foreign investors, without specifically providing for the preservation

www.pca-cpa.org/showpage.asp?pag_id=1494 (last visited on Apr. 17, 2015).

³⁴ IISD, *Australia to reject investor-state dispute resolution in TPPA*, INVESTMENT TREATY NEWS, Apr. 13, 2012, available at <http://www.iisd.org/itin/2012/04/13/news-in-brief-7> (last visited on Apr. 17, 2015).

³⁵ Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, Australian Treaty Series 1993, No. 30, entered into force on Oct. 15 1993, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1993/30.html> (last visited on Apr. 17, 2015).

³⁶ See Tobacco plain packaging—investor-state arbitration (Nov. 21, 2011), available at <http://www.ag.gov.au/tobaccoplainpackaging>. See also Phillip Morris Asia Ltd., Notice of Arbitration, available at <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf> (all last visited on Apr. 17, 2015).

³⁷ B. Bland & S. Donnan, *Indonesia to terminate more than 60 bilateral investment treaties*, FIN. TIMES, Mar. 26 2014, available at <http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3XqoRNJ1q> (last visited on Apr. 17, 2015).

³⁸ *Id.*

of governments' policy space to regulate in the public interest for health, the environment or financial reasons."³⁹ The autonomy that States enjoy over regulating their own domestic affairs, and that they are reluctant to cede through their BITs, is referenced in UNGPs. Specific to investment arbitration, *e.g.*, Guiding Principle 9 prescribes that States should "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives," citing the conclusion of investment treaties as an illustration on this issue.⁴⁰ The commentary to Guiding Principle 9 acknowledges that investment treaties "affect the domestic policy space of governments."⁴¹

B. A Regional Plan - the ASEAN Inter-governmental Commission on Human Rights Baseline Study

The recently published ASEAN Intergovernmental Commission on Human Rights ("AICHR")'s Thematic Study on the Corporate Social Responsibility ("CSR") and Human Rights in ASEAN (hereinafter Baseline Study) is a cornerstone of the ASEAN's regional strategy for business and human rights. Three points bear mention. First, the Baseline Study is the official investigation by an ASEAN sectoral body on business and human rights where researchers and members were nominated by AICHR representatives. Second, the Baseline Study, which was made public on November 10, 2014, reflects the current status of business and human rights considerations in ASEAN.⁴² Thus, it is an authoritative starting point for regional strategy on business and human rights. Third, the Study serves as the foundation to support the development of a common regional framework to support business and human rights in the ASEAN. The introduction to the Baseline Study states:

It is against this backdrop that the ASEAN Intergovernmental Commission on Human Rights ("AICHR") decided to pursue a baseline analysis on the nexus between Business and Human Rights. The Baseline Study is expected to provide a comprehensive assessment on CSR as it relates to the promotion and protection of human rights in

³⁹ M. Chow & J. Losari, *Indonesia is letting its bilateral treaties lapse so as to renegotiate better ones*, FIN. TIMES, Apr. 15, 2014, available at <http://www.ft.com/intl/cms/s/0/20c6c518-c16c-11e3-97b2-00144feabdc0.html#axzz3XqoRNJ1q> (last visited on Apr. 20, 2015).

⁴⁰ Commentary to Principle 9, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *See supra* note 6.

⁴¹ *Id.*

⁴² T. Thomas & A. Chandra, AICHR's Thematic Study on CSR and Human Rights in ASEAN 2 (2014), available at <http://aichr.org/documents> (last visited on Apr. 20, 2015).

the ASEAN region. **It was also expected that the outcome of the study could serve as the foundation for the establishment of a common framework to accelerate the promotion of CSR and human rights in the region.**⁴³

The authors of the Baseline Study add that:

This Baseline Study will also support **policy development** in line with the ASEAN Socio-Cultural Community Blueprint. The Blueprint's section on "Social Justice and Rights" calls for CSR principles to be incorporated into the **corporate agenda of businesses in the region** and contribute towards the **sustainable socio-economic development** in ASEAN Member States.⁴⁴

The Baseline Study supports the AEC Blueprint. It also serves the aims of the AEC Blueprint, which is the "realisation of the end goal of economic integration.... which is based on a convergence of interests of ASEAN Member Countries to deepen and broaden economic integration through existing and new initiatives..."⁴⁵ It also provides: "The ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments."⁴⁶

The Baseline Study is part of the Five-Year Work Plan of AICHR, designed to provide the Commission a better understanding on the emerging human rights-related issues pertaining to corporate conduct in the ASEAN region.⁴⁷ It can also serve as a tool to assess the ASEAN member States' readiness for NAPs. Dhanarajan and O'Brien have maintained:

Given the reliance on NAPs placed by the Council of Europe's Draft Recommendation on business and human rights, and the new focus by the UN Human Rights Council in its 2014 business and human rights recommendation, NAPs, as a vehicle for promoting

⁴³ *Id.* [Emphasis added]

⁴⁴ *Id.* [Emphasis added]

⁴⁵ See ASEAN ECONOMIC COMMUNITY BLUEPRINT 5, available at <http://www.asean.org/archive/5187-10.pdf> (last visited on Apr. 17, 2015).

⁴⁶ *Id.*

⁴⁷ The specific aims of the exercise are to: (1) identify state practices in facilitating or encouraging CSR, including business and human rights; (2) highlight CSR practices of ASEAN-based business as they relate to human rights; (3) explore the activities of various actors involved in the promotion of CSR; and (4) assess the level of engagement and dialogue between CSR promoters. See Five-Year (2011-2015) Work Plan of AICHR, available at <http://aichr.org/documents> (last visited on Apr. 30, 2015).

implementation of the GPs and other business and human rights frameworks clearly hold strong potential relevance beyond the EU...⁴⁸

It is noteworthy that the authors of the Baseline Study have similarly called for the ASEAN Foundation to serve as a coordinating body in relation to business and human rights in the region:⁴⁹

The governments of ASEAN member states need to take leadership in encouraging and enabling businesses to implement and embed CSR values throughout their organisations. Businesses can be a force for good and they have to conduct themselves with responsible business conduct for their social license to operate. CSR and its links to human rights can be a competitiveness advantage as well as address social and environmental issues in ASEAN. The governments have taken a first step by including CSR as a strategic objective for the ASEAN Community 2015. It has through the ASEAN Foundation formed the ASEAN CSR Network. The next step is for AICHR/ASEAN to identify a body/organisation to take a coordinating role, taking into account the recently established ACN.⁵⁰

C. Stock Exchange Regulators and Non-Financial Reporting

In the ASEAN region, and indeed in Asia generally, various stock exchanges have put in place either mandatory or voluntary disclosure requirements for social and environmental governance that are worthy of mention. The Stock Exchange of Thailand participated in a Corporate Social Responsibility Institute, which promotes awareness and understanding in implementing and reporting CSR practices in line with international benchmarks.⁵¹ The Malaysian Stock Exchange, Bursa Malaysia, requires listed issuers to annually report on the CSR practices in 2012, the Securities Commission adopted a CSR Framework and a Code for Corporate Governance

⁴⁸ S. DHANARAJAN & C. O'BRIEN, HUMAN RIGHTS AND BUSINESS: 14TH INFORMAL ASEM SEMINAR ON HUMAN RIGHTS: BACKGROUND PAPER 17 (Nov. 18-20, 2014), available at <http://www.asef.org/images/docs/Background%20Paper.pdf> (last visited on Apr. 17, 2015).

⁴⁹ In March 2015, the Human Rights Commission of Malaysia, SUHAKAM, published a 'Strategic Framework' on a NAP for Malaysia, available at <http://business-humanrights.org/sites/default/files/documents/Malaysia-Strategic-Framework.pdf> (last visited on Apr. 15, 2015).

⁵⁰ *Supra* note 42, at 20.

⁵¹ The Corporate Social Responsibility Institute ("CSRI") Working Group has drafted two manuals: (1) the Guidelines for Sustainable Development Report; and (2) the Guidelines for Corporate Social Responsibility - for the preparation of CSR Reporting in compliance with the Global Reporting Initiatives ("GRI"), which is an internationally recognized standard for sustainability reporting. See Social Responsibility of the SEC, available at <http://www.sec.or.th/EN/AboutUs/Pages/GlobalReportingInitiative.aspx> (last visited on Apr. 17, 2015).

that applies to government-linked and publicly listed companies. Further, the Bursa Corporate Governance Guide encourages directors to consider producing Sustainability Reports that address, among other things, community involvement and human rights and child labour.⁵² Hong Kong requires listed companies to “comply or explain” its environmental, social and governance guidelines.⁵³ In 2012, the Taiwan Stock Exchange launched an index that focuses on the corporate governance and corporate social responsibility.⁵⁴

In Singapore, there has been an increased call by consumers for firms to match their ethical and environmental values with concrete action.⁵⁵ In 2011, the Singapore bourse, SGX, also issued its “Sustainability Reporting Guidelines” which encouraged companies to assess and disclose the environmental and social aspects of their organizational performance, and to disclose its sustainability policy.⁵⁶ SGX has recently announced that it will follow suit with mandatory disclosure requirement for listed companies with regard to sustainability, social and environmental policies.⁵⁷ This is in response to the reportedly ‘slow’ uptake by companies of the Guiding Principles and a finding that up to two-thirds of listed companies were not communicating sustainability information to stakeholders.⁵⁸ These developments reflect stakeholder demands greater transparency. Magnus Bocker, the CEO of SGX, has this to say:

Some companies take sustainability reporting seriously and do it very well. A few have gained global recognition. But for most companies, it’s more of a ‘nice to have... the world is getting more involved and investors are asking for the information.

⁵² See Bursa Malaysia Corporate Governance Guide, at 25, available at http://www.bursamalaysia.com/misc/system/assets/7257/CG_Guide2.pdf (last visited on Apr. 17, 2015).

⁵³ See *The Exchange publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide*, HKEX NEWS RELEASE, Aug. 31, 2012, available at <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm> (last visited on Apr. 17, 2015).

⁵⁴ Harvard Kennedy School of Government’s Hauser Institute for Civil Society, Global CSR Disclosure Requirements, available at <http://hausercenter.org/iri/about/global-csr-disclosure-requirements> (last visited on Apr. 17, 2015).

⁵⁵ J. Cheam, *SGX chief: ‘We need tougher regulations and efficient capital markets’* Eco-BUS. NEWS, Nov. 27, 2013, available at <http://www.eco-business.com/news/sgx-chief-we-need-tougher-regulations-and-efficient-capital-markets> (last visited on Apr. 17, 2015).

⁵⁶ SINGAPORE EXCHANGE (“SGX”), GUIDE TO SUSTAINABILITY REPORTING, available at http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2011.pdf (last visited on Apr. 17, 2015).

⁵⁷ V. Shah & J. Cheam, *SGX to make sustainability reporting mandatory*, Eco-BUS. NEWS, Oct. 17, 2014, available at <http://www.eco-business.com/news/sgx-make-sustainability-reporting-mandatory> (last visited on Apr. 17, 2015).

⁵⁸ L. LOH ET AL., ACCOUNTABILITY FOR A SUSTAINABLE FUTURE: SUSTAINABILITY REPORTING IN SINGAPORE AMONG SINGAPORE EXCHANGE MAINBOARD LISTED COMPANIES 2013, available at http://www.csrsingapore.org/c/images/stories/publications/FA_Singapore%20Compact%20Research%20Study%20Publication_290714.pdf (last visited on Apr. 17, 2015).

Our market needs to collectively, take the next step upward and move to ‘comply or explain’ on sustainability issues...The environment and social aspects need to be reported in accordance with sustainability guidelines... Company actions, practices and policies may be associated with risks to the environment or to society, whether staff, suppliers or end-customers. These risk major loss or disruption to the company. Such material matters need to be disclosed... I believe that in Singapore we have not been afraid of facing up to difficult realities because it drives behavioural improvements. Certainly, fear of poor numbers cannot be a reason not to do sustainability reporting. Rather, companies would do well to incorporate sustainability considerations into business strategy.⁵⁹

D. Environmental and Social Governance

To ensure the ASEAN to fulfil its vision, the Asian Development Bank proposes that the ASEAN States must have “[a] proper combination of domestic reforms and initiatives for closer integration that complement and reinforce one another are needed to promote the region’s equitable and inclusive development, strengthen its macroeconomic stability, and protect the environment.”⁶⁰ AEC is premised on equitable and inclusive growth, and environmental protection⁶¹ – principles which comport with the letter and spirit of business and human rights. AEC is not alone in this regard. A tenet of the ASCC blueprint is the promotion of corporate social responsibility.⁶² Specifically, it recommends that the ASEAN countries adopt and implement international standards on responsible business and that the ASEAN increases awareness of ensuring sustainable relations between commercial activities and the communities where they are located, particularly by supporting community-based development.⁶³

It has been noted that a wide range of policies can be adopted at the national

⁵⁹ M. Bocker, CEO of the SGX, at the International Singapore Compact Summit (Keynote Speech), Oct.17, 2014, available at http://sgx.com/wps/wcm/connect/sgx_en/home/highlights/speeches/Sustainability-Reporting-SINGAPORE-COMPACT-CSR-SUMMIT-17-Oct-2014 (last visited on Apr. 17, 2015).

⁶⁰ *Supra* note 27.

⁶¹ *Id.* at 222-30 & 242-8.

⁶² See ASEAN SOCIO-CULTURAL COMMUNITY BLUEPRINT 13 (June 2009), available at <http://www.asean.org/archive/5187-19.pdf> (last visited on Apr. 17, 2015).

⁶³ The ASEAN Foundation has catalyzed the formation of a regional network for CSR (hereinafter ASEAN CSR Network) to address the lack of regional cooperation on Corporate Social Responsibility and in line with the actions called for in the Blueprint for ASEAN Socio-Cultural Community (2008-2015). The Network aims to support the Blueprint for ASEAN Socio-Cultural Community, which includes as part of its strategic objectives ensuring that corporate social responsibility is incorporated in the corporate agenda and contributes towards sustainable socio-economic development in ASEAN Member States. See ASEAN CSR Network, available at <http://www.aseanfoundation.org/csr> (last visited on Apr. 17, 2015).

level, “from the introduction of stricter regulations on environmental standards than those currently in place,” to “increasing environmental awareness and introducing training programs to enhance public sector capacity.”⁶⁴ On August 5, 2014, *e.g.*, Singapore’s Parliament passed the Transboundary Haze Pollution Act (“THPA”).⁶⁵ THPA aims to solve the yearly haze problem that affects Singapore as a result of burning forests for agricultural use mainly in parts of Indonesia and elsewhere.⁶⁶ THPA has been lauded as a ground-breaking statute. Section 6 of THPA allows for a cause of action that is actionable in Singapore if any person who sustains personal injury, physical damage or economic loss. THPA gives Singapore courts jurisdiction over companies that have “no assets in Singapore and no presence in Singapore.”⁶⁷ A unique feature of THPA is that it has extraterritorial effect;⁶⁸ local and foreign companies alike can be subject to THPA’s jurisdiction, as long as the company is deemed to be liable for causing or contributing to haze pollution in Singapore.

THPA is therefore “designed to shift the cost-benefit calculus to the economic actors who perpetuate such practices.”⁶⁹ In doing so, it give effect to the Guiding Principles. Guiding Principle 2 relates to the principle of extraterritoriality in the actions of States with regard to business and human rights.⁷⁰ Further, the Guiding Principles seek to reaffirm a responsibility on States to ensure, through legislative and other means, that those affected by human rights and environmental abuses have access to effective remedy.⁷¹ It also calls to mind the ASEAN Agreement on Transboundary Haze Pollution, which has been signed and ratified by all the ten ASEAN Member States. Despite requiring parties of the Agreement to “take legal, administrative and/or other measures to implement their obligations under the

⁶⁴ *Supra* note 27, at 222-30 & 242-8.

⁶⁵ See Transboundary Haze Pollution Act (No. 24 of 2014), available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=CompId%3Ae2031db7-7071-4016-9060-80de762953ef;rec=0;resUrl=http%3A%2F%2Fstatutes.agc.gov.sg%2F%2Fbrowse%2FtitleResults.w3p%3Bletter%3DT%3Btype%3DactsAll> (last visited on Apr. 17, 2015).

⁶⁶ *Id.*

⁶⁷ See Singapore Parliamentary Debates, vol. 11 (Aug. 5, 2014), available at <http://sprs.parl.gov.sg/search/report.jsp?currentPubID=00006482-WA> (last visited on Apr. 15, 2015).

⁶⁸ THPA § 4. It reads: “This Act shall extend to and in relation to any conduct or thing outside Singapore which causes or contributes to any haze pollution in Singapore.”

⁶⁹ K. Vijayan, *Chief Justice Sundaresh Menon: Haze Law 'a local solution to issues across the border*, STRAITS TIMES, Sept. 20, 2014.

⁷⁰ Guiding Principle 2. It reads: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

⁷¹ For a commentary on the UNGPs in this regard, see OHCHR, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (2012), available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (last visited on Apr. 17, 2015).

Agreement [which include controlling sources of land/fire],” Singapore is perhaps the first to have done so.

IV. Development of NAPs in Southeast Asian States

UNWG is mandated by the Human Rights Council to promote the effective implementation of the UN Framework and the Guiding Principles. The Working Group considers that NAPs on business and human rights can be an effective means to coordinate and accelerate action at the national level.⁷² After all, the fundamental purpose of a NAP is to strengthen protection against business-related human rights abuses through an inclusive multi-stakeholder process of identifying needs and gaps and practical and actionable policy measures.

In 2013, UNWG proposed a research project to develop implementation guidelines for NAPs that would draw upon the perspectives in the Global South.⁷³ The Working Group awarded the grant to a coalition of African and Asian research institutions, led jointly by the Centre for Applied Legal Studies at the University of Witwatersrand (“CALS”) and the Asian Business and Rule of Law Initiative at the Singapore Management University. Members of the coalition also include the Centre for Human Rights, University of Pretoria (“CHR”) in Africa, and the ASEAN CSR Network (“ACN”) in Asia. For the Asian component of this research project, the centrepiece is an Asia Consultation that took place in Indonesia on February 4, 2015. This consultation gathered responses and interventions more than one hundred high-level stakeholders from business, government and civil society. Notably, members of the ASEAN Intergovernmental Commission of Human Rights (“AICHR”), the Working Group and leading businesses and civil society organizations based in Asia were in attendance.⁷⁴

⁷² For details, see Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/69/263 (Aug. 5, 2014), available at <http://daccess-ods.un.org/TMP/9593071.34151459.html> (last visited on Apr. 20, 2015).

⁷³ Center for Applied Legal Studies, CALS selected by UN Working Group, available at http://www.wits.ac.za/academic/clm/law/cals/newsitems/201311/22181/news_item_22181.html (last visited on Apr. 17, 2015). See also Centre for Applied Legal Studies & partner organizations to develop National Action Plan template to implement UN Guiding Principles, available at <http://business-humanrights.org/en/centre-for-applied-legal-studies-partner-organizations-to-develop-national-action-plan-template-to-implement-un-guiding-principles> (last visited on Apr. 17, 2015).

⁷⁴ ASEAN Next-Gen CRS Forum, Business and Human Rights Consultation, Feb. 3-5, 2015, available at <http://asean-csr-network.org/c/programme/calendar-of-events/162-business-and-human-rights-consultation> (last visited on Apr. 17, 2015).

In the author's view, the following points summarize and reflect the key recommendations which may be made on the basis of the responses gathered at the Asia Consultation.⁷⁵

1. National and regional initiatives regarding CSR and human rights should be aligned. Pursuant to the Baseline Study that was presented by AICHR, the ASEAN-wide guidelines should be designed in line with UNGPs and other international standards.
2. For them to be an effective NAP, there has to be inter-ministerial cooperation within a country, with a coordinating ministry overseeing the NAP process. On that note, the onus of protecting human rights in the business context should not fall to businesses, but remain with the government.
3. Existing mechanisms and general national action plans that the ASEAN States have committed to could be tapped upon to mutually reinforce the link between CSR and human rights. Further, the national action plans for human rights in Thailand and the Philippines can be also a starting point, or serve as the very policy coherence tool within which NAPs in these countries can be devised.
4. Businesses should be encouraged to act as 'champions' for promoting the interrelationship between human rights and CSR. Organizations such as the ASEAN CSR Network, various chambers of commerce, and local branches of the UN Global Compact can take the lead in this regard. They should identify and liaise with 'champions' within the business community for this purpose.
5. The relevance of CSR should not be limited purely to the socio-cultural framework of the ASEAN Community framework. It must be also considered in connection with the ASEAN Economic Community, which will be launched later in 2015. The ASEAN's economic integration is a key priority for the region, and closely followed by the international community as a whole.
6. NAPs can also serve as a basis to outline a State's regulation of bilateral investment treaties concerning issues of public interest such as human rights and the environment. This will add a level of certainty that is essential for States and foreign investors alike. Investment treaties cannot be a substitute for legislation and regulations concerning human rights and environmental protection at the domestic level, nor can Investor-State Dispute Settlement replace domestic courts

⁷⁵ On file with the author.

and administrative tribunals. These NAPs should also reference related regulations contained within the ASEAN Comprehensive Investment Agreement. It is important that provisions in the bilateral investment treaty correct the misguided perception that economic rights are superior to human rights and environmental rights.

7. The traditional definition of ‘development’ as being rooted solely in economic considerations has changed. The right to development is enshrined in Article 35 of the ASEAN Human Rights Declaration. As such inclusive, equitable, sustainable, and rights-based development are now critical aspects of development discourse in the region. NAPs should therefore be aligned with regional development plans, such as the Bali Concord III Plan of Action (2013-2017). And other plans that ASEAN and AICHR may develop in connection with the Post-2015 agenda. Bali Concord III notes, *e.g.*, that “ASEAN member States shall, where appropriate, integrate the programmes and activities of the Plan of Action into their respective national development plans.” To this end, the ASEAN governments should begin crafting their national action plans. Indeed, Malaysia is in the process of doing just this.⁷⁶
8. It is advisable to analyse a gaps between UNGPs and the State actor of CSR and human rights in member States, before a NAP is devised or implemented. For a NAP to be effective, there must be a multi-stakeholder monitoring and evaluation process. It should be pursued through constructive engagement with business. Since business and State stakeholders in some parts of the ASEAN may not yet be comfortable human rights language, a NAP on “Responsible Business Conduct” may be preferable to a NAP on “Business and Human Rights,” at least in the near term. Past experience with national action plans for human rights have shown that in order for the NAPs to be implementable, there needs to be adequate and continuous capacity building and education, and financial support.
9. The Vienna Declaration and Programme for Action (“VDPA”) should be invoked as a basis for designing NAPs. Article 71 of VDPA states that: “The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.” As a result of VDPA and the Universal Periodic Review (“UPR”) process, Indonesia, the Philippines and Thailand have developed national action plans in relation to human rights in general. The challenge is to include CSR/BHR norms consistent with UNGPs into these existing

⁷⁶ *Supra* note 49. See also ‘Malaysia to develop National Action Plan on Business & Human Rights,’ available at <http://business-humanrights.org/en/malaysia-to-develop-natl-action-plan-on-business-human-rights> (last visited on Apr. 17, 2015).

NAPs and/or creating a new model NAP on CSR and human rights that the ASEAN States can adopt.

10. CSR should not be limited purely to the socio-cultural pillar of the ASEAN Community framework, but must also form part of the economic pillar and therefore the AEC, which will be launched in 2015. The AEC Blueprint states that “ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments.”⁷⁷ Thus, there is considerable common ground to build on BHR principles while the AEC Blueprint is implemented. The various experts who are concerned with the AEC process should not be preoccupied with traditional trade issues such as non-tariff barriers. They must understand that trade and investment do touch on CSR and human rights as equitable development must take human rights to account. Currently, the AEC makes little reference to this and only briefly refers to SMEs in this regard. Further research needs to be conducted to incorporate CSR and human rights within the AEC plans of action.

NAPs for human rights issues are not new in Asia. The Philippines, *e.g.*, has issued a NAP on women, peace and security which implements the UN Security Council Resolutions 1325 and 1820. The creation of a NAP to implement Resolutions 1325 and 1820 will “help recognise, sustain, strengthen, and expand women’s role in peace building processes.”⁷⁸ Similarly, Singapore had issued a NAP on human trafficking,⁷⁹ which has led to the Anti-Human Trafficking Act. It was finally passed in Parliament in October 2014.⁸⁰ In crafting NAPs for business and human rights, the political diversity in the ASEAN should not be ignored. NAPs plans should respond to the needs of each ASEAN Member State. For NAPs to be effective in the ASEAN countries, they should be aligned to the country’s existing legal commitments.

A pluralistic and decentralized approach to regulation is crucial in securing regulatory legitimacy and compliance in the face of the specific human rights challenges that the ASEAN States face. This author would thus recommend

⁷⁷ *Supra* note 45, at 5.

⁷⁸ Peace Women, The Philippine National Action Plan on UNSCRS 1325 & 1820: 2010- 2016, available at http://www.peacewomen.org/assets/file/NationalActionPlans/philippines_nap.pdf (last visited on Apr. 17, 2015).

⁷⁹ SINGAPORE INTER-AGENCY TASKFORCE ON TRAFFICKING IN PERSONS, NATIONAL PLAN OF ACTION AGAINST TRAFFICKING IN PERSONS (2012-2015), available at http://www.mom.gov.sg/Documents/tip/tipbooklet_080812.pdf (last visited on Apr. 17, 2015).

⁸⁰ J. Fang, *Anti-human-trafficking laws passed in Parliament*, TODAY, NOV. 4, 2014, available at <http://www.todayonline.com/singapore/anti-human-trafficking-laws-passed-parliament> (last visited on Apr. 17, 2015).

that strategic national/regional action plans for regulation and enforcement be devised for providing guidance on how to address business and human rights challenges in the region. We should bear in mind Ruggie's refrain that any such plan should "follow the approach that has enabled us to get to this point. It is based on the premise that any course of action - voluntary, mandatory, or hybrid - should produce practical improvements in the lives of affected individuals and communities."⁸¹

V. Conclusion

Singapore's Chief Justice Sundaresh Menon has noted extra-judicially that knowledge of corporate legal accountability for human rights violations is vital to commercial lawyers "to protect your clients from expensive and protracted law suits in the court of law, but perhaps more importantly from reputational damage in the court of public opinion."⁸² In addition to direct financial or litigation risk, reputational risk matters, as well. Those businesses looking to invest in the ASEAN region should pay close attention to Mr. Menon's words. In several ASEAN States where governance is weak, such exploitation may instead contribute to poverty, corruption, crime and conflict with all the associated negative impacts on individuals' human rights. When States fail to meet their duty to protect human rights, the responsibility of extractive companies to respect human rights does not change. However, it can become all the more challenging for them to meet that responsibility in practice.

The Working Group has recommended that UNGPs be domestically incorporated into national or regional development and action plans consistent with the UN's post-2015 development agenda.⁸³ This author agrees that such national/regional action plans are the way forward. They should consider issues that are underexplored in the global conversation about business and human rights and that have been considered in this article in the context of the concerns, risks and

⁸¹ J. Ruggie, *A UN Business and Human Rights Treaty?: An Issue Brief* by John G. Ruggies, Jan. 28, 2014, at 5.

⁸² S. Menon, *Public International Law – A Requirement for every Private Lawyer*, Oct. 17, 2011, available at https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/Pacific_Rim_Advisory_Council_Conf_171011.pdf (last visited on Apr. 17, 2015).

⁸³ J. Bauer, Presentation on behalf of Centre for Applied Legal Studies, Wits University ("CALs") & Partners to the UN Working Group on Business and Human Rights Open Consultation on National Action Plans on Business and Human Rights (Geneva, Feb. 20, 2014), ¶ 7.

opportunities for countries in Southeast Asia. In light of the above, States and businesses should not only examine the role of a State's national institutions and foreign courts and commissions, but also carefully consider the "role of markets, consultation processes, third party auditing and accreditation mechanisms, private grievance procedures and so forth."⁸⁴

⁸⁴ *Supra* note 15.