

# **Implementing the UN Guiding Principles in Business and Human Rights**

**ASEAN CSR Network & Singapore Management University**

November 2015

**Post-event Summary:**  
**KL Forum & Workshop – Implementing the UN Guiding Principles in Business and Human Rights**

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**Kuala Lumpur, Malaysia**

Introduction

From 27 to 29 October 2015, the ASEAN CSR Network (“ACN”) organised the ASEAN Responsible Business Forum (“Forum”). The Forum was designed to provide a platform for key stakeholders to connect and advance responsible business practice and partnerships aligned with the dynamics of the ASEAN Economic Community (“AEC”) and the post-2015 ASEAN agenda. The Forum was held on 28 October 2015 and brought together about 250 key representatives of companies, governments, trade unions, and civil society to engage in high-level dialogues and interactive consultation Workshops. Specific topics that were tackled include business and human rights, business integrity, and inclusive and sustainable agriculture.

A consultation Workshop titled “Implementing the UN Guiding Principles in Business and Human Rights” (“Workshop”) was the final component of the Forum. The Workshop, held on 29 October 2015, was designed to gather input from government, business and civil society stakeholders on how developing national and regional strategies on business and human rights (“BHR”) can help create an enabling environment for the greater protection and respect for human rights in ASEAN. The Workshop was co-organised by ACN and the Singapore Management University (“SMU”), with support from the Government of Sweden through its embassy in Bangkok, the Asia-Europe Foundation (“ASEF”) with the financial support of the European Union, and the British Institute of International and Comparative Law (“BIICL”).

The Workshop participants included government representatives, representatives to the ASEAN Intergovernmental Commission of Human Rights (“AICHR”), business representatives and civil society organisations (“CSOs”), and representatives from the National Human Rights Institutions (“NHRIs”) within ASEAN.

The day was divided into three panel sessions, and a breakout session. The first two panel sessions dealt with implementing the UN Guiding Principles (“UNGPs”) and national action plans on BHR (“NAPs”) in ASEAN, while the third panel session and the breakout session dealt with human rights due diligence practices in businesses. The breakout session was designed to feed into the [Due Diligence Project](#), which is jointly carried out by BIICL and Norton Rose Fulbright LLP (“NRF”). The Due Diligence Project is a study aimed at producing practical recommendations for businesses in relation to their approach to human rights due diligence.

Opening remarks were delivered by Mr Thomas Thomas, the CEO of ACN, and Mr Thierry Shwarz, the Director of the Political & Economic Department of the Asia-Europe Foundation. Keynote speeches were also delivered by H.E. Tan Sri Dr Muhammad Shafee Abdullah, the Malaysian representative to AICHR and Prof. Robert McCorquodale, the Director of BIICL.<sup>1</sup>

Tan Sri Shafee gave the first keynote speech. He underscored the importance of increasing awareness of the fact that business can be potential human rights abusers. Business-related human rights abuses include causing pollution (including transboundary haze which impacts on public health), taking part in unsavoury labour practices (including child labour) and corruption (especially in the context of land evictions without free, prior and informed consent). In particular, mistreatment of migrant workers within ASEAN is an important issue of which States should take cognizance of. Contracts dealing with migrant workers should be transparent, and vetted. The perception that only States carry out human rights violations, should be removed. States and businesses should work together to alleviate human rights abuses by businesses.

Prof McCorquodale gave the second keynote speech, which centred around human rights due diligence practices in businesses. Among other things, he stated that due diligence is not just a self-serving, box-checking exercise to assess risk. Due diligence imposes an external, objective standard of conduct to take reasonable precautions to prevent certain types of harm such as human rights abuses, property damage and environmental pollution. He also spoke about the comprehensive Due Diligence Project that BIICL is undertaking with NRF.

The remainder of this report sets out the key takeaways from this Workshop.

#### Presentation: Launch of NAPs Project Report

In 2013, the United Nations (“UN”) working group on the issue of human rights and transnational corporations and other business enterprises (“UNWG”) issued a request for proposals for a project to develop implementation guidelines for NAPs that would draw upon the perspectives of those who would be creating and using them: States and their stakeholders, including business and civil society.

The UNWG awarded the grant to a Coalition of African and Asian research institutions, led jointly the Centre for Applied Legal Studies, University of the Witwatersrand (“CALS”); and the Asian Business and Rule of Law Initiative in the Singapore Management University (“SMU-ABRL”) together with Centre for Human Rights, University of Pretoria (“CHR”), and ACN.

On 4 and 5 February 2015, SMU-ABRL and ACN organised a consultation in Bali, Indonesia, gain a deeper understanding of the issues facing Africa and Asia with respect to NAPs. A similar consultation was organised in Johannesburg from 23-24 February 2015.

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<sup>1</sup> The full agenda for the Workshop is available upon request from ACN.

Having worked together over the last three years to facilitate the implementation of the Guiding Principles through national and regional plans of action, the CALS-SMU Coalition has submitted its final report to the UN Working Group. The [submission](#) to the UNWG is intended to add value to the [UNWG's draft guidance on NAPs](#). The Coalition's findings will also be featured at the 2015 UN Forum on Business and Human Rights in Geneva (16 – 18 November 2015) ("Geneva Forum"), where the UN Working Group will unveil its latest update to a global Guidance on NAPs.

Prof. Michael Addo, a member of the UNWG, stated that he was convinced that the outcomes of this research report will inform the progressive update of the UNWG's guidance document, and assist the UN Human Right Council and state parties to develop context-specific and sustainable NAPs that resonate with the nations of the Global South as much as they do with those of the North.

Mr Thomas Thomas said that the UNGPs represent an important opportunity to further define and implement the human rights obligations of businesses. He added that the ACN is proud to be working with SMU and other partners to provide a platform for charting the future of the UNGPs in ASEAN.

At the Workshop in Kuala Lumpur, a presentation on the Coalition's findings, was made. The key points that were highlighted include the following:

1. **Trade & Investment:** ASEAN represents a market of some 600 million people, with a combined GDP of about US\$2.5 trillion and upwards of US\$1.5 trillion in trade flowing throughout the region. This growth will demand more than \$7 trillion of investment in core infrastructure, housing and commercial real estate across ASEAN through 2030. Unprecedented foreign investment in the Global South brings benefits; but potential public health, environmental, and human rights risks as well. NAPs in Asia can ensure that human rights promotion and protection are not sacrificed for the sake of economic growth led by multinational corporations ("MNCs").
2. Beyond international norms, NAPs in ASEAN should reference clauses contained within ASEAN agreements, such as the ASEAN Comprehensive Investment Agreement ("ACIA") and other trade & investment treaties, which oblige foreign investors to respect the member States' right to regulate in the public interest.
3. **AEC & NAPs:** The AEC, which will be launched in 2015, is a key priority for the region. Corporate social responsibility ("CSR") considerations are currently subsumed under a separate ASEAN Socio-cultural Community Blueprint. NAPs processes in the Global South should first identify gaps in existing legislative and regulatory frameworks, and then outline ways in which to bridge them. It may make sense in certain contexts to integrate a NAP for business and human rights into a NAP for human rights, or a regional plan such as Bali Concord III.

4. **Infrastructure:** NAPs can be a means of monitoring infrastructure projects in Asia and Africa. For example, the Asian Infrastructure Investment Bank (“AIIB”), a much-lauded US\$100 billion lender launched this year, appears to have few environmental and social governance safeguards in place. NAPs can call for the periodic assessment and review, and thus better ensure that any related environmental and human rights impacts are mitigated.
5. **Sustainable development goals (“SDGs”) and NAPs:** Extractive companies, including agro-businesses, impact on a broad array of human rights in ASEAN States, such as environmental degradation, which has adversely affected health, sources of livelihood and access to clean water. There is currently little public access to documentation of concession and related contracts and businesses’ human rights practices under them, particularly in cases relating to land tenure. Asian NAPs should consider providing for greater transparency. While economic development dominates the agenda of ASEAN, forward-thinking policy-makers and businesses based in the Global South understand the value of SDG 16, which is “dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels”.
6. **NAPs Developments in the Region:** While several Asian States have started the NAP process (Myanmar, Philippines, Indonesia, and South Korea), Malaysia has led the way. In March 2015, its NHRI, SUHAKAM, released a “Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia” to provide a policy direction for the formation of a NAP. The strategic framework was prepared by SUHAKAM after round-table consultations with business groups, civil society and relevant government agencies through focus groups and a Workshop. The integrity of the NAPs development and monitoring process is crucial. A NAP in ASEAN should ideally provide for, among other things, inclusive multi-stakeholder dialogue, a balance between economic growth and human rights, and clarity and consistency for States and foreign investors alike.

#### Panel 1: Developing a regional strategy to implement the UNGPs through NAPs

The first panel was a plenary session titled “Developing a regional strategy to implement the UNGPs through NAPs”. Topics discussed included the context of the AEC and implications for sustainable development, the ASEAN Human Rights Declaration and the Trans-Pacific Partnership (“TPP”) and the UNGPs. Panellists also identified BHR issues that are rampant within ASEAN, such as migrant worker issues.

The key points that were discussed during this plenary session are as follows:

- In order for the UNGPs to be effectively transformed from paper to practice, the UNWG needs to form effective partnerships. Regional relationships are important. Regional organisations do play an important role in pushing the agenda for corporate

social responsibility (“CSR”), as many of these organisations influence political decisions that are made in their respective States.

- The pertinent BHR issues that the panellists identified as being relevant to ASEAN include labour rights, including having a mandatory minimum wage, and migrant worker rights. Any investment agreement must also take into account human rights. It is important to follow up on the recommendations in the [AICHR Baseline Study on CSR & Human Rights](#) that was released in 2014. ASEAN’s post 2015 development goals must also be taken into account when any country is devising a NAP.
- The discussion then moved to the TPP. The TPP was signed by 12 Pacific Rim States, including 4 within ASEAN – Brunei, Malaysia, Singapore and Vietnam (At the time of the Workshop, the official text of the TPP was being finalised).<sup>2</sup>
- The TPP includes unique provisions dealing with the role of State-owned enterprises in the economy, environment, labour rights, transparency, and regulatory coherence. Obligations in the TPP can be supported by NAPs.
- The TPP contains provisions to protect “policy space” for host governments. Article II.5 ensures that States are allowed to take measures to ensure that investment activities is taken in a manner sensitive to its regulatory objectives. This is in line with UN Guiding Principle 9, which recommends that “States should maintain adequate policy space to meet their human rights objectives when pursuing business related policy objectives”. Article II. 6 also states that parties reaffirm the importance of principles of CSR.
- The labour chapter of the TPP requires parties to agree, among other things, to adopt the fundamental labour rights as recognised in the ILO Declaration. The commitments in the labour chapter are subject to binding dispute settlement procedures. The parties to the TPP have also agreed to establish a labour dialogue to promote the rapid resolution of labour issues between TPP parties.
- A chapter in the TPP is dedicated to regulatory coherence in States. It requires that regulations should be written clearly and concisely, for public rights to access to information on new regulatory measures and that existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective. The chapter does not in any way affect the rights of TPP parties to regulate for public health, safety, security, and other public interest reasons. In this regard, Guiding Principle 8 recommends that States should ensure that human rights obligations are respected when shaping business practices.

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<sup>2</sup> The final text of the TPP Agreement was released on Thursday 5 November 2015. In 30 chapters, the TPP covers a wide range of subjects, from traditional trade liberalisation through to services, investment, environmental protection and labour standards.

## Panel 2: Building on existing programs and strategies to develop / implement NAPs

The second panel was a roundtable discussion titled “Building on existing programs and strategies to develop and implement NAPs”. Topics included the review of progress and lessons with development of NAPs, taking into account the contribution of other stakeholders and existing initiatives in the region, the importance of process and the role of other stakeholders such as civil society and business associations, opportunities for collaboration and sharing knowledge, whether there is an emerging ASEAN vision for the development of NAPs and the transboundary haze pollution.

The key points that were discussed during this roundtable discussion are as follows:

- Any NAP should be true to the UNGPs, and should be inclusive and transparent. They should not be a “one-off” process, and should account for cumulative progress. In other words, a NAP should provide for periodic review.
- In order to effectively ascertain BHR issues in a country, it will be useful to analyse BHR abuses by sector. BHR issues that plague one sector (e.g. oil and gas) may be very different from another (e.g. textiles). Responses and solutions in a NAP must be calibrated to address specific issues in a country, while remedies should remain flexible and inclusive.
- Transboundary haze pollution that has been plaguing many ASEAN States was couched as a problem that relates to human rights governance issues - and one that may amount not only to a regulatory breach, but a crime with relatively stiff penalties. Singapore’s National Environment Agency has issued “preventive measures notices” to six Indonesian firms under the Transboundary Haze Pollution Act. Some participants noted that ASEAN States have to scrutinise the economic models that contribute to haze pollution, and change these models to allow for more sustainable practices.
- Child rights were emphasised in this panel. Besides tackling child labour issues, which are prevalent in ASEAN, a NAP should endeavour to tackle unemployment in youth, as many ASEAN States have a young population. The manufacturing processes or the supply chain must be scrutinised, and entrenched responsible practices on the ground to ensure that child labour is eradicated.
- One viewpoint that was offered was that any country not taking NAPs seriously is championing economic apartheid. The unprecedented growth that ASEAN is enjoying is due to businesses – so development and economic issues are now indivisible. Thus, the relationship between business and government must be scrutinised. In other words, a government must examine the opportunity cost in not framing a NAP in a model that States have already accepted. In order to be a government leader in ASEAN, one must also be a business leader, i.e. learn to harness the power of business by establishing key lines of communication with them,

and so that the government is made to be aware of the key human rights issues that are plaguing businesses.

- The discussion also included the likelihood of a NAPs in States that are outside ASEAN. In Australia, while progress on BHR issues have been disappointing, discussion is ongoing amongst the key players to ascertain whether there is a benefit in having a NAP. With the new Prime Minister in place, there is optimism that progress will be made. The government in recent times has also ordered a number of multi-stakeholder initiatives on BHR, for example endorsing the Kimberley Process. There has also been much focus on private sector development and investing in women's issues. However, there has been a lack of capacity to carry out the initiatives. Coordination and coherence is lacking in this regard.

### Panel 3: Business and Human Rights Due Diligence

The third panel was a plenary session was titled "Business and Human Rights Due Diligence". The topics included human rights due diligence practices by businesses, and measures that have been taken, or can be taken by ASEAN governments in ensuring that the same is carried out. The panellists included representatives from MNCs, a corporate regulatory body, and a law firm. This session followed BIICL Director Prof Robert McCorquodale's keynote speech on human rights due diligence practices in businesses.

The key points that were discussed during this plenary discussion are as follows:

- Representatives from the MNCs explained that over the past decade, they have started to adopt CSR measures.<sup>3</sup> According to these representatives, implementing CSR practices has become a non-negotiable part of their corporate culture. When investing in a particular country, these corporations look at the human rights practices of that country, for example, the existing human rights policies and the conventions that the country in question has ratified. Their suppliers too, have to be compliant with the CSR practices. This is a consideration that many small and medium-sized enterprises ("SMEs") do not prioritise.
- Further, corporations have started to move away from the thinking that CSR obligations can be fulfilled through philanthropy and are taking to developing CSR strategies that can be implemented across ASEAN. These MNCs understand that they manufacture products that society uses on an everyday basis, so it is important that they maintain the highest CSR standards in order to create a culture in which CSR obligations are respected and not taken lightly. They follow international standards in order to achieve this – one example is the ISO 26 000 standard. Corporations also do remediation in instances where harm has been caused. Further, corporations have also engaged external organisations such as SHIFT, in order to form their CSR guidelines.

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<sup>3</sup> Examples that were mentioned at the Workshop include the [Microsoft Corporate Citizenship](#) and [Hitachi's CSR schemes](#).



- Since 2009, the Companies Commission of Malaysia, or Suruhanjaya Syarikat Malaysia (“SSM”), though its corporate responsibility (“CR”) agenda, has promoted a holistic corporate governance practice for adoption among the businesses and companies in Malaysia. Under Section 17(d) of its Companies Commission of Malaysia (Amendment) Act 2015, SSM is now entitled to promote CR. This amendment requires SSM to encourage their stakeholders to ensure that business activities are conducted in accordance with good corporate governance and to encourage and to promote corporate responsibility and business sustainability. In 2009, it also launched its Corporate Responsibility Agenda, and focuses on the CR culture of SMEs, which forms 98% of SSM’s membership.
- The recent amendments to the Malaysian Companies’ Act has introduced the Business Review Report (“BRR”). Under the BRR, companies will be encouraged to report on matters relating to, among other things, information on the company’s business/operations on the environment. As a regulator, SSM will promote matters relating to the environment, social and community issues and possibly human rights. SMM is also in the midst of drafting a Toolkit on Business Review which will facilitate, support and provide companies and businesses on available approaches, tools, standards and resources for corporate responsibility disclosure under the new Companies Act.
- The discussion then moved to the challenges in carrying out due diligence in business practices. One challenge is monitoring the actions of an MNC’s suppliers, many of which may be located in various jurisdictions all over the world. It may be difficult to assess whether the domestic laws of these States are in line with international human rights norms. It may also be difficult to track the actions of subsidiary companies. Another issue is governance – employees and senior management must take ownership for the BHR problems that occur within a corporation. When information is presented, corporations must be quick to take action.

#### Breakout session by BIICL and NRF

The final part of the Workshop was a breakout session facilitated by BIICL and NRF, which was designed to contribute to their Due Diligence Project. Participants were asked to answer two questions:

1. What human rights due diligence practices do you see (if at all); and
2. What human rights due diligence practices would you like to see?

As regards the first question, the following responses were given, among others:

- An increase in welfare-oriented programmes, particularly to single mothers;
- Increasing gender equality in workplace promotions;
- Accounting for disabled person in a company’s CSR guidelines;

- Better government assistance for logistical help for workers to get to their workplace (e.g. subsidies on motorcycles);
- Regulation focussed on the environment has become increasingly prevalent among businesses; and
- In ASEAN, more legislation focusing on human rights have been passed in recent years.

As regards the second question, the following responses were given, among others:

- A conducive environment where the private sector engages in dialogue with CSOs;
- A better push for environmental protection;
- Training should be conducted for low-wage workers, particularly migrant workers, so that they can be aware of their labour rights;
- Better monitoring of due diligence practices, particularly for SMEs;
- Fairer treatment of farmers;
- Promoting better awareness of the concept of due diligence;
- Better labour practices, in particular seeing an end to the practice of firing labourers before their probation period is over, so that corporations can continue to hire workers on a cheaper salary;
- More transparency in Indonesia's concession maps to give effect to Singapore's Transboundary Haze Pollution Act;
- Better due diligence practices for suppliers which are further down the supply chain, and not just for those suppliers which are "visible" to a corporation;
- Stronger regulation to curb the legal power or corrupt local officials;
- Better capacity building measures be taken across ASEAN; and
- A clear complaints mechanism in ASEAN, similar to the National Contact Point (NCP) scheme adopted in OECD countries.

Professor Robert McCorquodale said that the active engagement and interest by the participants in the breakout session was impressive. It was clear that the issue of human rights due diligence was essential to be clarified for all stakeholders, including companies, government and civil society, and that much more needs to be done to ensure that it becomes part of a company's activities.

At the end of the Workshop, Mr Thomas thanked participants and sponsors for the event's success and encouraged continued multi-stakeholder dialogue and engagement. He observed that the Workshop was wide-ranging in its coverage, raising issues on the importance of NAPs to implement the Guiding Principles; access to effective remedy; and identifying current and prospective practices of States (and business) in dealing with cross-border problems.

Mr Thomas will represent the CALS-SMU coalition at the Geneva Forum, and will speak on a panel on NAPs.