

To: United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (“Working Group”)

c/o: Professor Michael Addo, Dr Puvan Selvanathan and the Working Group’s Secretariat
Date: 27 November 2014

CALS-SMU Coalition (the “Coalition”) on NAPs: Update on Preliminary Guidance on National Action Plans and developments in business and human rights in Africa and Asia

1. Further to the submission to the Working Group in August 2014, this document is an update of our research requested by the Working Group, from a coalition of academic and independent institutions from the Global South.
2. As the Working Group lays the foundation stone for States to develop, enact and update national action plans regarding business and human rights (NAPs), we take this opportunity to highlight contemporary developments in Africa and Asia that may be relevant to the Working Group’s preliminary guidance that will be presented at the Third Annual Forum on Business and Human Rights, to be held in Geneva from 1-3 December 2014 (the “Preliminary Guidance”).
3. The Coalition notes that NAPs must be flexible to respond to the needs of each society. At the same time, States and other stakeholders in Africa and Asia require concrete guidance as to how and when to deploy the United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”), and would benefit from clear advice on what is expected of them. This iterative process is at a nascent stage in Africa and Asia, and the information below adds to the data before the Working Group and will contribute to its Preliminary Guidance.
4. This document examines how certain developments in Africa and Asia demonstrate that national (and regional) action plans in these regions are instrumental to forging the way forward. In particular, the ASEAN Economic Community (“AEC”) and the African Commission on Human and People’s Rights have set the stage for a functional framework on business and human rights. As we shall see, our preliminary research indicates that States, business and civil society organisations in Africa and Asia are receptive to national and regional action plans that relate to, and seek to embed, the Guiding Principles. As will be shown below, in Asia, Philippines and South Korea have, for example, implemented NAPs to implement UN Security Council Resolutions relating to the protection and promotion of human rights. The Human Rights Commission of Malaysia is also currently drafting a framework for business and human rights. In Africa, Tanzania’s Ministry of Constitutional and Legal Affairs committed to the development of a NAP as part of its five-year National Human Rights Action Plan.
5. We submit that national and regional action plans in Africa and Asia should continue to consider and give due regard to issues that are underexplored in the global conversation about business and human rights, such as gender and concerns of emerging and/or

conflict-affected economies. When designing and implementing such plans, States 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".¹ Our research to date also suggests that compliance with the Guiding Principles can be secured by NAPs that 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 legitimate the activities of regulatory actors.

A. Key Developments & Perspectives in Southeast Asia

Towards a Borderless Economic Community

6. In 2003, ASEAN officials outlined a typology of 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"), the AEC and the ASEAN Socio-Cultural Community ("ASCC"). These "pillars" are meant to withstand ASEAN's long-term goal of forming a 'Borderless Economic Community by 2030'.²
7. More than a decade later, ASEAN's influence has grown and these pillars remain important touchstones for regional integration and development, especially with 2015 set to see the implementation of the AEC. Collectively, 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. Increased urbanisation has channelled more ASEAN households into the consumer class.³
8. This growth will demand more than \$7 trillion of investment in core infrastructure, housing and commercial real estate across ASEAN through 2030.⁴ The increased connectivity of ASEAN region could "*significantly increase intra-regional trade*".⁵ In this regard, 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*."⁶
9. This brings Southeast Asia's bilateral investment treaties ("BITs") and the investment chapters of free trade agreements into sharp relief, as it does regulatory and human rights concerns. Southeast Asian States have taken a keen interest in the ongoing

¹ See B. Morgan and K. Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, Law in Context series, 2007), p.11.

² *ASEAN 2030, Towards a Borderless Community* at pp. 222-230; 242-248.

³ *Ibid.*

⁴ *Ibid.*

⁵ McKinsey Institute, *Southeast Asia at the crossroads: Three paths to prosperity* (November 2014) at pp 21 – 22.

⁶ *Ibid.*

arbitration of *Philip Morris Asia Limited v The Commonwealth of Australia*,⁷ in which the company is seeking compensation from Australia for lost income due to the introduction of plain-packaging laws for tobacco products.⁸ Cases such as this are prompting States in Southeast Asia 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 BITs may seem, at first glance, to be a cancellation of its treaty commitments, and of the protection that such treaties afford.⁹ Some have claimed that it is "likely to be seen as a backward step".¹⁰ However, as Ewing-Chow and Losari observe, these BITs "tend to only contain provisions protecting foreign investors, without specifically providing for the preservation of governments' policy space to regulate in the public interest for health, the environment or financial reasons."¹¹

10. Similarly, Singapore has committed to "ensuring a stable and fair regime for foreign investors" in its free trade agreement ("FTA") with the European Union ("EU"), "while also retaining the right to regulate in the public's interest".¹² The EU-Singapore FTA, which will inform ongoing negotiations for an EU-ASEAN FTA, is also remarkable in its express reference to principles of sustainable development in trade. Indeed, the FTA "seeks to ensure that trade supports environmental protection and social development, and does not come at the expense of the environment and labour rights".¹³ Rules to boost trade and investment in environmental technologies will also be simplified, and "there will be room for civil society participation in overseeing the implementation of these commitments".¹⁴ These principles comport with the letter and spirit of the Guiding Principles.¹⁵

A Regional Action Plan - the ASEAN Inter-governmental Commission on Human Rights Baseline Study & Bali Concord III

⁷ UNCITRAL Rules, PCA Case No. 2012-12.

⁸ International Institute for Sustainable Development Investment Treaty News, "Australia to reject investor-state dispute resolution in TPPA" April 13 2012, available at <http://www.iisd.org/itm/2012/04/13/news-in-brief-7/>, last accessed 16 July 2014.

⁹ Ben Bland and Shawn Donnan, "Indonesia to terminate more than 60 bilateral investment treaties", *The Financial Times*, 26 March 2014, available at <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz31WJaKxAl>, last accessed 16 July 2014.

¹⁰ Ibid.

¹¹ Prof Michael Ewing-Chow and Mr Junianto James Losari, "Indonesia is letting its bilateral treaties lapse so as to renegotiate better ones," *The Financial Times*, 15 April 2014.

¹² Channel News Asia, *Negotiations for Investment Chapter of EUSFTA successfully concluded* (17 October 2014), available at: <http://www.channelnewsasia.com/news/business/singapore/negotiations-for/1420966.html>

¹³ Press Release by the Ministry of Trade and Industry (Singapore), *European Union-Singapore Free Trade Agreement Moves One Step Closer to Ratification* (20 September 2013) at p. 8, available at http://www.mti.gov.sg/NewsRoom/SiteAssets/Pages/European-Union-Singapore-Free-Trade-Agreement-Moves-One-Step-Closer-To-Ratification/EUSFTA%20Press%20Release_final%20%2820%20sept%29.pdf

¹⁴ Ibid.

¹⁵ See generally Kathryn Gordon, Joachim Pohl, Marie Bourchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A fact-finding survey* (OECD Working Papers on International Investment 2014/01) at p. 9, available at http://www.oecd.org/investment/investment-policy/WP-2014_01.pdf

11. In 2012, the **ASEAN Human Rights Declaration** (“AHRD”) was drafted by the **ASEAN Intergovernmental Commission on Human Rights** (“AICHR”), and was adopted by the ASEAN Member States. The AHRD highlights the rights of the people to ASEAN to “*participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development*” as well as encourages the adoption of “*meaningful people oriented and gender responsive development programmes aimed at poverty alleviation, and the creation of conditions including the protection and sustainability of the environment*” in the region.¹⁶ We believe that these programmes are critically important in the evolution of NAPs and related initiatives in ASEAN.
12. The recently published **AICHR Baseline Study** (“Baseline Study”) too is a cornerstone of ASEAN’s regional strategy for business and human rights. Three points bear mention. First, the Baseline Study is the official study 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 10 November 2014, reflects the current status of business and human rights considerations in ASEAN.¹⁷ Thus, it is an authoritative starting point for regional strategy for business and human rights.
13. Third, the study serves as the foundation that supports the development of a common regional framework to support business and human rights in ASEAN. The Baseline Study should therefore be read together with the **Bali Concord III Plan of Action (2013-2017)** (the “Bali Concord III”) to be seen as a regional action plan of sorts for business and human rights.¹⁸ The Bali Concord III states: “*ASEAN Member States shall, where appropriate, integrate the programmes and activities of the Plan of Action into their respective national development plans*”.¹⁹ As 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 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**”.²⁰ (Emphasis added.)

14. The authors of the study add that it is consistent with the ASCC Blueprint:

¹⁶ ASEAN Human Rights Declaration, para. 35-36, available at www.asean.org/news/asean-statement.../asean-human-rights-declaration.

¹⁷ The paper is available at: <http://business-humanrights.org/en/business-human-rights-in-asean#c107029>.

¹⁸ *The Bali Concord III Plan of Action (2013-2017)*, available at <http://www.kemlu.go.id/ptri-asean/Magazines/Bali%20Plan%20of%20Action%20Three.pdf>.

¹⁹ *Ibid*, p. 32.

²⁰ Thomas Thomas and Alex Chandra, *A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN, Report prepared by the study team on business and human rights of the ASEAN Intergovernmental Commission on Human Rights*, (2014), p. 2.

“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”.²¹ (Emphasis added.)

15. The Baseline Study supports the AEC Blueprint as well. It also serves the aim 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...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.”*²²
16. The Baseline Study is part of the Five-Year Work Plan of the AICHR, designed to provide the Commission a better understanding on the emerging human rights-related issues pertaining to corporate conduct in the ASEAN region.²³ The Baseline study can also serve as a tool to assess ASEAN member states’ readiness for NAPs. According to Dhanarajan and O’Brien:

“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 implementation of the GPs and other business and human rights frameworks clearly hold strong potential relevance beyond the EU...**”²⁴ (Emphasis added.)

17. In 2011, the EU Committee of Ministers requested the Steering Committee for Human Rights (“CDDH”) to conduct a study on the feasibility and the added value of new standard-setting work of the Council of Europe on corporate social responsibility in the field on human rights, and to implement its recommendations. To perform these tasks, the Drafting Group on Human Rights and Business (“CDDH-CORP”) has been set up and has already held two meetings (14-16 October 2013 and 12-14 February 2014). It is noteworthy that the authors of the AICHR Baseline Study have similarly called for AICHR/ASEAN to identify a coordinating body in relation to business and human rights in the region:

“The governments of ASEAN member states need to take leadership in encouraging and enabling businesses to implement and embed CSR values throughout their organisations.

²¹ Ibid.

²² ASEAN Economic Community Blueprint, p. 5, available at: <http://www.asean.org/archive/5187-10.pdf>.

²³ 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.

²⁴ Sumithra Dhanarajan and Claire Methven O’Brien, *14th Informal ASEM Seminar on Human Rights: Background Paper*, at p. 33.

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**²⁵ (Emphasis added.)

National Action Plans in Asian States

18. National action plans and strategies that touch upon human rights issues in general are not new in Asia. Even though there appears to be no stand-alone NAP in Asia as yet, several relate to business and human rights issues, and are aligned with the country's existing legal and policy commitments. The following NAPs are instructive.

- **Philippines** has issued a national action plan on women, peace and security which implements the UN Security Council Resolution's resolutions 1325 and 1820 ("Resolutions 1325 and 1820"). The creation of a national action plan to implement Resolutions 1325 and 1820 will "*help recognise, sustain, strengthen, and expand women's role in peace building processes*".²⁶ In particular, this national action plan aims to "*build [women's] capacities to engender peace and reconstruction processes*" and "*strengthen women's leadership for conflict prevention, conflict resolution..., transformation and peacebuilding*".²⁷ There have also been efforts to develop a NAP on business and human rights. Where the effort to develop a NAP on human rights faltered, the Commission on Human Rights opted for a gradual approach: it has begun a three-year process of collaborative learning among government agencies, businesses and civil society based on their experience with Resolutions 1325 and 1820 and as a way of building momentum and creating champions for a NAP.²⁸
- **South Korea** has also crafted a national action plan for the implementation of Resolution 1325. It is hoped that this national action plan "*will be a key tool for promoting women's equal participation in conflict resolution and peacebuilding, for protecting women's human rights, and for strengthening gender equality and women's empowerment*".²⁹ South Korea has also drafted its Second (2012-2016)

²⁵ Thomas Thomas and Alex Chandra, *A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN, Report prepared by the study team on business and human rights of the ASEAN Intergovernmental Commission on Human Rights*, (2014), p. 20.

²⁶ Peace Women, "*The Philippine National Action Plan on UNSCRS 1325 & 1820: 2010 – 2016*", p.5, available at: http://www.peacewomen.org/assets/file/NationalActionPlans/philippines_nap.pdf.

²⁷ Ibid.

²⁸ Joanne Bauer, *Where do National Action Plans on Business and Human Rights Belong in the Corporate Sustainability Movement* (17 March 2014), available at: <http://www.csrwire.com/blog/posts/1262-where-do-national-action-plans-on-business-human-rights-belong-in-the-corporate-sustainability-movement>

²⁹ Peace Women, *National Action Plans – Republic of Korea*, available at: <http://www.peacewomen.org/naps/country/asia-pacific/republic-of-korea>. See also "*1325 Network Statement Regarding the Republic of Korea: National Action Plan for Implementation of UN Security Council Resolution*

National Action Plan on the Promotion and Protection of Human Rights, which gives priority to protecting the human rights of socially vulnerable and minority groups, and focuses on legislative reform that will enhance the right to freedom and social rights.³⁰

- The Human Rights Commission of **Malaysia**, SUHAKAM, is currently drafting a framework for business and human rights. Recommendations will reportedly be sent to the government in March 2015. In August 2014, Malaysian Minister Nancy Shukri is reported to have said that the Malaysian government is conducting an 18-month policy research study in order to devise a National Human Rights Action Plan.³¹
- **Singapore** had issued a national action plan on human trafficking,³² which has “engaged businesses on corporate social responsibility for the prevention of TIP in supply chains”³³ This national action plan has led to the Anti-Human Trafficking Act (“AHTA”) being passed in Parliament in October 2014.³⁴ The AHTA is designed to spearhead prevention and deterrence of human trafficking through tough penalties and enforcement.³⁵
- **Indonesia**³⁶ and **Thailand**³⁷ have national action plans regarding human rights in general. In Indonesia, the implementation of these national action plans can be supported by the private sectors through their CSR activities. The Indonesian Centre for Ethics (“ICE”), in collaboration with (1) the Indonesian government; (2) oil and mining firms; and (3) civil society organisations, has been active in carrying out national consolidation processes to promote and implement the Voluntary Principles on Security and Human Rights since 2010. In addition to this, ICE has also established a Champion Council and Group of Facilitators, in order to initiate discussions to enhance collaboration between the government, firms and civil society organisations on this matter.³⁸

1325 on Women, Peace and Security”, available at:

http://www.peacewomen.org/assets/file/NationalActionPlans/rok_nap_1325_network_statement_en.pdf

³⁰ Asia Pacific Forum, Korea: *Proposal for National Action Plan on Human Rights* (29 February 2012), available at: <http://www.asiapacificforum.net/news/korea-commission-develops-proposal-for-national-action-plan-on-human-rights>. For information on South Korea’s first national action plan on human rights, see National Human Rights Commission of Korea, *National Action Plan for the Promotion and Protection of Human Rights*, available at: <http://www.humanrights.go.kr/english/etc/nap.jsp>

³¹ New Straits Times Online, *Study on Human Rights Needed*, available at: <http://www.nst.com.my/node/22995>

³² 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

³³ *Ibid.*, p. 15.

³⁴ Today, *Anti-human-trafficking laws passed in Parliament* (4 Nov 2014), available at:

<http://www.todayonline.com/singapore/anti-human-trafficking-laws-passed-parliament>

³⁵ *Ibid.*

³⁶ Available at http://www.ohchr.org/Documents/Issues/NHRA/NAPIndonesiaTahun2011_2014.pdf (available in Bahasa Indonesia only)

³⁷ Press release, *The Second National Human Rights Plan, 2009-2013* (26 October 2009), available at:

http://thailand.prd.go.th/view_news.php?id=4495&a=2. For the full national action plan, see: http://www.ohchr.org/Documents/Issues/NHRA/NAPIndonesiaTahun2011_2014.pdf (available in Thai only)

³⁸ AICHR, *Baseline Study on Corporate Social Responsibility (CSR) and Human Rights in ASEAN (Indonesia)*, p.10 (on file with author)

Stock Exchange Regulators & Non-financial Reporting

19. As noted in the Baseline Study, in the ASEAN region, and indeed in Asia generally, it appears that stock exchanges have put in place either mandatory or voluntary disclosure requirements for environmental, social and governance (“ESG”) performance.³⁹
- The Stock Exchange of **Thailand** established a Corporate Social Responsibility Institute, which promotes awareness and understanding in implementing and reporting CSR practices in line with international benchmarks.
 - The **Malaysian** Stock Exchange, Bursa Malaysia, requires listed issuers to annually report on CSR practices. In 2012, its Securities Commission adopted a CSR Framework and a Code for Corporate Governance that applies to government-linked and publicly listed companies. Further, the Bursa Corporate Governance Guide encourages directors to produce Sustainability Reports that address, among other things, community involvement, human rights and child labour.
 - **Hong Kong** requires listed companies to “comply or explain” its ESG guidelines by 2015.⁴⁰
 - In 2012, the **Taiwan** Stock Exchange launched an index that focuses on corporate governance and corporate social responsibility.⁴¹
 - In 2011, the **Singapore** bourse (“SGX”) issued Sustainability Reporting Guidelines in which it *encouraged* companies to assess and disclose the environmental and social aspects of their organisational performance, and to disclose its sustainability policy.⁴² There has also been a call by consumers for firms to match their ethical and environmental values with concrete action.⁴³ SGX has recently announced that it will follow suit with *mandatory* disclosure requirement for listed companies with regard to sustainability policies, social and environmental policies.⁴⁴ 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 publicly communicating sustainability

³⁹ Thomas Thomas and Alex Chandra, *A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN, Report prepared by the study team on business and human rights of the ASEAN Intergovernmental Commission on Human Rights*, (2014), p. 15

⁴⁰ HKEx News Release, *The Exchange publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide* (31 August 2012), available at: <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm>

⁴¹ Initiative for Responsible Investment, *Global CSR Disclosure Requirements*, available at: <http://hausercenter.org/iri/about/global-csr-disclosure-requirements>

⁴² See the Singapore Exchange’s *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

⁴³ Eco-Business News, *SGX to make sustainability reporting mandatory* (17 October 2014), available at: <http://www.eco-business.com/news/sgx-make-sustainability-reporting-mandatory/>

⁴⁴ Eco-Business News, *SGX to make sustainability reporting mandatory* (17 October 2014), available at: <http://www.eco-business.com/news/sgx-make-sustainability-reporting-mandatory/>

information.⁴⁵ These developments reflect stakeholder demands for greater transparency.

20. Magnus Bocker, the CEO of SGX, has this to say:

“Our market needs to collectively, take the next step upward and move to ‘comply or explain’ on sustainability issues...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... 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.”⁴⁶

Environmental & Social Governance

21. To ensure that ASEAN fulfils its vision, the Asian Development Bank proposes that ASEAN States must have “[a] proper combination of domestic reforms and initiatives for closer integration that complement and reinforce one another ... to promote the region’s equitable and inclusive development, strengthen its macroeconomic stability, and protect the environment”⁴⁷ AEC is premised on equitable and inclusive growth, and environmental protection⁴⁸ – principles that 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.⁴⁹ Specifically, it recommends that ASEAN countries adopt and implement international standards on responsible business and that ASEAN increases awareness of ensuring sustainable relations between commercial activities and the communities where they are located, particularly by supporting community-based development.
22. The ASCC Blueprint calls for long-term development strategies that protect the environment without sacrificing rising living standards. One suggestion is that national environmental laws and standards be harmonised regionally. Such calls for increased environmental protection are in line with national plans on sustainable development.

⁴⁵ Lawrence Loh, Bernadette Low, Isabel Sim and Thomas Thomas, *Accountability for a Sustainable Future: Sustainability Reporting in Singapore among Singapore Exchange Mainboard Listed Companies 2013*, available at:

http://www.csrsgapore.org/c/images/stories/publications/FA_Singapore%20Compact%20Research%20Study%20Publication_290714.pdf

⁴⁶ Keynote Speech by Mr Magnus Bocker, CEO of the SGX, at the International Singapore Compact Summit (17 October 2014), available at:

http://sgx.com/wps/wcm/connect/sgx_en/home/highlights/speeches/Sustainability-Reporting-SINGAPORE-COMPACT-CSR-SUMMIT-17-Oct-2014

⁴⁷ *ASEAN 2030, Towards a Borderless Community* at p. xxi; available at:

<http://www.adbi.org/book/2014/07/18/6357.asean.2030.borderless.economic.community/>

⁴⁸ *ASEAN 2030, Towards a Borderless Community* at pp. 222-230; 242-248

⁴⁹ *ASEAN Socio-Cultural Community Blueprint*, p. 13; available at: <http://www.asean.org/archive/5187-19.pdf>

Two examples are Brunei's National Long-Term Development Framework,⁵⁰ and Singapore's Blueprint on Sustainable Growth.⁵¹

23. It has been noted by the Asian Development Bank Institute that a wide range of policies can be adopted at the national 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*”.⁵² Several countries also need to increase R&D investment and create regulations to promote the development of green technologies that limit pollution and solid waste.⁵³
24. Notably, on 5 August 2014, Singapore's Parliament passed the Transboundary Haze Pollution Act (“THPA”) which addresses corporate entities that cause haze pollution in Singapore.⁵⁴ The THPA aims to solve the yearly haze problem that affects Singapore as a result of burning forests for agricultural use in parts of Indonesia and elsewhere. The THPA has been lauded by members of parliament,⁵⁵ academics⁵⁶ and civil society organisations⁵⁷ as a ground-breaking statute that is expected to deter the haze problem by imposing both civil and criminal liabilities on errant companies. A unique feature of the THPA is that it has extraterritorial effect⁵⁸ – local and foreign companies alike can be subject to the THPA's jurisdiction, as long as the polluting company is deemed to be liable for causing or contributing to haze pollution in Singapore. The Act “*is designed to shift the cost-benefit calculus to the economic actors who perpetuate such practices*”.⁵⁹

B. Key Developments & Perspectives in Africa

25. In September 2013, Ecuador delivered a declaration to the UN Human Rights Council on behalf of the Africa Group, among others.⁶⁰ In it, the Africa Group stated that:

⁵⁰ Brunei Darussalam's National Vision, available at: http://www.bedb.com.bn/why_wawasan2035.html

⁵¹ *Sustainable Singapore Blueprint 2015*, available at: <http://app.mewr.gov.sg/web/ssb/index.html>

⁵² *ASEAN 2030, Towards a Borderless Community* at p. 243

⁵³ *Ibid.*

⁵⁴ 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%2Faol%2Fbrowse%2FtitleResults.w3p%3Bletter%3DT%3Btype%3DactsAll>

⁵⁵ Singapore Parliamentary Reports, (Vol. 92), *Transboundary Haze Pollution Bill* (Second Reading Bills), 4-5 August 2014.

⁵⁶ *First reading of Haze Bill on July 7*, 28 June 2014, *The Business Times*, p 13.

⁵⁷ Statement by Dr Nigel Sizer, Global Director, Forests Program, World Resources Institute (5 August 2014), available at: <http://www.wri.org/news/2014/08/statement-singapore%E2%80%99s-new-haze-pollution-law-%E2%80%9Cnew-way-doing-business%E2%80%9D>

⁵⁸ Guiding Principle 2 states that “[s]tates should set out clearly the expectation that all business enterprises domiciles in their territory and/or jurisdiction respect human rights throughout their operations”. The Commentary to GP2 states that “...some treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.”

⁵⁹ KC Vijayan, ‘Chief Justice Sundaresh Menon: Haze Law ‘a local solution to issues across the border’, *Straits Times*, 20 September 2014.

⁶⁰ Ecuador, Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights

“Corporations reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises.”

26. It went on:

“The endorsement by the UN Human Rights Council in June 2011 of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework’ was a first step, but without a legally binding instrument, it will remain only as such: a ‘first step’ without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.”

27. Pursuant to that, in June 2014, at the 26th session of the UN Human Rights Council, South Africa (and Ecuador) introduced a resolution on Business and Human Rights.⁶¹ This resolution called for the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. It was supported by ten African countries. Although three African countries absented themselves, it is significant to note that no African country voted against the resolution.⁶²

Corporate Criminal Liability in Africa

28. In July 2014 the General Assembly of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,⁶³ which states that the Court:

“complement[s] national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples’ rights in keeping with Article 58 of the [African] Charter [on Human and Peoples’ Rights] and ensuring accountability for them **wherever they occur**”.⁶⁴ (Emphasis added.)

29. The Protocol merged the African Court on Human and Peoples’ Rights and the African Court of Justice and thus created the African Court of Justice and Human Rights. Perhaps most significantly it granted this court the jurisdiction to hear and convict

Council, available at <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

⁶¹ UN Human Rights Council, *Resolution on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1.

⁶² Business and Human Rights Resource Centre, *UN Human Rights Council sessions*, available at <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>.

⁶³ African Union, *Decisions on Draft Legal Instruments*, Assembly/AU/Dec.529(XXIII).

⁶⁴ Preamble, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, EX.CL/846(XXV) Annex 5.

corporate entities for criminal acts.⁶⁵ According to the Protocol, corporate criminal liability may be found for the following crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.⁶⁶ Acts of criminality include instigation, accessory, attempt, organisation, direction, and the financing of criminal acts.⁶⁷ The extended jurisdiction of the African Court will become effective after the ratification of the protocol by 15 African States.⁶⁸

Right to Development in Africa

30. The African continent, through its governing institution, the African Union, has demonstrated its commitment to development. The African Union's Constitutive Act provides that one of the objectives of the African Union is to "*promote sustainable development at the economic, social and cultural levels as well as the integration of African economies*".⁶⁹ In addition, the African Charter on Human and Peoples' Rights ("African Charter") guarantees Africans the right to social and economic development,⁷⁰ as do the Optional Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Youth Charter.⁷¹
31. To the furtherance of these rights, the African Union has put in place a number of policies. The first, the New Partnership for African Development ("NEPAD"), adopted in October 2001, draws a link between poverty, development and environmental sustainability. The long term objective of NEPAD is:

"To eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development and thus halt the marginalisation of Africa in the globalisation process".⁷²
32. African States adopted the Environmental Initiative because they acknowledged the relationship between a healthy environment and employment, social and economic development.⁷³ Its objectives include: combating desertification; monitoring and regulating the impact of climate change; and securing institutional, legal, planning, training and capacity-building requirements for environmental governance.

⁶⁵ Ibid, article 46C.

⁶⁶ Ibid, article 48A.

⁶⁷ Ibid, article 28N.

⁶⁸ Ibid, article 11.

⁶⁹ Article 3(j) of the African Union Constitutive Act.

⁷⁰ Article 22 of the African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁷¹ Articles 19, and 10 respectively.

⁷² African Union, *New Partnership for African Development*, available at http://www.nepad.org/system/files/framework_0.pdf, at p 13.

⁷³ Ibid, pp 33-34.

33. A second policy on sustainable development of the African Union, the Action Plan for Accelerated Industrial Development of Africa (APAIDA), was endorsed in January 2008. The APAIDA seeks to accelerate the industrialisation of Africa,⁷⁴ significantly, by promoting socially responsible industries at the national level.⁷⁵ The Strategy for the Implementation of the Plan of Action for the Accelerated Industrial Development of Africa, was adopted by the African Union in April 2008.⁷⁶ As its name suggests, it endeavours to operationalise APAIDA; programme cluster 7 speaks to Sustainable Development for Responsible Industrialisation. The relevant programme objectives of programme 7 read as follows:

- Ensuring that firms operating in Africa, whether large or small, go beyond mere profit-motives but embrace the norms of sustainable development.
- Ensuring that all stakeholders in particular states, firms (Industrial Enterprises and small and medium enterprises) and civil society embrace the principles of corporate social responsibility.
- African governments must harmonise the standards and principles that all companies must adhere to regarding corporate social responsibility.
- Compliance with corporate social responsibility standards should form a precondition for investment and procurement.⁷⁷

34. To the furtherance of this, the strategy lists the following activities:

- Country constitutions must establish sustainable development as a constitutional right enforceable by reasonable legislation.
- Review policies to incorporate sustainable development principles or readjust policies towards a sustainable development framework. Engage local and international established norms to guide the policy development process.
- Ensure all stakeholders own the policy review or adjustment process and focus on harmonisation where appropriate of policies, laws and regulations across the continent.
- Give effect to policy by the enactment of laws that incorporate sustainable development aspects. Many countries have weak environmental laws and here an opportunity exists to strengthen these laws.⁷⁸

⁷⁴ *Action Plan for the Accelerated Industrial Development of Africa*, EXT/MIN/PA(I), p 2.

⁷⁵ *Ibid*, p 7.

⁷⁶ *Strategy for the Implementation of the Plan of Action for the Accelerated Industrial Development of Africa*, AU/MIN/ CAMI/3(XVIII), p 2.

⁷⁷ *Ibid*, p 66.

⁷⁸ *Ibid*.

35. APAIDA and its strategy are significant for three reasons. First, they solidify the importance of sustainability as a foundation for development in Africa. Second, they clearly articulate the importance of business operations that go beyond profit production. Finally, the strategy is aligned with the process and rationale for the development of NAPs.
36. The African Commission on Human and Peoples' Rights ("African Commission") made a pronouncement on the right to development in terms of the African Charter in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* case.⁷⁹ The African Commission said that the right to development has both constitutive and instrumental elements and that the violation of either constitutes a violation of the right to development. In order to meet the requirements of the right to development, a decision on development "*must be equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important, over-arching themes.*"⁸⁰ This should be borne in mind in the development of the Preliminary Guidance.

Extractives and Development in Africa

37. Article 21 of the African Charter provides for "*the right of the people to freely dispose of their wealth and natural resources, which right shall also be exercised in the exclusive interest of the people, and the people shall not be deprived of it.*" It further provides that "*state parties shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, so as to enable their people to fully benefit from the advantages derived from their natural resources.*" The African Commission, a body established in terms of Article 30 of the African Charter to promote and protect human and peoples' rights, articulated the intentions of the drafters of this provision as wanting "*to remind African governments of the continent's painful [colonial] legacy and restore cooperative economic development to its traditional place at the heart of African society.*"⁸¹
38. To the advancement of this right, in 2009 the African Union adopted the Africa Mining Vision — "*transparent, equitable and optimal exploitation of mineral resources to underpin **broad-based sustainable growth and socio-economic development***" (Emphasis added.) The Africa Mining Vision calls for mine sector sustainability in economic, environmental and social terms.⁸²
39. Like the APAIDA, the Africa Mining Vision, is actioned by means of a strategy. The Action Plan for Implementing the Africa Mining Vision, adopted in 2011, provides that:

⁷⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009).

⁸⁰ *Ibid*, para 277.

⁸¹ *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001), at para 56.

⁸² *Africa Mining Vision: February 2009*, available at http://pages.au.int/sites/default/files/Africa%20Mining%20Vision%20english_0.pdf, p 12.

“On their part, Governments need to strengthen the frameworks that govern environmental and social impact assessment, management and regulation. They should also enhance the capacities and effectiveness of regulatory agencies and improve the culture of how these institutions interact with citizens and communities affected by mining. This would help minimise conflicts and tensions with communities due to displacement and disruption of livelihoods by mining activities. . . . On their part, companies need to improve the practice and application of corporate social responsibility.”⁸³

40. Therefore, this instrument, like those that precede it, clearly sets out States’ and corporations’ responsibility with respect to social and environmental issues. They set a solid foundation for the development of NAPs by African States.

Decisions of the African Commission on Human and Peoples Rights

41. The African Commission on Human and Peoples’ Rights has, on at least three occasions, made a pronouncement on a State’s failure to comply with its international duty to protect human rights from violations by corporations.

42. In 2000, the African Commission set down a decision in the *Commission Nationale des Droits de l’Homme et des Libertés v Chad* matter. In this case, the African Commission clarified that even where a human rights violation is not committed by a State, the State still has the responsibility to protect human rights. The failure to do so amounts to an abdication of the principles set out in the African Charter.⁸⁴

43. Similarly, in the 2001 decision of *Social and Economic Rights Action Centre and another v Nigeria*, the African Commission said the following, with regards to a communication concerning human rights violation by an oil consortium:

“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from the damaging acts that may be perpetrated by private parties. . . . This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.”⁸⁵

44. The African Commission made a similar statement four years later, in the *Zimbabwe Human Rights NGO Forum v Zimbabwe* matter. The African Commission said:

“Human rights standards do not contain merely limitations on state’s authority or organs of state. They also impose positive obligations on states to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a state can

⁸³ *Action Plan for Implementing the Africa Mining Vision*, available at <http://aamig.com/wp-content/uploads/2012/08/Action-Plan-for-AMV-Final-Version-Jan-2012.pdf> p 31.

⁸⁴ *Commission Nationale des Droits de l’Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995).

⁸⁵ *SERAC*, above note 81.

generate responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”⁸⁶

45. The African Commission went on to say that “*what would otherwise be wholly private conduct is transformed in a constructive act of state, ‘because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]’*” therefore, “*a state can be held complicit where it fails systematically to provide protection of violations from private actors*”.⁸⁷
46. The interpretation of African regional law by the African Commission makes it clear that more is required of states than simple non-action. African states are required to take positive steps to prevent others, including corporate entities, from violating human rights. Therefore, a foundation exists for the development of NAPs under African regional law as a mechanism to prevent human rights violations.

Development of National Action Plans by African States

47. Some African States have already started taking steps towards developing NAPs on Business and Human Rights.
- **Mozambique** commissioned a civil society group to undertake a National Baseline Assessment.⁸⁸
 - **Ghana’s** Commission for Human Rights and Administrative Justice partnered up with NGOs, Shift and the Centre for Research on Multinational Enterprises, to host capacity building workshops for stakeholder groups on the Guiding Principles.⁸⁹ One workshop was held in July 2014 to “*introduce the [Guiding Principles] as a framework to advance the protection and respect for human rights in Ghana by the state and its institutions as well as by businesses*”.⁹⁰ This was done with the aim of supporting the development of a NAP in 2015.
 - In its five year National Human Rights Action Plan, **Tanzania’s** Ministry of Constitutional and Legal Affairs committed to the development of a NAP on business and human rights.⁹¹ This commitment was coupled with specific actors, identifiable actions and a budgetary commitment and is led by the following statement:

⁸⁶ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005), para 143.

⁸⁷ *Ibid*, paras 144 and 160.

⁸⁸ Shane Darcy, *Developing National Action Plans on Business and Human Rights*, available at <https://businesshumanrightsireland.wordpress.com/2014/09/19/developing-a-national-plan-on-business-and-human-rights/>.

⁸⁹ Shift, *building Capacity of the UN Guiding Principles on Business and Human Rights in Ghana*, available at <http://www.shiftproject.org/project/building-capacity-un-guiding-principles-ghana>.

⁹⁰ Government of Ghana, *Press Release: CHRAJ Holds Workshop On UN Guiding Principles On Business and Human Rights*, available at <http://allafrica.com/stories/201407111095.html>.

⁹¹ Ministry of Constitutional and Legal Affairs, *Tanzania National Human Rights Action Plan*, p. 143.

“Tanzania’s wealth of natural resources has attracted significant foreign industry and investment. While the presence of foreign and transnational corporations has been positive for the economy, it has also affected the human rights of local communities. There have been complaints that land belonging to local or pastoral communities has been taken for use by foreign investors, and the environmental impact assessments of mining and industrial sites on surrounding communities are often inadequately monitored and not fully complied with.”⁹²

48. Pursuant to this, Tanzania adopted the following objectives, among others:

- Implement research activities to establish issues in human rights and business in the Tanzanian context and use results for human rights education.
- Establish a Plan of Action that promotes meaningful participation and consensus of all stakeholders.
- Develop formal mechanisms to ensure compliance with human rights obligations, provide information to companies about their obligations, ensure companies make public statements about their human rights plans, and undertake periodic reviews to promote accountability.
- Ensure policies are formulated on human rights and business in Tanzania.⁹³

49. It is clear from the above that African States are beginning to heed the Working Group’s call to develop NAPs.

C. Africa/Asia Survey and Consultations on NAPs

50. The Coalition is gathering data on African and Asian perspectives on the development and implementation of NAPs in these regions to assist the Working Group. Through interviews with civil society, government and business stakeholders, the Coalition is seeking responses to what NAPs may mean for countries in Africa and Asia, particularly those experiencing conflict, and the context-specific challenges and opportunities that arise. In addition, this process hopes to assess the significant role of gender in the development of NAPs.

51. The Coalition’s questionnaire will soon be made available online. Coalition members interviewed stakeholders at the following regional and international conferences this year: the International Civil Society Week, organised by Civicus in Johannesburg, South Africa and the 14th Informal Asia-Europe Meeting in Hanoi, Vietnam. They will also interview stakeholders at the UN Forum on Business and Human Rights in Geneva, Switzerland between 1 and 3 December 2014.

⁹² Ibid, p 50.

⁹³ Ibid, p 51.

52. In February 2015, the Coalition will hold regional workshops in Southeast Asia and in Johannesburg. The Southeast Asia workshop will take place in connection with ASEAN Next Generation CSR Forum – “Breakthroughs for Inclusive & Sustainable Growth in ASEAN Post-2015”, which will be held in Bali, Indonesia from 3 to 7 February 2015. And, the Johannesburg workshop will take place on the days following the Alternative Mining Indaba scheduled to take place in Cape Town between 9 and 12 February 2015.

CALS	SMU	Advisers
Prof Bonita Meyersfeld Bonita.Meyersfeld@wits.ac.za	Ast/Prof Mahdev Mohan mahdevm@smu.edu.sg	Prof Joanne Bauer jjb71@columbia.edu
Nomonde Nyembe Nomonde.Nyembe@wits.ac.za	Jaya Anil Kumar jayanilkumar@gmail.com	Sumi Dhanarajan sumi.dhanarajan@gmail.com
CHR	ASEAN CSR Network	SAIFAC
Josua Loots Josua.Loots@up.ac.za	Thomas Thomas thomas@asean-csr-network.org Jerry Bernas jerry@asean-csr-network.org	Andrew Konstant andrew@saifac.org.za