



BUSINESS & HUMAN RIGHTS IN SOUTHEAST ASIA

RECOMMENDATIONS ON THEMATIC PRIORITIES & POSSIBLE ACTIVITIES FOR THE UN WORKING GROUP

8 December 2011

INTRODUCTION

1. We, the Singapore Management University Asian Peace-building and Rule of Law Programme ('SMU-APRL') and Mazars, jointly welcome the call by the UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises ('WG') for proposals to help it determine its key thematic priorities and activities. SMU-APRL is a research platform for SMU academics and affiliates to contribute to policy-relevant human rights and governance research in the region. Mazars is a leading international organization specializing in audit, accountancy, tax, legal and advisory services. Chief contributors to this submission include SMU-APRL's Cynthia Morel¹ and Delphia Lim.²
2. Our submission and the recommendations it puts forward are informed by our academic and professional experience and expertise as scholars, lawyers and auditors based in Southeast Asia ('SEA').³
3. The WG is designed, *inter alia*, to operationalize and build upon the Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework ('GPs'). In its own words, the WG "*must ensure that [the GPs] are effectively implemented by both governments and business, and that they result in improved outcomes for individuals and groups around the world whose rights have been affected by business activity.*" Recognizing the WG's mandate, our submission aims to assist the WG in considering sensible and durable ways to engage with stakeholders in SEA in light of the following.
4. *First*, it is necessary and highly opportune for the principles set out in the UN 'Protect, Remedy and Respect' Framework ('UN Framework') and the GPs to be embedded into the shared social, economic and political norms and values that are being formulated to apply across ASEAN, particularly the **ASEAN Human Rights Declaration** that is currently being drafted. This would be invaluable to encouraging governments and business here to effectively implement the GPs.
5. *Second*, there is a growing corpus of **ASEAN-specific expert resources** relating to human rights research, due diligence and auditing, such as region-wide thematic human rights studies.⁴ Expert resources and databases enabling governments and businesses to implement the GPs should be among the resources that the WG draws upon. Such resources are needed to, for instance, develop domestic legislation on business and human rights in the case of governments, and, in the case of businesses, assess and respond to the human rights risks in their operating contexts. Indeed, the UNOHCHR's Interpretive Guide on the Corporate Responsibility to Respect Human Rights ('GPs Interpretive Guide') recommends that businesses draw on credible internal and external expert resources that can support and assist

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³ The authors of this submission would like to thank Ms. Vanessa Zimmerman for her valuable input.

⁴ Region-wide thematic human rights studies are being undertaken by the ASEAN Intergovernmental Commission on Human Rights, and the Human Rights Resource Centre in ASEAN, which have been led by and will include members of SMU-APRL.

them in meeting their corporate responsibility to respect human rights.⁵

6. We set out in the next section developments in SEA that have implications for business and human rights, and our plans for helping ensure that Governments and businesses have access to and benefit from expert resources required for the proper and uniform implementation of the GPs.
7. In the following sections, we share our thoughts on specific business and human rights issues in SEA, namely: (i) the rule of law, (ii) the role of ASEAN stock exchange regulators, banks and financial institutions, (iii) indigenous peoples and the right to development, (iv) extractive industries, and (v) lessons from SEA on heightened-risk situations. Our views on these issues may be part of our future agenda for developing expert resources on business and human rights.

BUSINESS AND HUMAN RIGHTS IN ASEAN

Towards a harmonized, rules-based regime

8. Human rights have traditionally been low on the region's agenda. ASEAN as a multilateral institution has been criticized for failing to adequately promote and protect human rights, due to its long-standing policy of non-interference in member States' internal affairs. Nevertheless, noting the development of a network of ASEAN treaties governing trade and investment, former ASEAN Secretary-General Rodolfo Severino predicted that "this developing rules-based economic regime will gradually extend to other areas of ASEAN cooperation, [as] ASEAN is more than an economic association."⁶ This prediction has come to pass.
9. With the adoption of the ASEAN Charter in November 2007, ASEAN moved toward becoming a single polity. In 2009, ASEAN member States designed a 'Roadmap', which envisions the creation of a "rules-based Community of shared values and norms" built on three pillars, namely, the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, each with its own blueprint and infrastructure for implementation and integration.
10. Significantly, human rights compliance has become an established part of ASEAN's discourse and stated goals. The ASEAN Intergovernmental Commission on Human Rights ('AICHR') is an important mechanism established to develop "common approaches and positions on human rights matters of interest to ASEAN."⁷ AICHR's progress of work as ASEAN's "overarching body...for the promotion and protection of human rights and fundamental freedoms in accordance with the ASEAN Charter" was noted at the recent 18th ASEAN Summit, including its progress in drafting an ASEAN Human Rights Declaration ('Declaration').⁸ The UN High Commissioner for Human Rights Navanetham Pillay has positively observed that the Declaration "will set the tone for the emerging ASEAN human rights system."⁹

⁵ United Nations Office of the High Commissioner on Human Rights, "The Corporate Responsibility to Protect Human Rights: An Interpretive Guide," at 4.2, 4.3, 5.4 and 7.

⁶ Rodolfo C. Severino, "ASEAN Way and the Rule of Law," address at the International Law Conference on ASEAN Legal Systems and Regional Integration sponsored by the Asia-Europe Institute and the Faculty of Law, University of Malaya, Kuala Lumpur, 3 September 2001.

⁷ AICHR Terms of Reference at para. 4.11.

⁸ 2011 Chair's Statement of the 18th ASEAN Summit, issued by the Chair of ASEAN in Jakarta, Indonesia on 8 May 2011, available at http://www.asean.org/Statement_18th_ASEAN_Summit.pdf.

⁹ 7th Official Meeting of the ASEAN Intergovernmental Commission on Human Rights Address by the United Nations High Commissioner for Human Rights, 28 November 2011, available at <http://bangkok.ohchr.org/news/press/address-high-commissioner-asean-intergovernmental-commission-human-rights.aspx>.

11. The Commissioner has also noted that SEA benefits from a “very energetic and sophisticated” civil society.¹⁰ Civil society organizations (‘CSOs’) have been increasingly concerted in their efforts to document business-related human rights abuses and influence policy-making.¹¹

Embedding the UN Framework into ASEAN’s norms & values

12. As ASEAN works towards articulating its norms and values, it is vital that business and human rights standards be included. As things stand, corporate social responsibility (‘CSR’) is only mentioned in the blue-print for the ASEAN Socio-Cultural Community. But business impacts on human rights in the region pertain to all three pillars and need to be holistically understood and addressed.¹²
13. Certain developments have generated momentum that can be built upon in embedding the UN Framework and the GPs holistically in SEA.
14. *First*, at least 4 ASEAN countries are in talks vis-à-vis the Trans-Pacific Partnership to enter into a free trade agreement that may ensure adherence to “high environmental and labor standards.”¹³ ASEAN countries are indeed increasingly impacted by the linking of their free trade prospects with compliance with international labor standards. It is critical for ASEAN to recognize the importance of business and human rights to its development as an economic community.
15. *Second*, of the 11 thematic studies AICHR is mandated to prepare, the first is a baseline thematic study on CSR and Human Rights in ASEAN (‘AICHR CSR Study’),¹⁴ which could be tabled before the ASEAN Foreign Ministers Meeting in 2012. AICHR’s Singapore representative, Mr. Richard Magnus, has lauded the UN Framework and the GPs as useful references for this study. SMU-APRL’s Director, Assistant Professor Mahdev Mohan, has been provisionally nominated as Singapore’s representative to the study team which is to conduct the AICHR CSR Study.
16. *Third*, at the 7th Official Meeting of AICHR in November this year, the UNOHCHR referred to the drafting of the ASEAN Human Rights Declaration by AICHR, and called for the Declaration to not only maintain, but also enrich international human rights standards by focusing on new areas such as the responsibilities of business in relation to human rights.¹⁵ This clarion call paves the way to ensuring that the UN Framework and the GPs are part of the Declaration.
17. **Recommendation:** The WG should be aware of the regulatory landscape relating to human rights and rules-based integration in SEA/ASEAN which could facilitate its work. The WG should also (i) work closely with AICHR, (ii) engage in dialogue with AICHR researchers, and otherwise contribute to its inaugural thematic study on CSR & Human Rights, and (iii) provide

¹⁰ *Ibid.*

¹¹ See e.g. Forum-Asia press release, “Corporate Social Responsibility in ASEAN Needs to Emphasize ‘Responsibility’”, 2 May 2011, available at <http://www.forum-asia.org/?p=6931>.

¹² *Ibid.*

¹³ *Taipei Times*, “Obama launches trade deal in Asia push”, 13 November 2011, available at <http://www.taipetimes.com/News/front/archives/2011/11/14/2003518255>. The 4 ASEAN countries referred to above are Singapore, Brunei, Malaysia and Vietnam.

¹⁴ Press Release of the Fifth Meeting of the ASEAN Intergovernmental Commission on Human Rights, Jakarta, 25-29 April 2011, available at <http://www.asean.org/26208.htm>.

¹⁵ *Supra* note 9.

input to and otherwise support AICHR representatives as they draft the ASEAN Human Rights Declaration.

Credible Expert Resources

18. Addressing business and human rights issues requires expertise across “virtually the entire spectrum” of internationally-recognized human rights¹⁶ such as the rule of law, the right to development, and the rights of vulnerable groups. For instance, in June 2011, the Committee on the Rights of the Child for the first time called on a State party to comply with international and domestic standards on corporate social and environmental responsibility, particularly the UN Framework.¹⁷
19. However, systematic research and analysis on human rights issues in ASEAN has, at best, been nascent. Governments and businesses seeking guidance on how to address their business and human rights responsibilities in the ASEAN context would find resources lacking. AICHR’s thematic studies are one step to addressing this gap.¹⁸
20. In this regard, SMU-APRL intends to partner with the Human Rights Resource Centre in ASEAN (‘HRRC’), Mazars, and other expert partners to:
 - (i) build on the initial studies presently being developed in this field to conduct sustained research and establish a data-base that identifies and assesses the potential and actual adverse human rights impacts of business activities in SEA, and tracks the efficacy of efforts to address them;
 - (ii) conduct business and human rights training workshops, informed by our combined academic and professional expertise, for human rights practitioners and CSOs in the region;
 - (iii) engage with business enterprises in the provision of consulting and due diligence auditing services which integrate our research findings and impact assessments, and propose best practices to ensure corporate compliance with the UN Framework and GPs; and
 - (iv) analyze State protection against business-related human rights abuses and access to effective remedy for victims of such abuses in SEA, and aim to report on these matters at the UN Human Right Council’s Universal Periodic Review.
21. The following projects and courses conducted or co-organised by SMU-APRL are critical in allowing stakeholders to better understand issues related to business and human rights in SEA and for ASEAN:
 - (i) a multi-site HRRC study, named the *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (“Rule of Law Study”), the first of its kind in South-east Asia.¹⁹ It identifies and analyses regional conceptions of ‘rule of law and good governance’ and how these conceptions relate to respect for and protection of human rights. Disseminated to key human rights actors in the region, this early-phase base-

¹⁶ GPs Interpretive Guide, *supra* note 5 at 1.5.

¹⁷ See Committee on the Rights of the Child, 57th Session, 30 May to 17 June 2011, “Concluding Observations: Cambodia,” CRC/C/KHM/CO/2, at paras. 26 and 27.

¹⁸ Nonetheless, AICHR faces constraints in executing its wide-ranging functions. AICHR representatives have highlighted the difficulties faced in terms of the capacity of AICHR members and its limited budget. They have indicated that assistance is needed in, *inter alia*, capacity-building for AICHR members and staff and AICHR’s thematic studies. See UNDP Asia Pacific Regional Centre and OHCHR Regional Office for South-east Asia, Report on “Regional Dialogue on UN Engagement with the ASEAN Human Rights System”, Bangkok, 6 September 2010, available at <http://bangkok.ohchr.org/news/events/regional-dialogue-un-engagement-with-asean-human-rights-system.aspx>.

¹⁹ Available online at <http://hrrca.org/data>.

line study has been described as a useful point of reference for further in-depth empirical studies, and will help pave the way for the harmonization of human rights standards in ASEAN;²⁰

- (ii) baseline HRRC studies on women and children's rights and business and human rights in ASEAN;²¹
 - (iii) studies examining indigenous peoples' rights issues and businesses' human rights compliance in conflict / post-conflict zones in ASEAN; and
 - (iv) a Summer Institute on Business & Human Rights at the SMU School of Law. This is a workshop with an Asia-Pacific focus that will examine the challenges and opportunities faced by advocates and business managers at the intersection of business operations and efforts to promote international human rights and sustainable development.
22. **Recommendation:** The WG should seek to tap on SMU-APRL and its partners' collective expertise detailed above, as well as other related resources and projects spearheaded by scholars, experts and CSOs in SEA.

An Unprecedented Human Rights Audit – Asia Pulp & Paper Group

23. SMU-APRL and Mazars also intend to work jointly on human rights auditing and consulting using a sophisticated audit system developed by Mazars for the private sector, which involves the GPs in assessing clients' compliance.²² Importantly, we will collaborate on the first ever human rights audit undertaken by a company in the region, Asia Pulp & Paper Group (APP). APP has appointed Mazars Indonesia to independently assess existing policies, principles and performance across the company's regional corporate operations, eight Indonesian pulp and paper mills and supply chain.²³
24. Mazars has developed a proprietary tool incorporating eight core principles to assess human rights policies and performance, known as the Mazars Indicators for Human Rights and Social Compliance ('MIHRSC'). This assessment tool is also based on and refers to the most relevant national and international standards, including prevailing Indonesian labour-related law and regulations, Universal Declaration on Human Rights, Organization for Economic Cooperation and Development ('OECD') guidelines for multinational enterprises, and around 80 Human Rights and International Labour Organization ('ILO') conventions and declarations. The Mazars audit team will be led by James Kallman, President Mazars Indonesia, and advised by Marzuki Darusman, director of the HRRC and an internationally acclaimed human rights expert.
25. **Recommendation:** In consultation or collaboration with Mazars and SMU-APRL, the WG should closely follow and study the background, process and outcomes of the APP human rights audit with a view to encouraging other responsible businesses to follow in APP's footsteps.

²⁰ See *Jakarta Post*, "ASEAN begins accepting rule of law despite conflicts," 4 May 2011, available at <http://www.thejakartapost.com/news/2011/05/04/asean-begins-accepting-rule-law-despite-conflicts.html>.

²¹ See "HRRC Launches Study on the Rights of Women and Children in ASEAN", 16 September 2011, available at <http://hrrca.org/content/hrrc-launches-study-rights-women-and-children-asean>; "Business and Human Rights Study in ASEAN," 2 January 2011, available at <http://hrrca.org/content/business-and-human-rights-study-asean>.

²² See <http://www.mazars.co.id/Home/Our-services/Sustainability-Practice/Human-Rights-Audit>.

²³ Asia Pulp and Paper press release, "Asia Pulp and Paper Follows UN Lead, Commits to First-Ever Human Rights Audit," 13 September 2011, available at <http://www.businesswire.com/news/home/20110913007613/en/CORRECTING-REPLACING-Asia-Pulp-Paper-Lead-Commits>.

RULE OF LAW IN ASEAN & THE GPs

26. The rule of law undergirds the implementation of any human rights responsibility, whether of businesses or governments.²⁴ Establishing an effective rule of law compatible with promoting and protecting fundamental human rights is crucial to the full implementation of the GPs.
27. In ASEAN, the groundwork is being laid for an institutional framework to facilitate the free flow of information based on each country's national laws and regulations, the preventing and combating of corruption; and cooperation to strengthen the rule of law, judicial systems, legal infrastructure, and good governance.²⁵
28. In this regard, our findings from the Rule of Law Study show that regardless of their varying stages of development, there appears to be a growing consensus in ASEAN regarding the constitutive elements of the rule of law as a principle of good governance, and acceptance amongst member States that the rule of law is necessary to promote and protect fundamental human rights.
29. Apart from establishing effective rule of law in States, businesses must be apprised of the status of the rule of law in the area they operate when assessing their human rights risks.²⁶ It is hoped that reports such as the Rule of Law Study will provide businesses with the accurate picture they need to ensure that they can respect human rights and provide redress, if necessary.

Preventing and Combating Corruption

30. Recent news of payments by Freeport to Indonesian police officers guarding its West Papua mine, which could "[taint] police neutrality" in the ongoing and violent strike by Freeport workers, demonstrates how preventing and combating corruption in this region is an important issue for any business and human rights agenda.²⁷ Further, the influx of foreign direct investment into developing ASEAN countries known for prevalent corruption (see below²⁸) underscores the urgency of doing so.
31. One possible way to achieve greater progress is for States with low levels of corruption and strong enforcement capacity, such as Singapore, to take the lead. In this regard, we may consider recommending to such States the approach of the 2010 United Kingdom Bribery Act ('UK Bribery Act').

²⁴ For the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It also requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms. See UN Secretary-General (UNSG), *Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance*, 14 April 2008.

²⁵ *Supra* note 6 at para. 15.

²⁶ GPs Interpretive Guide, *supra* note 5 at 7.8.

²⁷ *The Atlantic*, "Is a US Mining Company Funding a Violent Crackdown in Indonesia?", 29 November 2011, available at <http://www.theatlantic.com/international/archive/2011/11/is-a-us-mining-company-funding-a-violent-crackdown-in-indonesia/249164/>.

²⁸ See "[Best Practices for Extractive Industries](#)" at 13 below.

32. The UK Bribery Act not only makes bribery committed extraterritorially an offence,²⁹ it also contains a unique provision requiring companies to *prevent* bribery committed by persons performing services for or on behalf of the company.³⁰ At the same time, it affords companies a defence if they have in place adequate procedures designed to prevent such persons from bribing in the course of performing services for or on behalf of the company. A creative “with, not against” approach has been adopted in respect of enforcement.³¹ In determining whether to prosecute, public interest factors will be considered. Factors against prosecution include proactive corporate compliance measures, self-reporting (whistle-blowing) and remedial actions.³²
33. Companies are therefore, in a rather novel manner, given a role in anti-bribery regulation and enforcement. To comply, companies are encouraged to include anti-bribery provisions in, for example, their supply chain contracts or joint venture agreements.³³ They are also discouraged from doing business with companies that pose corruption risks that one should reasonably know of.³⁴ Further, the approach to prosecutions encourages companies to report possible violations by their business associates and partners even if they are not directly involved.
34. This approach gives effect to GP 13(b), which states that “[t]he responsibility to respect human rights requires that business enterprises...[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” Further, the extraterritorial reach of the offence of failing to prevent bribery spurs this company-driven regulation and enforcement to cross borders and have a region-wide impact.³⁵
35. A company-driven approach to addressing regional corruption, as opposed to one dominantly driven by member States, is apposite in the ASEAN context, where the principle of non-interference means that member States are reluctant to directly address systemic rule of law weaknesses in another member State. Notably, Singapore, for instance, is moving towards an approach similar to that in the UK by urging companies to cooperate with enforcement and prosecutorial agencies to avoid or defer corporate crime prosecutions.³⁶
36. **Recommendation:** Our recommendations will have the benefit of drawing on Mazars’ strong practice in this area, in both the UK as well as internationally, and involving not only the UK Bribery Act, but also similar legislation and related corporate practices.

²⁹ The offences created by the Act apply to bodies incorporated in the UK in respect of acts committed anywhere in the world; the offence of failing to prevent bribery applies to the same, as well as bodies wherever incorporated carrying on business in the UK. See UK Bribery Act, ss. 7 and 12.

³⁰ 2010 UK Bribery Act, ss. 7 and 8.

³¹ See Charlie Monteith, “The Bribery Act 2010: Part 3: Enforcement”, (2011) 2 Crim. L.R. 111, (Sweet & Maxwell) at 114 (“To work with business, in other words, not against it, has meant the SFO placing a huge emphasis on raising awareness, education, persuasion, and ultimately prevention.”) Charlie Monteith was a member of the Law Commission’s Bill Advisory group and the UK Serious Fraud Office who was a key architect of the UK Bribery Act.

³² *Ibid.*

³³ UK Ministry of Justice, “The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing,” at 16 to 17.

³⁴ UN Interpretive Guide, *supra* note 5 at 7.8 (“...not knowing about human rights abuses linked to the enterprise’s operations, products or services is unlikely by itself to satisfy key stakeholders, and may be challenged in a legal context, if the enterprise should reasonably have known of, and acted on, the risk through due diligence.”)

³⁵ *Supra* note 29.

³⁶ *Business Times*, “Prosecutors may do deals to seal justice,” 4 October 2011.

ASEAN STOCK EXCHANGE REGULATORS, BANKS & FINANCIAL INSTITUTIONS*Stock exchange regulation*

37. Stock exchange regulators can play a significant role in encouraging businesses in SEA to implement the GPs through the listing, disclosure and reporting requirements they impose. The UN Interpretive Guide has emphasized that formal reporting helps embed within an enterprise an understanding of human rights issues and the importance that respecting human rights holds for the business itself; the additional transparency provided can help protect the enterprise's reputation and build trust in its stakeholder relationships.³⁷
38. Bursa Malaysia requires listed issuers to include in their annual reports a description of the CSR practices and activities undertaken by them and their subsidiaries; this is mandatory.³⁸ Listed issuers' CSR reporting are assessed by, e.g. their risk management/analysis framework, disclosure of non-compliance with laws/legislation/codes/listing requirements, policy statements and stated commitments, specific reporting guideline(s) adopted, and third party audits/reviews undertaken.³⁹ To some extent, these requirements reflect the GPs' Operational Principles of the corporate responsibility to respect human rights, such as GPs 16 (policy commitment), 17 (human rights due diligence), 18 (assess human rights impacts by drawing on internal and/or external human rights expertise), and 21 (external communication and formal reporting).
39. The Singapore Exchange ('SGX') encourages, but does not require, its listed companies to report to stakeholders on their "corporate footprint in the environmental and social realms" through listing and annual reports and standalone sustainability reports.⁴⁰ SGX recommends that listed companies report their sustainability policy and goals, corporate stand on bribery and corruption, performance assessment against stated goals, labour practices and relations, diversity and inclusion programs and practices that assess and manage the impacts of operation on communities, and product responsibility policy and practices. Listed companies in high impact environmental and social risk industries are specifically encouraged to conduct sustainability reporting.⁴¹
40. Significantly, the stock exchanges of seven ASEAN countries will very soon be setting up electronic trading links that will interconnect the seven stock exchanges and facilitate cross-border order trading, in furtherance of the ASEAN Economic Community agenda.⁴² Bursa Malaysia and SGX will be the first stock exchanges connected in June 2012.⁴³ The establishment of a direct trading link among the region's stock exchanges promises to facilitate the harmonization of listing, disclosure and reporting requirements, including those related to CSR.

³⁷ UN Interpretive Guide, *supra* note 5 at 10.4.

³⁸ Bursa Malaysia Main Market Listing Requirements, Chapter 9, section 9.25 read with Appendix 9C, Part A, sub-paragraph 29.

³⁹ 2008 National Annual Corporate Report Awards (NACRA) criteria for the CSR Report Award category, available at <http://www.world-exchanges.org/sustainability/m-6-4-4.php>. Bursa is one of the organisers of NACRA. The said criteria helps to elaborate on the non-prescriptive CSR reporting requirements in Bursa Malaysia's listing requirements.

⁴⁰ Singapore Exchange, "Guide to Sustainability Reporting for Listed Companies," at 3, 13 and 14.

⁴¹ *Ibid* at 9.

⁴² Reuters, "ASEAN stock exchanges eye cross-border trading in 2012," 3 December 2011.

⁴³ Today, "ASEAN Trading Link to connect SGX, Bursa in June next year," 18 November 2011.

41. **Recommendation:** The WG should support efforts by bourses and regulators in the region to implement non-financial reporting, disclosure and other requirements in accordance with the GPs. Bursa Malaysia is a leading light, with mandatory requirements that seek to give effect to the GPs. Still, empirical research on, among other things, their effectiveness and areas for improvement is required. The WG should also encourage business enterprises to integrate human rights reporting into its annual financial reports. This would go a long way towards demonstrating that respecting human rights is truly integral to the ways in which businesses operate and is relevant to their bottom line.⁴⁴

Bank & financial institutions

42. The Equator Principles are significant to the operationalization of the GPs. They require member financial institutions to, *inter alia*, conduct internal due diligence on the social and environmental risks of projects proposed for financing, and to oblige their borrowers to conduct social and environmental impacts and risks assessments, implement responsive management measures, conduct informed consultations with affected communities and establish grievance mechanisms. These lending requirements reflect the GPs, in particular, the Operational Principles of the corporate responsibility to respect human rights, and GP 13 (“the responsibility to... avoid causing or contributing to adverse human rights impacts... and [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”). Notably, a review of the Equator Principles published this year has recommended that they be extended their reach beyond project financing to, e.g. corporate loans.⁴⁵
43. However, while many major worldwide banks with a strong presence in ASEAN are members of the Equator Principles, the Equator Principles are arguably not always given effect in practice.
44. **Recommendation:** There are a number of ways the GPs can help strengthen the Equator Principles, which would in turn strengthen the GPs’ application. For example, the GPs are driving burgeoning participation in human rights due diligence and auditing. Member institutions’ compliance with the Equator Principles could be part of such human rights compliance assessments. Also, the GPs are spurring financial regulators to include human rights standards in their regulatory requirements, similar to the regulatory developments in respect of ASEAN stock exchanges. The Equator Principles would be a relevant guide/benchmark for these regulatory requirements. It is worth considering recommending that financial regulators do so.

LESSONS FROM AFRICA ON INDIGENOUS PEOPLES AND THE RIGHT TO DEVELOPMENT

45. GP 18 underscores the importance of having business enterprises pay special attention to human rights impacts on individuals from vulnerable groups or populations that may be at heightened risk of marginalization. The Right to Development, as expressed in a milestone 2010 decision (‘*Endorois* Decision’) of the African Commission on Human and Peoples’ Rights (‘African Commission’), establishes a host of safeguards designed to protect indigenous communities affected by development projects, and has positive implications on the treatment

⁴⁴ *Supra* note 37.

⁴⁵

See

http://www.cliffordchance.com/publicationviews/publications/2011/06/broadening_the_equatorprinciplesbyondprojec.html.

of indigenous peoples' rights in SEA.⁴⁶

46. *First*, encroachments posing a severe threat to the socio-economic or cultural survival of an indigenous community will meet a far more stringent public interest test than for others. In this regard, restitution of indigenous land will generally be required unless factually impossible to accommodate.⁴⁷
47. The heightened risks to which indigenous peoples are exposed in matters affecting their ancestral land have been widely recognized across the UN system. The strictest possible limitations relating to encroachments on indigenous land were applied accordingly by the African Commission, on the basis of the following principle:
- “Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, shelter, the right to self-determination, and the right to exist as a people.”⁴⁸
48. *Second*, due diligence is essential in the conduct of consultation processes seeking to obtain the community's free, prior, and informed consent ('FPIC'). The right to development is not only a right of outcome, but also a right of process.
49. Drawing heavily on the principles posited by Nobel laureate Professor Armatya Sen, the African Commission in the *Endorois* Decision ruled that development must be equitable, non-discriminatory, participatory, accountable, and transparent. Equity is an especially important, “over-arching theme” in the right to development. The income or other benefits derived from development must be equally distributed.⁴⁹ The African Commission's ruling was equally emphatic on the requirement that all forms of development contribute to the empowerment of communities.⁵⁰ In this regard, the African Commission held that both the choices and the capabilities of the Endorois had to improve in order for their right to development to be realized.⁵¹

⁴⁶ *Minority Rights Group International and the Centre for Minority Rights Development (on behalf of the Endorois Welfare Council) v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights (2010) [**Endorois Decision**].

⁴⁷ *Ibid.* at para. 234. This normative standard is reflected in various instruments, including the UN Committee on the Elimination of Racial Discrimination's General Recommendation 23 (1997). In this General Recommendation, CERD called upon states to “(r)ecognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. *Only when this is for factual reasons not possible*, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.” (Emphasis added).

⁴⁸ Cited in the *Endorois* Decision, *supra* note 46 at para. 212. Originally outlined in Nazila Ghanea and Alexandra Xanthaki (2005) (eds). *Indigenous Peoples' Right to Land and Natural Resources* in Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

⁴⁹ Arjun Sengupta, “Development Cooperation and the Right to Development,” Francois-Xavier Bagnoud Center Working Paper No. 12, (2003), available at www.hsph.harvard.edu/fxbcenter/working_papers.htm.

⁵⁰ *Supra* note 46 at para. 283 (“The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realized.”)

⁵¹ *Ibid.*

50. Much of the African Commission's ruling in relation to choice hinged on the quality of consultation processes seeking to obtain the community's FPIC. The scope of FPIC has evolved through jurisprudence to require States to both accept and disseminate information, and practice constant communication between parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, communities must be consulted, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that communities are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, in the case of indigenous peoples in particular, consultations should take account of their traditional methods of decision-making.⁵²
51. The African Commission underscored that the principle of due diligence under international law made it incumbent upon the Kenyan State to conduct the consultation process in such a manner that enabled the community representatives to genuinely help shape the outcome.⁵³ This inherently rejects the practice of presenting options as *faits accomplis*.
52. *Third*, securing formal commitments in relation to benefit-sharing with indigenous communities was also recognized by the African Commission as constituting a vital step in ensuring that indigenous peoples' choices and capabilities are improved upon. In the context of the *Endorois* case, the African Commission equally held that the right to obtain "just compensation" translated into a right of the members of the community to "reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival."⁵⁴
53. Importantly, the African Commission made clear that the Endorois community's empowerment depended on more than their becoming recipients of dividends. In this regard, the right to development was understood to place an obligation upon States to treat indigenous peoples as active stakeholders rather than passive beneficiaries.
54. The *Endorois* Decision is aligned with GP 18, which states that assessments of human rights impacts should be taken at regular intervals in view of the dynamic happenings on the ground, while at the same time cautioning under GP 17 that:
- "businesses conducting due diligence (processes) should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."
55. In other words, human rights due diligence requirements emphasize that businesses cannot content themselves with their processes alone, but must consider and be accountable for the outcomes they contribute to.
56. **Recommendation:** The WG should learn from and seek to apply in SEA these comparative examples which emerge from case law and established practice. Human rights due diligence has the potential to be the GPs' most remarkable contribution to securing State adherence to and corporate compliance for human rights. As former UN Special Representative on business

⁵² *Saramaka People v Suriname*, Judgment of November 28, 2007, Series C No. 172 at para. 133.

⁵³ *Supra* note 46 at para. 281.

⁵⁴ *Supra* note 46 at para. 295.

and human rights Professor John Ruggie has observed, embracing due diligence will require strategies that identify how all relevant actors can and must learn to do many things differently.

BEST PRACTICES FOR EXTRACTIVE INDUSTRIES

57. Developing ASEAN countries are seeing an influx of foreign direct investment. In particular, there are fears that countries with rapidly developing extractive industries, such as Cambodia, will fall prey to the “resource curse”, i.e. the paradox that countries with an abundance of natural resources tend to have less economic growth than countries without these natural resources.⁵⁵ Perennial problems of corruption and poor governance in these countries make the ‘resource curse’ foreseeable.
58. There are also concerns that the rapid awarding of, among other things, mining concessions, is undermining food security and income opportunities for rural people in countries such as the Lao People’s Democratic Republic, by for instance, putting pressure on competing demands for land and affecting rural livelihoods.⁵⁶ Women and children, especially those from ethnic minorities, are particularly vulnerable in the implementation of these development policies.⁵⁷
59. We highlight 2 initiatives relevant to addressing these problems.

Extractive Industries Transparency Initiatives

60. The Extractive Industry Transparency Initiative is a mechanism for improving transparency and accountability by requiring companies to publish what they pay, and governments to disclose what they receive, when they strike deals with each other relating to the extractives sector. Beyond disclosure of payments, the effectiveness of such transparency initiatives may be strengthened by requiring informed consultations with affected communities before contracts are signed.⁵⁸
61. The success of Timor-Leste with extractive industry transparency also provides useful lessons. Timor-Leste has developed an advanced system for monitoring and receiving petroleum revenues, designed to insulate it from the resource curse. All such revenues (except for comparatively minor management and marketing fees) are transferred directly to a Petroleum Fund (‘Fund’), which underwrites the lion’s share of the country’s expenditure. To ensure transparency, the Central Bank of Timor-Leste, which has operational management of the Fund, submits quarterly reports on the performance of the Fund to the Minister of Finance. The Fund’s Annual Report contains a more complete description of the Fund’s activities and its audited financial statements.⁵⁹

⁵⁵ E.g. *The Guardian*, “Cambodia’s Oil Must Not Be the Slippery Slope to Corruption and Catastrophe”, 21 June 2011; “Revenues from oil, gas and mining must benefit all Cambodians, new coalition urges”, Cambodians for Resource Revenue Transparency press release, 12 June 2009; *The Economist*, “Cambodia’s Oil Resources: Blessing or Curse?”, 26 February 2009.

⁵⁶ International Rivers, “Power Surge: The Impacts of Rapid Dam Development in Laos,” September 2008, at 3; “Contribution By The United Nations Country Team In Lao People’s Democratic Republic For The Universal Eight Session, 2010” [*UNCT Lao PDR Report*] at para. 54.

⁵⁷ UNCT Lao PDR Report, *ibid.* at para. 54; Concluding Observations of the Committee on the Elimination of Discrimination against Women: Laos People’s Democratic Republic,” CEDAW/C/Lao/CO/7, 7 August 2009, at paras. 44 and 45.

⁵⁸ *BBC Asia Edition*, “NGO wants involvement of public in mining deals”, 28 November 2011, available at <http://www.thecitizen.co.tz/news/4-national-news/17488-ngo-wants-involvement-of-public-in-mining-deals.html>.

⁵⁹ See <http://www.bancocentral.tl/PF/main.asp>.

62. The Fund's reporting requirements and integration with the State budget help ensure transparency. The Fund's framework is considered a best practice for petroleum production, taxation and revenue management, and was given the third highest overall score in a ranking of sovereign wealth funds by the Peterson Institute for International Economics. Timor-Leste is also on EITI's list of compliant countries.

Natural Resource Certification Processes

63. Natural resource certification processes are a possible talisman against the resource curse and poorly implemented development policies. The Enough Project recently analyzed the benefits of having a certification programme in relation to the illegal conflict minerals trade in Congo.⁶⁰ This programme serves as an example of how SEA can similarly ensure a human rights certification or auditing process for its natural resources.
64. Establishing a proper and credible certification process is crucial. Global Witness' recent withdrawal from the Kimberley Process on grounds that calls for reform had been continually rejected, while calling for the diamond industry to be held accountable for its compliance with international standards, underscores this.⁶¹
65. Drawing on Enough's experience in Africa, the following five lessons regarding certification are apposite in SEA:
- (i) *First*, a successful certification process requires political leadership. ASEAN leadership should encourage member nations to accept and implement such a process.
 - (ii) *Second*, certification should be given credence by a multi-stakeholder body that allows for participation from governments, corporations, and civil society. This allow for a system of checks and balances.
 - (iii) *Third*, the process must include an auditing procedure from an independent source to verify the legitimacy of the process by providing the public with an added assurance that all the regulations are met.
 - (iv) *Fourth*, transparency is the key to maintaining trust and accountability and must be ensured at all times.
 - (v) *Fifth*, the certification procedure must be backed by requisite sanctions to secure compliance. Underpinning this ideal is a rational enforcement strategy, where a stepwise progression of penalty for non-compliance ultimately results, for the recalcitrant, in severe censure and penalties, including membership suspension. ASEAN must ensure that the process is not merely a formality but one in which all member States firmly respond if a company is found to be in violation of agreed standards. ASEAN and other regional bodies should work toward adopting a resolution that implements a standardized certification process for all member States.

Recommendations

66. Participation in the Extractive Industries Transparency Initiative ('EITI') and other publish-what-you-pay initiatives should be strongly encouraged. The WG should consider facilitating a

⁶⁰ See <http://www.enoughproject.org/certification>.

⁶¹ *Global Witness*, "Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable," 5 December 2011, available at <http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>.

natural resource certification process in ASEAN. Also, the WG should study the work of the African Commission's Working Group on Extractive Industries for best practices to build on.⁶²

HEIGHTENED RISK SITUATIONS

67. As noted in the UN Special Representative on business and human rights Professor John Ruggie's "Recommendations on Follow-Up to Mandate," it is crucial for businesses and victims alike that there be more certainty in relation to applicable legal protection against business-related human rights abuses in conflict-affected, post-conflict, fragile and newly independent or democratized States, where human rights enforcement may be weak or non-existent.
68. In the absence of a binding legal instrument, best practices will lend much-needed clarity and certainty to businesses operating in heightened-risk areas, and enable them to conduct effective human rights due diligence. ASEAN's history of conflict and evolving transition towards respect for the rule of law and good governance, democracy and human rights has many lessons to teach in this regard. We believe that through detailed research and comparative study, these lessons will contribute to the formulation of regional and international best practices for business conduct in heightened-risk situations. Relying on our experience in transitional justice processes in SEA and conducting human rights training and capacity building for the justice sector in the aftermath of conflict, we at SMU-APRL are presently looking into this as an area of sustained research together with our partners.
69. We have thus far undertaken case studies on Sri Lanka, Cambodia and Timor-Leste. In summary, while Sri Lankans and Cambodians may suffer from systematic violations of labour and land rights, Timor-Leste is prone to violations of fundamental liberties, such as threats to right to life and security at the hands of private security and military actors who are beyond reproach. Best practices of companies seeking to improve their human rights compliance in these countries show that it is probably better to work through industry-wide initiatives. In all 3 countries, conflict could be re-ignited by a failure to properly identify, prevent and mitigate the human rights-related risks of business activities and business relationships.⁶³
70. A risk-mitigation approach that enforces self-regulation of business actors in post-conflict regions appears highly appropriate.⁶⁴ This would create a conducive regulatory space for embedding and sustaining the operation of the UN Framework and GPs in conflict-affected countries. In this regard, the Committee on the Rights of the Child has noted the absence of such a framework in Cambodia, and called on Cambodia to "establish and implement regulations to ensure that the business sector complies with international and domestic standards on corporate social and environmental responsibility," that are in line with the UN Framework and the GPs.⁶⁵

⁶² The African Commission's Working Group on Extractive Industries was established to examine, and act upon, human rights violations by extractive industries and governments. See "Resolution On The Establishment Of A Working Group On Extractive Industries, Environment And Human Rights Violations In Africa," CHPR/Res148(XLVI)09, available at http://www.achpr.org/english/resolutions/resolution148_en.htm.

⁶³ See Collier Paul *et al.*, "Post-Conflict Risks," (2008) 45 Journal of Peace Research 461 at 474. This is a seminal empirical study that identified an economy's strong primary resource orientation as a significant factor contributing to the probability that a country will experience civil strife.

⁶⁴ See Graham David and Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, (2008) 34 World Development 868 at 882. Graham and Woods advocate for greater transparency in operations by trans-national corporations, for strong social pressure and for greater adherence to international instruments in order to make such self-regulation efforts successful.

⁶⁵ *Supra* note 17.

71. **Recommendation:** The WG should pay close attention to best practices that are emerging in or in the aftermath of conflict and rely on the on-site expertise of human rights researchers, lawyers and practitioners.

CONCLUSION

72. We hope the above has been of assistance, and invite the WG to contact us should we be able to contribute to its efforts in any way.

Yours faithfully,



Mahdev MOHAN
Director
SMU-APRL



James KALLMAN
President Director
Mazars

8 December 2011