

Business and Human Rights in Southeast Asia

Developing National Action Plans



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Asia Centre

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Asia Centre looks forward to continued fruitful collaboration with FNF, CALD and IDEAS in their common quest to uphold the dignity and rights of peoples across Southeast Asia.

Yours Sincerely

Dr. James Gomez,
Regional Director, Asia Centre

Dr. Robin Ramcharan,
Executive Director, Asia Centre

Foreword

On 16 June 2011 the Human Rights Council of the United Nation endorsed the 'Guiding Principles on Business and Human Rights'. The document includes three general principles: states must respect, protect and fulfil Human Rights; businesses must comply with laws and respect Human Rights; when rights are violated, there must be remedies. With these general principles in mind, the UN laid out what governments and businesses can and should do. No new international law obligations were created. The principles aim to guide states and businesses. In 2016, the UN published a reference guide on National Action Plans on Business and Human Rights.

Today, ten years after the Guiding Principles were endorsed, where are we at? Here in Southeast Asia, few ASEAN states have drafted National Action Plans - most have not. Few businesses have self-assessed their Human Rights practices - most have not. Few parliamentarians have put Business and Human Rights on their agenda - most have not.

This publication takes a closer look at what has been achieved so far in Southeast Asia, focusing on National Action Plans. What distinguishes this book from other publications on Business and Human Rights is its angle: how can businesses and parliamentarians contribute to drafting, elaborating and enforcing National Action Plans? The book also offers practical ideas on how to operationalise such plans.

The Friedrich Naumann Foundation for Freedom promotes Economic Freedom. While we believe that businesses should be able to operate as freely as possible and that globalisation has and continues to lift millions out of poverty, we also believe that the Rule of Law and the protection of Human Rights are essential. Businesses not only have moral and legal obligations to treat their employees well, to respect their dignity and to make sure that conditions at their workplaces are humane - it's also in the businesses' interest to do so. Consumers continue to, rightfully so, ask tough questions about supply chains. Employees perform better when conditions are not only fair and free from harm, but also pleasant. Businesses should put due diligence processes and access to remedy in place.

National Action Plans on Business and Human Rights are important tools to encourage and help businesses to take steps to assess and to improve their practices. It should not take another ten years before all states have formulated Action Plans. I hope this publication contributes to a sense of urgency.

I would like to thank the Asia Centre, the Council of Asian Liberals and Democrats (CALD) and Institute for Democracy and Economic Affairs (IDEAS) for making this book possible. The Friedrich Naumann Foundation for Freedom (FNF) is honored to be associated with it.

Moritz Kleine-Brockhoff
Regional Director Southeast and East Asia
Friedrich Naumann Foundation for Freedom

Abbreviations

AICHR	ASEAN Intergovernmental Commission On Human Rights
ALTSEAN-BURMA	Alternative ASEAN Network On Burma
ASEAN	Association Of Southeast Asian Nations
ABAC	ASEAN Business Advisory Council
AMS	ASEAN Member States
ARAIBA	ASEAN Responsible And Inclusive Business Alliance
BHEUU	Legal Affairs Division, Prime Minister's Department (Malaysia)
BHR	Business And Human Rights
BO	Business Organisation
CHR	Commission On Human Rights (Philippines)
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
DRLP	Department Of Rights And Liberties Protection
ELSAM	institute for Policy Research and Advocacy (Indonesia)
ENNHRI	European Network of National Human Rights Institutions
ESCRC	Economic, Social, And Cultural Rights Center
ESIA	Environmental And Social Impact Assessment
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
HRD	Human Rights Defender
ICAR	International Corporate Accountability Roundtable
ICC	International Chamber Of Commerce
ICESCR	International Covenant On Economic, Social and Cultural Rights
ILO	International Labour Organization
KOMNAS HAM	Indonesian National Commission on Human Rights
MIFER	Ministry Of Investment And Foreign Economic Relations (Myanmar)
MCRB	Myanmar Centre for Responsible Business
NAP	National Action Plan
NAP-BHR	National Action Plan on Business and Human Rights
NAP-RBP	National Action Plan on Responsible Business Practice
NBA	National Baseline Assessment
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission (Thailand)
NHRI	National Human Rights Institution
NLD	National League For Democracy
MNE	Multinational Enterprises
MSME	Micro, Small, and Medium-Sized Enterprise
OECD	Office Of The United Nations High Commissioner For Human Rights
OHCHR	Presidential Human Rights Committee
PHRC	Responsible Business Conduct
RBC	Responsible Business Conduct
RLPD	Rights and Liberties Protection Department (Ministry of Justice, Thailand)

Abbreviations

SAC	State Administration Council
SDGS	Sustainable Development Goals
SEA	Southeast Asia
SME	Small and Medium-Sized Enterprise
SUHAKAM	Malaysian National Human Rights Commission
UN	United Nations
UNHRC	United Nations Human Rights Council
UNDP	United Nations Development Programme
UNGPS	United Nations Guiding Principles on Business and Human Rights
UNWG	United Nations Working Group (on BHR)
UPR	Universal Periodic Review



Chapter 1: Introduction - Business and Human Rights in Southeast Asia

James Gomez and Robin Ramcharan

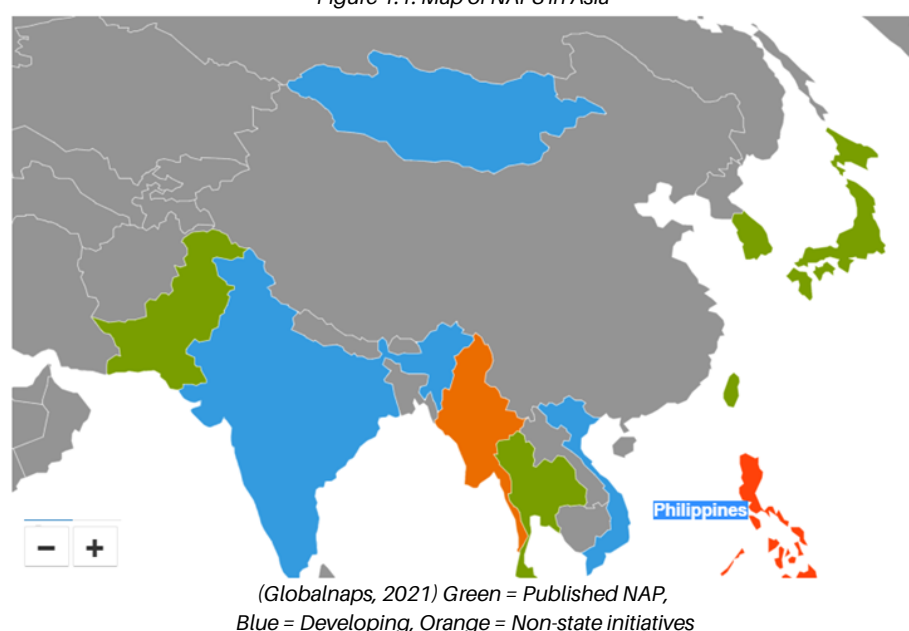
1 Background: The Uptake in NAPs in Southeast Asia

Shadowing the trend across Asia and Europe, there has been an uptake in the formulation of National Action Plans (NAPs) on Business on Human Rights (BHR) in Southeast Asia in the last few years. While this is a positive trend, challenges include the snail's pace at which this uptake is proceeding, lack of inclusivity in the elaboration of NAPs, the nebulous commitments to human rights norms contained in the NAPs and the equivocal commitment to enforcement of human rights norms by both Governments and business organisations (BO).

Across Asia, as seen in Figure 1.1, Thailand and Japan have adopted NAPs on BHR, South Korea has included a chapter in its National Human Rights Action Plan and several other countries are developing NAPs.¹ In two countries - Kazakhstan and the Philippines - National Human Rights Institutions (NHRIs) or civil society have proposed the adoption of NAPs. (OHCHR, 2021)

In Southeast Asia, Thailand took the lead in adopting a NAP on BHR in 2019, following a recommendation from Sweden in the Second Cycle (2012-2016) of the Universal Periodic Review (UPR). It is noteworthy that Thailand's National Human Rights Commission (NHRC) had previously begun considering the human rights impact of Thai companies operating in Cambodia. In Indonesia and the Philippines, spurred by proposals from their respective NHRIs, NAP development is ongoing. Myanmar's current political quagmire has effectively postponed any NAP development for years to come, though recent calls for corporations, notably Internet corporations,² to refrain from supporting the deadly military junta may speed up the process.

Figure 1.1: Map of NAPs in Asia



¹ Azerbaijan, India, Indonesia, Jordan, Malaysia, Mongolia, Myanmar, Pakistan.

²Asia Centre (2021) 'Myanmar: Dismantling Dissent - Crackdowns on Internet Freedoms', Asia Centre, at: <https://asiacentre.org/myanmar-dismantling-dissent-crackdowns-on-internet-freedoms>.

The uptake, which has grudgingly moved beyond rhetoric towards concrete action, occurs amidst a regression in rights in Southeast Asia and a general discomfort with open discussion about human rights across the wider region. It is not surprising that this context is propitious for States to engage with the United Nations Guiding Principles (UNGPs) on Business and Human Rights, as it affords them a soft approach to rights protection, while sternly resisting harder legal commitments that they already hold or continue to resist under international human rights law. It is thus necessary to keep a focus on the development of NAPs by States. After all, Pillar 1 of the UNGPs reminds us that States hold the duty to promote and protect human rights, including ensuring that business organisations operating within their jurisdictions do so as well.

2 The NAP Development Agenda: Origins And Evolution

This overall positive trend in Asia follows an earlier and similar uptake in NAPs around the world, notably in Europe, after the adoption of the UNGPs on Business and Human Rights by the United Nations (UN) Human Rights Council (UNHRC) in 2011.³ The UNGPs was developed by the late Professor John Ruggie, who worked with successive UN Secretaries-General on corporate accountability.

The UNGPs, rooted in international human rights law, stipulate the duty of States to protect (Pillar 1), the responsibilities of business organisations to respect (Pillar 2) and the duty to provide remedies for violations of human rights (Pillar 3). The UNGPs is the culmination of attention on the role of corporations in domestic and international society that emerged in the early 1970s, notably at the UN, and led to calls for greater accountability for the negative impacts of their business operations.

The focus on human rights dimensions of business activities, which moves away from voluntarist corporate social responsibility (CSR) rooted in the early years of the Cold War era (Spector, 2008), was placed on the UN agenda due to the increasing impact of business enterprises and debate about the roles and responsibilities in relation to human rights. The role of non-state, multinational corporations (MNCs) in international relations has been on the UN and academics' agendas since the early 1970s, starting with an Eminent Persons group in 1973, which met under the auspices of the UN Economic and Social Council (ECOSOC) to debate the role of MNCs. An observation was made by Joseph Nye at the time that some 200 giant multinational enterprises or large clusters operating in some 20 countries as well as projections that some 300 would dominate industrial production by the end of the 20th century. (Nye, 1974) Today, thousands of enterprises are operating globally, increasingly in Asia, and their impact on all aspects of human rights is well documented, including on the human rights of individuals and their communities.

Activists have turned their attention from an initial concentration only on States to the human rights dimensions of business operations. This went well beyond voluntarist corporate social responsibility that was in vogue under earlier UN-based initiatives that emerged in 1999: the drafting of the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' and the UN Global Compact. Ultimately they did not have the intended impact. Moreover, activists and scholars have moved on to consider, for example, the corporate responsibility to respect human rights in light of jurisprudence to improve UNGP framework in relation to affiliates of parent companies or to the human rights responsibilities of State-owned enterprises (Mares, 2010; Backer, 2017). The BHR agenda now includes issues such as the environment, economic, cultural, and social rights, debt relief, and access to affordable medicines. This expansion of BHR has been fueled by the 'discovery' of CSR by legal scholars in the past two decades (Santoro, 2015).

Professor Ruggie's UNGPs were at the forefront of international efforts to overcome the 'accountability gap' and reflects a convergence of understandings about the 'rights' responsibilities of corporations. The UNGPs, as Ruggie (2017) has noted 'reaffirm that business enterprises must comply with all applicable laws. Beyond legal compliance, they also stipulate that enterprises have the responsibility to respect human rights, irrespective of a state's willingness or ability to enforce the law'. The UNGPs were drafted with the hope that 'they would trigger an iterative process of interaction ... producing cumulative change over time'. Such a 'reflexive' prescribed 'a framework of institutionalized procedures and organizational norms' within which 'entities that are targeted for regulation ... acquire the capacity needed to more effectively address their social and environmental externalities. And the framework itself is subject to adjustment based on experiential feedback'. In a world where multilateral rule-making is increasingly difficult, national jurisdictions must play a complementary role in upholding international human rights law and guiding business entities in that direction via NAPs and other legislative and policy tools. The European Union (EU), for example, requested in 2011 that all member states adopt a NAP and the UNWG has recommended that all states do the same (European Commission, 2011).

Indeed, calls to develop NAPs first came from Europe. The European Union's Communication 681 urged States to adopt NAPs to implement the UNGPs. Critics at the time deplored a perceived emphasis on corporate responsibility at the expense of focus on business and human rights. It is worth recalling that NAPs development first came out of the Vienna Declaration and Programme of Action on Human Rights of 2000 (White, 2021). Regardless, it was the impetus for the development of NAPs around the globe. Despite a 'glacial' momentum, the movement in Europe had an impact at the global level. The UN Working Group on Business and Human Rights expressed its support for the development of NAPs in 2021 to the Human Rights Council (Human Rights Council, 2012). In its 2014 report to the UN General Assembly, the Working Group noted,

[t]he fundamental purpose of a national action plan is to prevent and strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals ...

States take stock of what they are already doing to implement the Guiding Principles and identify gaps which require further policy action to implement the Guiding Principles.

From this time onward, NAP development has proceeded gradually albeit slowly to Southeast Asia.

3 The Duty of States To Protect Human Rights

The UNGPs did not create new international law obligations, nor did they limit or undermine any legal obligations a State may have undertaken or be subject to under international law with regard to human rights (See Gomez and Ramcharan, 2021).

UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Duties of States

With regard to the duty of states the Guidelines stipulate that:

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.
3. In meeting their duty to protect, States should: (a) enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not
4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.
5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.
7. Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.
8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.
9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.
10. States, when acting as members of multilateral institutions that deal with business-related issues, should: (a) seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising; (c) draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

In the commentaries on each of these, the following key observations were made:

1. The State duty to protect is a standard of conduct. States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.
2. At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.
3. States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights. The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.
4. States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. The closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.
5. States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.
6. Where transnational corporations are involved, their 'home' States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.
7. To achieve the appropriate balance amidst different societal needs, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.
8. States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of economic agreements with other States or with business enterprises, while providing the necessary investor protection.
9. Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

The UNGPs were to be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

4 Keeping The Spotlight on States Through NAPs Development

NAPs are guided by the UNGPs. The latter is a normative tool and not a strictly legal one, though they build on existing human rights obligations and state practice. This normative approach, Ruggie (2017) argued, was the consequence of several factors affecting governance in a complex international system: 1) an increasingly complex world that has conformed to his predictions of an embedded liberalism⁴ leading to an international economy in which 'the multinational enterprise is the standard mode of organizing

⁴Embedded liberalism, developed in his early theoretical work on international relations, is summarised as follows: "after World War II the commitment to international liberalization was institutionally coupled with norms and practices protecting national social communities. Governments played a key role in enacting and sustaining it. See John Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) International Organization 379.

economic activities across countries.’ The fragmentation of international rule-making (also referred to as the fragmentation of international law) in which rule or law-making by States through multilateral instruments has diminished are a result of three factors: a) the emergence of a multipolar world in which new powers render coalition-building and consensus-seeking more difficult; b) the rise of ‘networked governance: essentially self-constituting transnational public or private governance arrangements, focused on specific problems’,⁵ and 3) the sheer substantive complexity of global issues, coupled with the extensive interest diversity across and even within states that many exhibit.

This complexity is also reflected in the governance of the BHR agenda. A variety of international mechanisms have addressed BHR, notably the Working Group on Business and Human Rights, Special Procedures of the Human Rights Council, the UN Global Compact, the Organisation for Economic Cooperation and Development, the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights⁶ and the International Labour Organisation’s (ILO) Tripartite Multinational Enterprise (MNE) Declaration. National Human Rights Institutions (NHRIs) also have a powerful role to play in advancing BHR. Ford (2015) has noted that the period ‘2015–25 will see fairly sustained pressure for the adoption of measures to ‘narrow the governance gap’ between corporate influence and accountability, including with regard to business respect for human rights’.

What is not clear thus far is the degree to which some key stakeholders that must be involved are actually taking part in the development of NAPs. Indeed, in providing guidance on the same, the UNGPs provides for an inclusive process in which the key stakeholders may participate.

5 The Basic Role and Function of NAPs

The basic structure UNGPs, adopted by the Human Rights Council in 2011, sought to clarify the roles of governments and companies as they addressed human rights impacts of business enterprises. They are grounded in three principles:

1. States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
2. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
3. The need for rights and obligations to be matched to appropriate and effective remedies when breached (UNHRC, 2011).

Their implementation is to be achieved through relevant policies, legislation and regulations, through progressive policies and practises from corporations and through providing remedies for victims of business-linked human rights abuses. The UNWG defined a NAP as an ‘evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs).’

A NAP, which is preventive in nature, is a vital tool suggested by the UNGPs to implement the ‘Protect, Respect and Remedy’ framework. The UNWG emphasized that for a NAP to be effective it needed to be founded on the UNGPs:

⁵Asia Centre (2021) ‘Myanmar: Dismantling Dissent - Crackdowns on Internet Freedoms’, Asia Centre, at: <https://asiacentre.org/myanmar-dismantling-dissent-crackdowns-on-internet-freedoms>.

⁶The Open-ended group was created by Human Rights Council Resolution 26/9 of 2014, with the mandate to ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’ (UNHRC, 2019).

As an instrument to implement the UNGPs, NAPs need to adequately reflect a State's duties under international human rights law to protect against adverse corporate human rights impacts and provide effective access to remedy. A NAP further needs to promote business respect for human rights including through due diligence processes. Moreover, NAPs must be underpinned by the core human rights principles of non-discrimination and equality (UNWG, 2014).

In addition, NAPs ought to be context-specific and address the country's actual and potential adverse corporate human rights impacts, to be developed in inclusive and transparent processes and to be regularly reviewed and updated. (UNWG, 2014)

States were exhorted to use the UNGPs as a foundational reference, to conduct capacity building on the UNGPs among government entities, to identify gaps in State and business performances based on the UNGPs and to take the UNGPs as the guiding instrument when identifying and deciding upon adequate measures to address protection gaps. NAPs can play an important role in this regard.

6 Operationalising NAPs in the Region

This work follows on from Asia Centre's book on BHR in Asia (Gomez and Ramcharan, 2021). A full overview of the eclectic topics covered under the BHR banner generally and with respect to Asia is contained therein. Suffice it to note the core content of some recent examinations about Southeast Asia that will inform future action in this area. Santoro has noted that BHR is a multidisciplinary and interdisciplinary endeavour drawing from business ethics, law, the social sciences, and a social, economic and political justice movement involving governments and intergovernmental institutions, as well as indigenous peoples, nongovernmental organisations, and other civil society actors.

BHR advocates seek, at a minimum, to hold businesses accountable for their own direct human rights violations and impacts along their entire value chains (Santoro, 2015). The core BHR issues and controversies, notes Santoro, centre around two sets of questions: (1) fairness and justice – on what basis, if any, can business be said to owe moral duties regarding human rights? How extensive are the human rights duties of business in situations where business has no direct or indirect connection to human rights violations by states?; (2) implementation, public policy, and law – how might voluntary codes of conduct and other self-regulatory mechanisms serve to bring business behaviour into greater alignment with human rights duties? What role should private law, state action, the United Nations, or treaties play in promoting business adherence to human rights norms? Can indicators help to monitor corporate human rights conduct?

The discussion of NAPs is highly relevant in this core agenda, especially point two in the preceding paragraph. Analysis of NAPs in Asia is nascent (See Gomez and Ramcharan (a), 2021; White, 2021) White examined the extent to which NAPs have had an impact on the realisation of rights. He probes the appropriateness and accessibility of remedies where rights have been breached. He calls attention to the role of the state in Southeast Asia, where '[t]he "State-business nexus" is particularly important' as there is 'a high degree of involvement of governments in business activities.' He notes arenas where regulation and reform could be facilitated through NAPs: trade and investment agreements, the informal economy and conflict/post-conflict situations. White argues that NAPs hold the potential to embed culturally appropriate remedies frameworks – both judicial, non-judicial – into NAPs (White, 2021).

Mohan and Morel (2015) has proposed NAPs for the ASEAN region grounded in the Vienna Declaration and Programme for Action (VDPA)⁷ and premised on the UNGPs. He notes that given the onus of protection that falls on Governments, 'national and regional action plans in ASEAN should give due regard to issues that are underexplored in the global conversation about business and human rights, such as gender issues and concerns of emerging economies'. He called for a tailored, multi-stakeholder approach to developing NAPs, one that should be pursued through constructive engagement with business and might be titled 'Responsible Business Conduct' as opposed to a NAP on 'Business and Human Rights', given regional discomfort with the term 'human rights'.

Constructive engagement entails deeper engagement with stakeholders, including parliamentarians and business organisations. Emphasis on the duty of the State in particular calls attention to the need for parliamentarians to be more attentive to during the course of parliamentary work. In this regard toolkits for MPs are especially needed, as are guidance tools targeted at chambers of commerce.

7 Methodology

This qualitative study is the culmination of mapping of the BHR landscape in Asia through Asia Centre's International Conference in 2017, its publication on BHR in Asia (Gomez and Ramcharan, 2021), desk research and informal interviews in 2021 with local stakeholders including parliamentarians and business organisations. Authors from key stakeholder institutions, the Council of Asian Liberals and Democrats (CALD) in the Philippines and the Institute of Democracy and Economic Affairs (IDEAS) in Malaysia, were called upon to map the contribution of key stakeholders across the region, parliamentarians and business organisations, respectively.

8 Structure of the Book

Contributors have surveyed the origins and evolution of the BHR agenda, the trend in NAPs development and the challenges of NAP development, notably the contribution of parliamentarians and of business entities in elaborating NAPs, themes which are in need of attention to complement extant literature.

Having taken note, in this introduction, of the uptake in NAPs processes in the region, the evolution from CSR to BHR and the general context of regression in rights and democracy, Chapter 2 by Gomez and Ramcharan, outlines challenges with NAP development across the region. It takes stock of the different stages of consideration of NAP proposals identified in the previous Introduction. It then examines procedural aspects of the development of action plans. It is guided by questions such as: is there a proper process and who guides this process? Is there a credible NAP development process? Is it an inclusive process? Are all relevant stakeholders properly consulted? It considers key challenges which include alignment with international human rights standards and the provision of remedies. It showcases the Thai NAP.

Chapter 3 by Paolo Zamora and Francis Abaya of the Council of Asian Liberals and Democrats (CALD), examine the role of parliamentarians in NAP processes across the region. They necessarily outline the NAP processes underway, providing additional details from their membership of parliamentarians, to vividly highlight the absence of Parliamentarians in NAP processes in the region. The chapter examines, from key informant interviews, the role (or lack of it) of parliamentarians in the process. It shows that the experiences

of Southeast Asian countries in the development of the NAP-BHR has been primarily executive-driven, with minimal or no role at all for parliamentarians. Taking this into account, the chapter advances recommendations on how the NAP-BHR process can benefit from parliamentary involvement.

Chapter 4, by Thomas Thomas, founder CEO of ASEAN Corporate Social Responsibility Network (ACN), for the Institute for Democracy and Economic Affairs (IDEAS), examines the reluctant role of business organisations (BOs) in participating and advancing the BHR agenda through the development of NAPs. While Southeast Asia has seen spectacular economic growth and inflows of foreign direct investment, these have not been accompanied by equal gains in respect for human rights standards. To the extent that BOs do participate in NAP development processes on BHR, their interest in doing so is secondary to their business objectives. Nevertheless, with careful nurturing and patience, the combination of NAPs, the BHR agenda and the force of existing legislation, as well as global pressure may well lead to a more ethical conduct of business operations. The NAPs on BHR provide the framework to realise these BHR goals as in the UN Guiding Principles on BHR.

In the concluding Chapter 5, Gomez and Ramcharan summarise the findings and recommendations, while placing this study in the ongoing context of the pandemic. They note, in particular, that with the disruption of globalisation, which effectively means the unprecedented disruption of national and global business operations, the human rights of millions of workers in the region is negatively impacted. 'Workers' includes women, migrant workers, minorities and other marginalised groups. Business entities have a moral and legal duties to respond to the negative impact on these communities. Parliamentarians have an indispensable role.

The ensuing chapters are guided generally by three inter-related concerns: 1) the need to uphold the duty of the state to protect human rights in context of 'guidelines' on BHR; 2) the need to draft NAPs in an inclusive process by including all stakeholders and 3) the need to go beyond rhetoric and to align the commitments in NAPs with core international human rights standards.

These key themes permeate this study and are explored with a view to guiding future engagement on the BHR agenda in the region.

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Chapter 2: Challenges of NAP Development in Southeast Asia

James Gomez and Robin Ramcharan

1 Introduction

Southeast Asia has seen strong interest in the development of NAPs notably in Indonesia, Malaysia, Philippines, Thailand and Vietnam. Thailand has already announced its NAP on BHR (2019-2022), in the context of nation-wide protests against its current authoritarian system of governance. This has been taking place amidst serious regression in democracy and human rights protection across the region, including in the Philippines where an outgoing President has allegedly facilitated the killings of thousands of citizens in an alleged drug war. Myanmar is mired in internal civil conflict and rule by a military junta that mounted a coup d'état in February 2021, overthrowing a democratically elected government. Vietnam remains as a Communist, authoritarian regime that views 'human rights' as a western construct, despite the humanistic pronouncements of its founder, Ho Chi Minh.

In this regional context, States have been eager to demonstrate their 'democratic' credentials. The central role of the State in driving the process of elaborating NAPs is the foundational context of this study. The UNGPs have served as a soft tool to guide states policies and behavior on BHR. This chapter outlines the process of NAPs development in the region in line with the UNGPs and some key normative and procedural challenges. It draws on the experiences of other regions as well.

NAPs on business and human rights, as noted earlier, have enjoyed an uptake in practice globally and rhetorically across Asia, especially in the context of the ASEAN Economic Community (AEC) featuring increased regional trade and investment. Moreover, the 2030 Agenda for Sustainable Development of 2015 recognised the role of business organisations as drivers for economic growth and infrastructure, which are necessary components for achieving the Sustainable Development Goals (SDGs), and at the same time, called on businesses to act in accordance with the UNGPs. Following Thailand's NAP, Australia, Japan, Malaysia, Myanmar, the Philippines and Vietnam have been discussing NAPs, while civil society has pushed for instruments in India, Myanmar and South Korea (BHR Resource Centre, 2018). Japan launched its NAP in October 2020.

2 The Process of NAPS Development in Southeast Asia

The process of NAPs development in the region was kick-started in 2013, when the Indonesian NGO, Human Rights Resource Centre undertook a baseline study on BHR for ASEAN countries. The next year, ASEAN Intergovernmental Commission on Human Rights (AICHR) also undertook a baseline study. In 2015 the Human Rights Commission of Malaysia (SUHAKAM) announced its 'Strategic Framework for a National Action Plan'. Though welcomed by the Malaysian government (Rakyat Post, 2015) it took the latter 5 years to actually commit to developing a NAP. On 24 June 2019, the Minister of Laws, YB Liew, formally announced a cabinet decision to launch a process to develop a Business and Human Rights NAP. As noted in the introduction, while Thailand has already announced a NAP, processes and pronouncements have been underway at various stages in Indonesia, Malaysia, Myanmar, Philippines and Vietnam. It should be noted that Brunei, Cambodia, Laos Singapore and Timor-Leste have not yet expressed such interest.

The UN Working Group on BHR has called for NAPs guided by the UNGPs. The former Thai Representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR), Seree Nonthasoot (2017) has noted that the UNGPs has indeed served as a guide to Southeast Asian states in considering NAP development. Civil Society experts, Benjamin and Sta. Maria (2018), have shown that, at the start of their respective national dialogues on BHR, Indonesia, Malaysia, the Philippines and Thailand had publicly committed to ensuring their plans are consistent with the UNGPs. Myanmar had also committed to the same but the country is now mired in civil unrest since the military coup of February 2021.

Thailand, under military dictatorship, stepped out in front of fellow-ASEAN members. It promulgated a NAP on BHR for the period 2019-2022, having accepted a Swedish recommendation in the second cycle (2016-2020) of the Universal Periodic Review (UPR) of the Human Rights Council (HRC) to develop and enact one. Thailand worked closely with the UN Working Group on BHR and with the BHR unit of the United Nations Development Programme (UNDP) in Bangkok. It should be noted that Thailand's National Human Rights Commission (NHRC) had already been investigating Thailand's business activities abroad following allegations of overseas human rights violations by Thai companies. The NHRC had submitted to the cabinet a proposal for the government to ensure observance of human rights by Thai corporations, including in their overseas investment (Nonthasoot, 2017).

While NAPs are welcome in the BHR context, limitations and critiques based on existing action plans globally are noteworthy. This chapter looks at the process of NAP development in the region, critiques and limitations based on examples from other jurisdictions, a case study of the Thai NAP and current challenges facing NAP development.

3 Assessing the Process of NAP Development

In considering and drafting NAPs, Benjamin and Sta. Maria (2018) have pointed to four indicators that can be used to assess the NAP development process across the region: 1) seeking a formal commitment from government to engage in the NAP process and designating leadership, 2) creating a format of cross-department collaboration with government, 3) establishing platforms of engagement and consultations with various stakeholders and providing resources for the process and 4) arriving at agreements on what to do with the outcome of consultations to ensure the credibility of a NAP.

Indicators for NAP Development



3a Seeking Formal Commitments

It is noteworthy that National Human Rights Institutions (NHRIs) have been at the forefront of recommending NAPs in Indonesia and Malaysia. In the former it was KOMNAS Ham that recommended the development of a NAP on BHR given that the National Human Rights Action Plan 2014-2019 did not reflect the UNGPs. Komnas HAM, supported by civil society, launched a NAP in June 2017 with little support from the Government. By November 2017, the Government indicated that it would develop national guidelines by 2018, with the Ministry of Economic Affairs leading the initiative. It has been reported to the authors that Indonesia may announce a NAP at the UN Business and Human Rights Forum at the end of 2021.

In Malaysia, it was the Malaysian National Human Rights Commission (SUHAKAM) that prompted the Government to act after the former released a study on BHR in 2010. Malaysia committed to developing a national framework for BHR in 2015. On 24 June 2019 the Minister of Laws, YB Liew, formally announced a cabinet decision to launch a process to develop a business and human rights NAP. (Globalnaps, 2021) Progress has been stalled with political turmoil in Malaysia over the past few years. Governmental action has been spurred by the Presidential Human Rights Commission (PHRC), backed by CSOs. Work has stalled and no baseline study has been conducted as of yet. However, it should be noted that SUHAKAM has been active for a long time on Indigenous issues and land rights. Impetus from UNDP has spurred interest in a BHR framework in Malaysia, but political turmoil has halted progress (UNDP, 2021).

In Myanmar, following the victory of the National League of Democracy (NLD) in the parliamentary elections of 2015, nudged by UNDP, the then Economic Adviser to the government of Myanmar had announced that the government intended to develop a NAP. Thereafter, the Myanmar National Human Rights Commission (MNHRC) together with the ASEAN-CSR network and the Union of Myanmar Federation of Chambers of Commerce (UMFCCI) held a workshop on NAP development. (Globalnaps, 2021). The UNDP noted in 2018, that general human rights discourse in ASEAN, had prompted Myanmar

to come forward and take initial steps towards implementation of the UNGPs. For example, the National Human Rights Commission of Myanmar organized a workshop on the UNGPs in October 5 2018 where officials from the Ministry of Economy were both present and engaged. The appetite to engage B&HR issues may be growing in Naypyidaw. Where this is the case, UNDP will do its best to feed Myanmar's interest as part of the project objective to promote an all-of ASEAN shift towards responsible business practices (UNDP, 2018).

The push for a NAP bore fruit when Dr. Aung Tun Thet, former Chair of the Local Network and Economic Adviser to the President, announced that Myanmar would pursue a NAP. The coup d'état of February 2021, has stalled these efforts. The alternative government to the military junta, the National Unity Government opposition, has signaled the need for accountability of domestic and foreign companies continuing work with the Junta (The Irrawaddy, 2021).

In the Philippines, a clear commitment to a NAP development process is yet to emerge. The PHRC is responsible for the State's human rights agenda, but no concerted strategy has been developed yet. PHRC held a government consultation on a National Action Plan on Business and Human Rights in 2017, and the undersecretary for the Presidential Human Rights Committee announced in March 2017 that the Executive Branch would start developing the Third National Human Rights Action Plan for 2018-2022, though the inclusion of business and human rights remained unclear. (DIHR, 2021)

At present only the Commission on Human Rights (CHR) and CSOs have been pushing the BHR agenda. The CHR has deemed complaints about violations of human rights by business entities to be under its ambit. The CHR and other stakeholders proposed in February 2018, for example, that the UNGPs be incorporated into the Corporation Code of The Philippines, though ultimately they were not successful (CHR, 2018).

In Thailand, it is the Rights and Liberties Protection Department of the Ministry of Justice which is mandated to implement a recommendation from Sweden and accepted in May 2016 during the UPR process. It should nevertheless be noted that, prior to the adoption of its NAP, Thailand's National Human Rights Commission (NHRC) had already been investigating Thailand's business activities abroad following allegations of overseas human rights violations by Thai companies. The NHRC had submitted to the cabinet a proposal for the government to ensure observance of human rights by Thai corporations, including in their overseas investment (Nonthasoot, 2017).

In Vietnam, a laudable engagement with CSR is slowly being transformed into an engagement with BHR. While no such framework for the latter exists, the Ministry of Justice has committed to developing one (B+HR Asia, 2018). In 2018, the UNDP reported, while anticipating a 'slow and lengthy process' noted that

At the request of the Government of Vietnam, UNDP will provide assistance to draft a 'Road Map to Business and Human Rights'. This request signals one of the most important opportunities to position another ASEAN country on the same track as Indonesia and Thailand. The appointment of a clear focal point for Business and Human Rights within the Ministry of Justice and the workshop planned for March on the road-map, also evidences encouraging progress. ... UNDP is investing in advocacy efforts to have Business and Human Rights as a subject in focus of the recommendations which will be presented to Vietnam during the UPR process in January. A recommendation on BHR presented and accepted by the Government of Vietnam would be a game changer and significantly facilitate project implementation in this country (Ibid.).

While nervous about engaging in human rights generally, Vietnam has committed to promoting awareness of the minimum responsibilities of business in respecting human rights. It is hoped that the NAP may be completed by 2023 (DIHR, 2021).

While no baseline study has been undertaken yet, in October 2018, the Ministry of Justice, in partnership with UNDP Vietnam and the Government of Sweden, produced a 'Preliminary Assessment of the Regulatory Framework on Responsible Business in Vietnam'. The study represents a potential starting point in building a coordinated plan and in identifying priority areas for the development of a NAP on Responsible Business Practice (RBP). It provides an analysis of laws and policies in relation to the adoption of the UNGP and Vietnam's commitments to international treaties and agreements (UNDP, 2020b).

Legal developments relevant to BHR in Vietnam portend favourably towards a future NAP. These include recent amendments to laws - on Enterprises (2020) and on Investment (2020) - that took effect on 1 January 2021, aimed at enhancing Vietnam's responsible business practice and overall business environment. Vietnam has ratified 25 International Labour Organization Conventions as of 2021, including seven fundamental conventions covering the areas of collective bargaining, nondiscrimination, child labor and forced labor (ILO, 2021).

3b Cross Departmental Collaboration

One of the problems in the last few years has been weak or non-existent cross departmental collaboration, (Benjamin and Sta. Maria, 2018) with the exception of Thailand, which created a national committee to work on the NAP. In Thailand's case, an implementation MOU involved the NHR Committee, the Ministry of Justice, the Ministry of Foreign Affairs, Ministry of Commerce, Federation of Thai Industries, the Thai Bankers association, the Thai Chamber of Commerce and the Global Computing Network of Thailand. A Thai CSOs Coalition for the UPR collaborated in the process.

Elsewhere, collaboration was weak perhaps due to concerns of departmental jurisdictions over human rights and the 'optimistic belief' that a NAP, once adopted by the highest authority, may be readily implemented. How this might be achieved is not clear in Indonesia, for example, where regional governments have local autonomy. Failing an agreement with national authorities or KOMNAS Ham would have difficulty with implementation.

In Malaysia, it appears that since June of 2019, the crafting of a BHR framework lies within the Legal Affairs Division of the Prime Minister's Department (BHEUU) – the government body mandated to draft the NAP on BHR. Collaboration has ensued between BHEUU and the UNDP regional BHR unit in Bangkok. BHEUU also set up a core working group to support the development of the NAP and organised a training to focus on the relevant government ministries and agencies involved: 1) Ministry of Human Resources; 2) Ministry of Environment and Water; and the 3) National Governance, Integrity and Anti-Corruption Centre, Prime Minister's Department (UNDP, 2021).

In Myanmar, steps were taken in collaboration with the National Human Rights Commission, Ministry of Investments, and ministry departments on company registration, investment commission, and environment conservation (Globalnaps, 2021).

In Vietnam, the Ministry of Justice has led the way, collaborating with the Ministry of Planning and Investment, and the Vietnam Chamber of Commerce and Industry (VCCI), in UNDP capacity building workshops and dialogue in 2018 (B+HR Asia, 2018).

3c Platforms for Engagement with Stakeholders

Thailand and Indonesia had established such platforms. The Thai National Committee and the CSO coalition were noted, though it remains unclear the degree to which the latter and the business sector were able to affect the final text of the NAP. In Indonesia Komnas HAM, ELSAM and the Business and Human Rights Working Group (BHWG) collaborate on ensuring consultations, notably between CSOs and the private sector.

In Malaysia, the BHEUU has led the way through virtual consultations on stakeholders, amidst the Covid-19 pandemic, leading to the identification of three thematic areas of focus: labor, environment, and governance.

In Myanmar, in the absence of a national platform there emerged initiatives from CSOs, seeking to build awareness on BHR in Myanmar, such as the Myanmar Centre for Responsible Business (MCRB). Others

include the Alternative ASEAN Network on Burma (ALTSEAN-Burma) and the International Corporate Accountability Roundtable (ICAR) initiated in December 2017, a 'Shadow National Baseline Assessment (NBA) of the Current Implementation of Business and Human Rights Framework' to support NAP development in Myanmar. Topics of concern included land rights, labour rights, state-owned enterprises, and access to remedy.

In Malaysia, Myanmar, the Philippines and Vietnam there are no such national platforms for engagement by all stakeholders.

3d Credibility of NAPs

The credibility of NAPs is tied to stakeholder participation and input. Michael White (2021) has noted that, worldwide, most NAPs have failed to: (1) conduct comprehensive baseline assessments to inform the NAP content; and (2) facilitate the participation and consultation of key stakeholders, including individuals historically discriminated against; Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) people; women; children; and afro-descendants.

In the Thai process, stakeholders were informed that baseline studies carried out by the Thai CSO coalition, notably in marginalised communities, would be considered in developing policies and recommendations for the NAP.

The credibility and effectiveness of NAPs, according to Benjamin and Sta. Maria, depended on several key aspects for the State: 1) the commitment of the highest-ranking state officials, 2) State allocation of resources (technical and financial), 3) State-defined leadership structure to coordinate across ministries; 4) Engagement of the executive branch of government, 5) State bureaucracies engaging with their respective networks to inform the process, and 6) a State led process of drafting a terms of reference for the process, the priority issues, for implementation and for eventual claims by victims. (White, 2021).

The credibility of the unfolding NAPs processes in Malaysia, the Philippines and Vietnam is uncertain. In Malaysia, based on the plans of BHEUU, the office was supposed to have done an NBA this year, with a view to releasing a Zero Draft NAP by 2022. There was due to be another round of consultations on the draft, especially given the challenges brought about by the pandemic, so the launch could only take place in 2023. However, the COVID-19 pandemic has disrupted plans, including on when and how the UNWG could provide inputs. In the Philippines there is no clear roadmap on a NAP. CHR and non-governmental stakeholders are pushing the agenda. In Vietnam, the government remains skeptical of human rights matters and moves grudgingly towards a NAP.

4 Challenges of NAP Development: Drawing Lessons from Other Jurisdictions

The overall objectives of NAPs, note Augenstein, Dawson and Thielbörger (2018), are to: take stock of existing state measures that contribute to the implementation of the UNGPs; identify gaps in states' legal and policy framework that require further action; and outline strategies to close protection gaps and to otherwise prevent and redress corporate-related human rights abuse. These objectives were not being

served properly by existing NAPs globally. As states pursue their obligations under Pillar 1 of the UNGPs, they must also take into consideration the experiences of other jurisdictions, which point to significant pitfalls.



4a Failure to Conduct Baseline Studies

Early NAPs in the UK, Denmark, the Netherlands, Finland, and Sweden, suffered from a failure to conduct baseline studies, which is necessary to address the specific problems faced in each jurisdiction. (DIHR and ICAR 2015) In the ASEAN area, Mohan and Morel (2015) noted the need for addressing specific contexts. In the case of Thailand, the Government's process commendably undertook a baseline study.

4b Need for Greater Transparency and Stakeholder Participation

Transparency and participation during the elaboration of the NAP as well as the provision of clear instruments to implement and to monitor the implementation are conditions for achieving this expectation. A Sao Paulo Law School report (2016) noted that 'a NAP elaborated without proper consultation does not consider the views and demands of all stakeholders and, therefore, may not relate to the human rights reality of the country.' Furthermore, 'a NAP which does not have legitimacy amongst relevant stakeholders faces the risk of not being implemented'.

The European Network of National Human Rights Institutions (ENNHRI) has offered biting criticism of procedural and substantive shortcomings in the development of EU member state NAPs: It noted that NAP processes in some Member States were 'neither participatory nor transparent', that stakeholders were involved 'weakly or not at all', and that civil society organizations in particular frequently lacked 'even basic information or opportunities to engage in dialogue with government representatives'.

The Thai drafting process started with a consultation of stakeholders as it produced its baseline study, discussed below. Although a 'zero draft'⁸ had been circulated for commentary by June 2018, the consultation and drafting process in Thailand had faced some criticism for being top heavy, with limited consultation with community organisations (Manushya Foundation, 2018).

In other countries of the region, thus far, promotional endeavours with the assistance of the UNDP have been undertaken, such as in Indonesia, Malaysia and the Philippines.

4c Neglect of Existing Obligations under International Law

NAPs should not provide a means for States to neglect their existing obligations under international human rights law. This was the key message of Dr. Seree Nonthasoot, Thailand's former representative to AICHR at Asia Centre's International Conference on Business and Human Rights: Holding Governments Accountable (BHR Conference) in July 2018 (Asia Centre, 2018). The UNGPs did not create any new duty but amalgamated existing human rights precepts underpinned by the recognition of the roles of businesses in human rights protection (Nonthasoot, 2017).

4d NAP Language Not Aligned to Human Rights Treaties

NAPs are not written in the same language of international human rights treaties, which would help to reconcile national plans with such law. Michael White (2021) has noted that NAPs generally do not present new policy or legislative commitments, rather, they often merely summarise existing State commitments. He noted, for example, that the issue of remedy had also not been dealt with in a meaningful way in the majority of NAPs to date. As more States continue to undertake NAPs processes, it is crucial that they address these important concerns.

A report by the The Sao Paulo Law School and UK Embassy in Brazil (2016), noted that the use of traditional human rights language 'is a key element for the effectiveness of the human rights and business agenda, since it makes it possible to establish a common ground between the demands of the affected peoples, which commonly use the human rights grammar, and the actions taken by States and by companies'. The absence of human rights language runs the risk of NAPs being used as mere political tools and not as human rights tools.

The CHR of the Philippines proposed amendments to the Corporation Code, led by the late Chito Gascon, that indicated the kind of human rights alignment that is needed in existing laws and that should also be included in NAPs. It proposed, for example, that Section 125 of the Code regarding incorporation of a company that such incorporation be subject to the stipulation that the said purposes for incorporation are those stated in in the certificate of authority and

5. ...Provided further, that it shall be part of the purposes of a corporation to support and respect the protection of internationally proclaimed human rights and make sure it is not directly involved or complicit in human rights abuses in their operations, products or services within the Philippines or in such other state where they conduct their business CHR, 2018).

4e Lack of Clarity

Existing NAPS across the world display a lack of clarity on the roles and responsibilities of States and companies in relation to human rights violations. In addition there tends to be a confusion between business responsibility to respect human rights with corporate social responsibility, which are voluntary actions taken by companies. (Sao Paulo Law School, c. 2016) AICHR's first study on CSR noted that States had to move beyond CSR and to address human rights based responsibilities (Thomas and Chandra, 2014).

4f Problem of Monitoring

The consequence of a lack of clarity of the roles and responsibilities of States and companies, is the difficulty in monitoring the implementation of the NAP. Indicators should be incorporated in the NAPs to guide the adoption of further policies and practices for the implementation of the UN Guiding Principles (Augenstein, 2018; Sao Paulo Law School, c. 2016). Germany's approach to monitoring the implementation of its NAP over 2019 and 2020, is instructive and points to the kind of process needed. It starts with five key elements of human rights due diligence enshrined in its NAP: 1) there is a public policy statement on respecting human rights; 2) a procedure for the identification of actual and potential adverse impacts on human rights is in place (risk analysis); 3) corresponding measures to ward off potential adverse impacts and checks on the effectiveness of such measures have been introduced; 4) Reporting takes place; and 5) the enterprise has established or participates in a complaints mechanism. Germany has developed a sound monitoring methodology, which includes: 1) a process based on methodologically sound scientific standards that took account of very different company situations and the varied challenges of different organisations; 2) a questionnaire providing for a 'comply-or-explain mechanism' in all questions; 3) conduct of interviews with talks were with representatives of social partners, business associations and NGOs; 4) a multi-stage plausibility review in which information provided companies was triangulated with information from media reports, and follow-up questions; and 5) the use of statistical methods to eliminate possible bias. The German Foreign Ministry has noted that:

All ten ministries of the Inter-ministerial Committee on Business and Human Rights, the relevant government body, lent their close and ongoing support to the monitoring process. All decisions by the Inter-ministerial Committee were taken by consensus. The Business and Human Rights Working Group of the National CSR Forum was involved in the work. The Federal Foreign Office commissioned a consortium headed by the auditing firm Ernst & Young (EY) to perform the survey. It also comprised Sustain Consulting, adelphi consult and focusright (Auswaertiges Amt, 2020).

The German Foreign Ministry noted that in 2020, 'the target of at least 50 percent 'NAP compliers' set by the Federal Government has therefore not been achieved.' In such a case, the government's approach stipulated that: 'if an effective and comprehensive review of the NAP in 2020 finds that companies' voluntary commitment is insufficient, we will introduce appropriate legislation at the national level and advocate an EU-wide regulation' (Ibid.).

4g Inadequate Design of Regulatory Mix to Protect Human Rights

NAPs did not sufficiently explore regulatory options - proper regulatory mix - to ensure adequate human rights protections nor the issue of access to remedy. Action plans tended to focus on 'awareness raising', 'research', 'other voluntary measures'. There was little focus on supporting the development of regulatory actions. (DIHR and ICAR, 2015) Effective implementation requires that the three pillars - Protect, Respect, Remedy - be treated as complementary, but many NAPs treated them 'unevenly, with little attention given in particular to remediation (Pillar 3)' (Augenstein, et al., 2018; White, 2021).

It has been noted by the Danish Institute for Human Rights (DIHR) (2014) that NAPs must go beyond the UNGPs (DIHR, 2014). It noted the need for alignment with constitutional provisions in each country which, argues Michael White, are quite progressive in some cases and entail a possible status of companies as duty bearers (White, 2021). CSOs have strongly advocated for NAPs that impose new regulations on business, failing which, achieving the second second pillar of the UNGPs - responsibility of business

organisations – might not be mandatory (HOMA, nd). It might lead to the conclusion that companies do not have obligations but only moral responsibilities that are secondary in nature stemming from social expectations (Ibid.). This is all the more important, given that:

The “State-business nexus” is particularly important in the South East Asian context, where there is a high degree of involvement of governments in business activities. This can create uncertainty about where government action ends and business activity begins. This complexity reinforces the need for NAPs to include commitments to develop new laws, policies, and regulations that send clear signals to businesses on how to conduct their activities. Transparency and accountability of the state in these environments is equally important and should be incorporated in NAPs (Ibid.).

The regulatory mix that may be in-built into NAPs include not only constitutional and international human rights obligations. A number of other sets of regulations are needed in the following areas. First, human rights protections may be extended and embedded into other areas such as investment promotion and regulation, which is surely an important dimension to the duty of states to protect. Second, protections must also extend to the informal sectors of Southeast Asian economies, which represent a significant part of regional GDP. This would go a long way to addressing issues of inequality and poverty. Third, as per Guiding Principle 7, states must ensure that companies doing business in conflict zones should not be involved in human rights abuses and to pay attention to gender-based and sexual violence. When operating in high risk zones, such as conflict zones, due diligence is required under Principle 23. In such circumstances, business organisations should consider whether to continue operating in that location. In such contexts, business organisations should have the responsibility of supporting the community in such a way as to try to overcome any conflict trap – further polarizing communities, undermining democratic institutions and exacerbating root causes of conflict such as poverty, inequality and capital flight (Ibid.).

4h Backward Looking NAPs

Finally, NAPs tended to be backward looking and not forward looking. Such NAPs pointed to past actions as opposed to identifying future actions (ENNHRI, 2015; DIHR and ICAR, 2015). ENNHRI noted in its 2015 report that EU Member States’ published NAPs had by then mostly described historical actions, and lacked specific commitments capable of demonstrably improving UNGPs implementation at national level (ENNHRI, 2015). In the Thai NAP a significant portion of the document is devoted to documenting the challenges and actions taken leading up to the NAP.

5 Overview of the Thai NAP Process

The government of Thailand, amidst considerable domestic political turmoil ongoing since 2014, adopted a strong process to the development of the NAP with extensive consultation domestically, regionally and internationally. In January 2017, a Cabinet resolution assigned the Department of Rights and Liberties Protection (RLPD) of the Ministry of Justice, a novel assignment for this Ministry, to take the lead in the implementation of the UNGP and in the drafting and implementation of a NAP-BHR.

A NAP National Committee guided the drafting and monitored the NAP process. The Committee, chaired by N. Pairchaiyapoom of RLPD, included the Office of the National Human Rights Commission of Thailand, Ministry of Foreign Affairs, Ministry of Commerce, Ministry of Finance, Ministry of Labor, among other relevant agencies. The drafting process proceeded in phases outlined in Table 2.1:

Table 2.1 Process of NAP Development in Thailand

Phase	Activities	Process and Stakeholder Issues
Phase 1 (2016-2017) <i>Consolidation of information on the situation of business and human rights at the local level</i>	National Baseline Assessment (NBA); data gathering from stakeholders.	Stakeholders outline grievances: minority groups issues include deforestation, land evictions; land rights and difficulties facing human rights defender; and the absence of participatory process in Environmental and Social Impact Assessment (ESIA) in the South.
Phase 2 (2017-2018) <i>Drafting and consultations on the National Action Plan on Business and Human Rights (Round One)</i>	Zero Draft developed Development, in participation with Thammasat Faculty of Law. First round of consultations leading to invitation of UNWG on BHR.	Draft heavily criticised and decision to rework. A new draft heavily criticised by CSOs.
Phase 3 (2018-2019) <i>Consultations and dialogue on the National Action Plan on Business and Human Rights (Round Two) and the final revision of the National Action Plan.</i>	Second round of consultations; cluster meetings, focus group discussions in collaboration with UNDP. 29 October 2019, Thai NAP is adopted.	Consultations lead to a revised draft that is adopted by the Cabinet.

(RLPD, 2019)

In the first phase above, a National Baseline Assessment (NBA) was also undertaken by the Thai Business and Human Rights Network to inform the development of the NAP. The NBA development process involved four sub-regional dialogues organised. Despite criticisms noted above, the participation and inclusion of the most at-risk and marginalized communities in the context of business and human rights was a key aspect to these interactions. Indigenous peoples, environmental human rights defenders, migrant workers, formal and informal labour workers, LGBTI activities, persons living with HIV/AIDS, sex workers, persons with disabilities and the elderly were actively engaged in the process.

In the second phase, in 2018, the United Nations Working Group on Business and Human Rights (UNWG) completed a 10 day mission to Thailand. They engaged in an open dialogue with various stakeholders including government, civil society organisations and business on current initiatives, opportunities and challenges to implement the UNGPs. Despite the consultations that had been undertaken, from a process perspective the Working Group considered more still needed to be done on the process. It had noted that further efforts would be needed to ensure an inclusive process, for example by making information about the NAP process available on the Ministry’s website, an open call for input and comments, and engagement with a wider group of civil society and business actors. In addition, the Working Group recommended that the NAP place special attention on: access to remedy, gender, and links with the SDGs.

The content of the Thai NAP adopted by the Cabinet in Phase 3 was divided in four chapters as shown in the Table 2.2 below:

Table 2.2 Outline of Thailand's NAP on BHR

Chapter	Content
Chapter 1	Background on the UNGPs, its three pillars and guidelines for drafting a NAP
Chapter 2	The development process of the NAP in Thailand, its key priority areas, its relevance to other national plans and strategies and to international commitments of Thailand.
Chapter 3	Outlines the key areas of commitment of Thailand under the NAP - 1) labour; 2) community, land, natural resources, and the environment; 3) human rights defenders; and 4) cross border investments and multinational enterprises - and a matrix of localised approaches, actions, time frames and indicators for compliance with the national strategy, the SDGs and the UNGPs.
Chapter 4	Outlines the implementation process, the most vital part of the NAP.

(RLPD, 2019)

Upon adoption the RLDP urged implementation and divided the same into short-term (2019-2020) and long-term (2019-2022) activities. A National Committee to Drive Forward the Implementation of Human Rights Affairs was established by the Ministry of Justice as well as a Sub-Committee to engage in implementation, promotion and evaluation of human rights issues so as to ensure alignment of the national human rights agenda. The RLDP held high-level dialogues across concerned ministries to improve their understanding of the NAP and selected provinces around Thailand to test the plan.

Thailand has thus become a leader in the region on BHR matters and, judging by the commitment of its current prime minister, it aims to be a champion of BHR regionally. Nevertheless, implementation is key to the NAPs success. While Governments upholding specific commitments may be easier to accomplish and monitor, whether big and small businesses can do so remains to be seen. A significant challenge that remains is the awareness among businesses of their responsibilities under the NAP.

The substantive rights areas included for action in the Thai NAP are: 1) labour; 2) community, land, natural resources, and the environment; 3) human rights defenders; and 4) cross border investments and multinational enterprises. A matrix of localised approaches, actions, time frames and indicators for compliance with the national strategy, the SDGs and the UNGPs was developed.

The Thai NAP and other NAPs processes reveal some of the challenges that were identified above, from other jurisdictions.

6 Key Challenges in Southeast Asian NAPs Development

The preceding sections have provided an overview of the complexity of the processes required for credible and effective NAPs development, drawing also from jurisdictions in Southeast Asia. There are significant challenges remaining. These challenges include incomplete NAPs, political will and misunderstanding of NAPs, political turmoil, discomfort with human rights and regression in rights and democracy.

6a 'Incomplete' NAP

White (2021), commenting on the then final draft NAP in Thailand, circulated in February 2019, noted that whilst it was good to see these focus areas (particularly cross border investment), the draft Thai NAP suffered by then from many of the same content issues of its predecessors from other countries: It failed to deal with remedies in any meaningful way, it did not adequately include state-based non-judicial grievance redress mechanisms; it did not include customary laws and practices of affected communities and it did not address barriers to accessing remedy. In many areas it did not provide concrete forward looking steps and an implementation/monitoring framework. It did not have legally binding mandatory provisions to hold business to account. It did not appropriately address the state business nexus and failed to incorporate key elements specific to the South East Asian context such as the informal economy and post conflict/conflict situations. In addition, he observed that it will be interesting to see whether a Eurocentric model (with its identified issues for achieving impact) without being adapted to the specific South East Asian context and culture will deliver meaningful change.

Following on from White's critiques, the provisions in the Thai NAP on labour rights is revealing of a soft commitment to human rights obligations. The typical approach on this and other rights areas covered by the NAP, provides a list of labour related international instruments that Thailand has ratified, identifies challenges and states governmental actions and priorities in this area. In relation to 'taking action on the business sector' the chapter on labour states, in relation to Pillar 1:

The State should initiate a pilot project with the private sector to set an example for various operators in the implementation of human rights **principles**. All types of entrepreneurs and businesses **should** be encouraged to respect human rights. Illegally established business enterprises **should** be prevented and suppressed. Measures for businesses of all sizes to conduct the Human Rights Due Diligence Report and disclose the report to the public **should** be stipulated. The dissolution and registration of companies **should** be examined to prevent the use of corporate principles in order to avoid not following verdicts. Measures to control employers to comply with labour laws **should** be established. Measures that apply to the fishery sector **should** be properly applied to look after the labour conditions in other industrial sectors such as agriculture and construction. Knowledge on the UNGPs and the NAP **should** be disseminated to businesses of all sizes as well as companies, branches and supply chain groups, etc *[emphasis added by authors]*

Actions in relation to Pillar 2 are equally soft. Stipulations related to state enterprises are somewhat perfunctory. On labour rights and discrimination, the NAP adopts the same language, 'should', rather than 'must' or 'shall', is provided for in relation to the responsibilities of business organisations (See Table 2.3 below) which must comply with human rights 'principles' and 'should' provide welfare for workers.

Table 2.3: Pillar 2 - Responsibilities of the Business sector in Respecting of Human Rights under the Thai NAP

2.1 Compliance with labour laws, the Thai Labour Standards and the principles of human rights

- State enterprises and the business sector **must** provide an announcement or a statement on the human rights policy in their organisations. This includes the UNGPs.
- State enterprises and the business sector **must** implement the Thai Labour standards, respecting and strictly complying with labour laws.
- State enterprises and the business sector **must promote** knowledge about labour laws, the Labour Standards and human rights principles, both in Thailand and internationally, to labour in the workplace.
- State enterprises and the business sector **must** cooperate with government agencies and international organisations in case there is an inspection of operation under labour laws, the Labour Standards and human rights principles.

2.2 Labour rights and welfare

- State enterprises and the business sector **should** provide welfare for workers and their families, such as childcare centres in a workplace.
- State enterprises and the business sector **should** not force workers to work overtime. Overtime work must be voluntary or by necessity, such as without doing so would cause damage. Overtime work should be proposed to workers systematically depending on the necessity.
- State enterprises and the business sector **should** establish measures to certify or insure health care for workers in the workplace.
- State enterprises and the business sector that use migrant workers **should** be responsible for the costs of recruiting labour and other expenses in accordance with the ‘employer pay principle’.

2.3 Elimination of discrimination in the workplace

- State enterprises and the business sector **should** specify measures and policies **to show the intention** of supporting equal opportunities without discrimination in employment, recruitment, compensation, termination, promotion and removal of any conditions that cause a negative impact on employees and job seekers as appropriate.
- State enterprises and the business sector **should** establish measures and policies to
- prevent sexual harassment in the workplace.
- State enterprises and the business sector **should** increase the employment of women, ethnic groups, persons with disability, senior citizens, ex-convicts, etc. by considering as appropriate, including requiring the establishments for proper facilities set-up.
- State enterprises and the business sector must not consider not employing or terminating employment due to HIV infection.

2.4 Complaint and remedy mechanisms

- State enterprises and the business sector **should** provide internal channels for complaint/petition mechanisms and keeping it as confidential information. Many channels **should** be opened and must have a convenient and fast access for tracking, such as on the website and via application on mobile phones, etc.
- State enterprises and the business sector **should** hold discussions to mediate disputes to achieve resolutions between workers before bringing the case to justice by giving the opportunity for workers to participate in negotiations.
- State enterprises and the business sector **should** agree on measures to remedy damage to workers in the event that workers’ human rights are violated. The remedies should cover physical and mental damage.
- State enterprises and the business sector **should** specify measures and mechanisms to support and solve issues around firing workers, including compensation for termination of employment in accordance with the relevant laws

[emphasis added by authors]
(RLPD, 2019)

In addition, while outlining its formal commitments to various international labour standards, the NAP does not itself specifically itemise the list of fundamental labour rights that business organisations ‘must’ or ‘shall’ abide by under national and international law. It could have provided, crucially, the key provisions from the International Covenant on Economic Social and Cultural Rights (ICESCR) (notably Articles 6, 7 and 8) and a list of core fundamental standards found in eight key labour conventions regarding freedom of association, right to organize and collective bargaining, forced labour, abolition of forced labour, minimum age, child labour, equal remuneration and discrimination in the work place (ILO, 2021).

In relation to Pillar 3 concerning remedies the NAP usefully provides, inter alia, for a number of actions (for various bureaucracies) including:

Remedies Provided by Thai NAP

<p>Complaint System</p>  <p>Establish a system and develop staff competency in order to receive complaints effectively</p>	<p>Employee Welfare Fund</p>  <p>Employees have the right to access the Employee Welfare Fund as regulated in the Labour Protection Act 1998</p>	<p>Remedy Mechanism</p>  <p>Mechanisms are set in place from both the government and private sectors at the regional level. They are consistent with the needs of affected people.</p>
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It is to be hoped that more forceful language and clear articulation of the fundamental rights may feature in successive NAPs, including the right to a remedy which is firmly established in international human rights law. (UNGA, 2006) Other areas of the Thai NAP are briefly discussed in the concluding chapter.

6b Political Will and Misunderstanding of BHR

Confusing signals from Indonesia’s Government has further delayed the adoption of a NAP specifically on BHR, even if it was the first country to launch a draft NAP in 2017. This draft was abandoned and new discussions began in 2019. It is not clear which route the Government will go: a specific NAP on BHR or stick to the BHR chapter in the National Action Plan on Human Rights. More consultation is needed at the national level to clearly distinguish on the differences between CSR and BHR, and the inadequacy of the former. At the time of writing, it seemed that Indonesia was set to announce a NAP, albeit a weak one, at the Business and Human Rights Forum in Geneva.

6c Political Turmoil

Political turmoil has thus far foiled attempts at a NAP in Malaysia and Myanmar. The delay in the NAP process in Malaysia is due to changes in Government following corruption allegations against Primer Minister Najib that brought down his government in 2018 and due to a political coup in 2020, which saw the recently elected Government of Prime Minister Mahathir fall as a consequence of Parliamentary procedures. The COVID-19 Pandemic also affected the BHEUU’s timeline, consultation process, and mechanisms in reaching out to various stakeholders across the country. Nevertheless work has continued virtually and a Zero Draft could forthcoming in 2022, with a view to the adoption of a NAP in 2023.

In Myanmar, significant work remains to be done before a full understanding of BHR can be achieved across government bureaucracies. This was eminently obvious at an AICHR regional workshop on BHR in 2017, at which many officials from multiple bureaucracies were present.⁹ In the current pandemic context, BHR is not on the radar of governmental priorities. While many in the current context of the national civil conflict are urging businesses to cut ties to the military junta, Vicky Bowman, Director of the Myanmar Centre for Responsible Business (MCRB), has called attention to the fact that businesses pay taxes and that these are badly needed in Myanmar so as to maintain basic public services (Logan, 2021).

While the Ministry of Investment and Foreign Economic Relations (MIFER) has already conveyed that a NAP is not their priority at the moment, Bowman believes that the MIFER should take the lead in developing a NAP. 'It's a natural fit' and it understands the issues on responsible business and investments more than any other ministry (Bowman, 2021). MIFER was established to improve responsible investments and to facilitate international economic cooperation (Ministry of Investment and Foreign Economic Relations, n.d.).

6d Discomfort with Human Rights

A general and well-known discomfort with international human rights standards and obligations lies at the core of the non-engagement with the BHR agenda in a number of countries, including Brunei, Cambodia, Laos, Myanmar and Singapore, as well as the hesitant engagement of others, notably Vietnam. In addition, there are confusions between BHR and responsible business conduct. Yuyun Wahyuningrum, Indonesia's Representative to the ASEAN Intergovernmental Commission on Human Rights has noted the perception in Indonesia of human rights as involving 'shaming and blaming', while some government officials see human rights as stumbling blocks to investments.¹⁰ Vietnam is notoriously reluctant to engage on perceived 'western' standards of human rights.

6e Regression in Rights and Democracy

Thailand's NAP and the reluctant process underway in the Philippines, prodded by the CHR, both take place amidst a serious regression in rights and democracy in these two countries in particular. In the latter country, the Economic, Social, and Cultural Rights Center (ESCRC) of the CHR has taken up the challenge of providing 'Guidance Document on Business and Human Rights' (December 2020) to educate stakeholders on the UNGPs and to situate BHR in the context of the Philippine Development Plan for 2017-2022. This context in particular, calls for greater scrutiny of the State's commitment to human rights and to ensure that NAPs on BHR do not remain merely symbolic acts for public consumption.

7 Conclusion

Given these serious critiques of NAPs in countries that are progressive on the human rights front, it is therefore necessary to keep the focus on Asian Government's actions, duties and responsibilities as BHR in Asia advances through NAPs and other regulatory and policy frameworks. These critiques of NAPs also point to the need to identify complementary ways in which to advance BHR, elements of which are explored in this work.

⁹ Asia Centre participated in this workshop.

¹⁰ Yuyun Wahyuningrum in a personal communication to CALD, 17 June 2021, in the context of research for this work.

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Chapter 3: National Action Plans On Business And Human Rights In Southeast Asia: What Role For Parliamentarians?

Paolo Zamora and Francis Gerald Abaya

1 Introduction

Since the start of the process of drafting National Action Plans (NAP) on Business and Human Rights (BHR) in Southeast Asia, there has been no involvement of parliamentarians. More troubling is the lack of awareness among parliamentarians of BHR principles and the lack of pronouncements on the various NAP processes. The legislative branch, whose role it is to scrutinise the Executive, to promote and protect human rights and ultimately to pass laws of the land on this matter, must play an active role in NAP development and in demanding that the Executive be accountable in the development of NAPs on BHR.

Ten years have passed since the launch of the United Nations Guiding Principles (UNGPs) on BHR and it appears that global standards and initiatives on the intersections between business and human rights continue to evolve around these principles.

In order to promote the effective and comprehensive implementation of the UNGPs, the UN Working Group (UNWG) encouraged states, business enterprises and civil societies to work together and develop a NAP. The NAP is a manifestation of UNGP translating into practice the three pillars of 'protect, respect, and remedy.'

The NAP is an 'evolving policy strategy developed by a state to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights' (UNWG, 2014). It is a policy document that reflects the plans and concrete actions of the government as well as the expectations from businesses.

The UNWG recognises that there is no 'one size fits all' to NAPs. However, it considers four vital elements to be integrated in a NAP to fully achieve its impact (Ibid.):

1. it must be in accordance with the UN Guiding Principles, which includes state duties to protect business-related human rights and provide an effective remedy;
2. it must respond to challenges of the national context;
3. its development process must be inclusive and transparent; and
4. it must be regularly reviewed and updated.

This chapter discusses the process of NAP development in the Southeast Asian subregion, and the role (or lack of it) of parliamentarians in the process. To accomplish this task, the authors conducted extensive desk research and key informants interviews on the substance and process of the NAP in the subregion. It should be noted that the role of Parliamentarians has not been treated thus far in the eclectic literature on business and human rights in Southeast Asia. This chapter seeks to overcome that lacuna.

This chapter complements Chapter 1 in that it is based on the correspondences in the Council of Asian Liberals and Democrats (CALD) and ASEAN Parliamentarians for Human Rights (APHR) network. It should be noted that due to time constraints only 4 of 15 parliamentarians responded, namely: 1) Kiat Sitttheamorn, Member of Parliament from the Democrat Party of Thailand; 2) Jose Christopher 'Ki' Belmonte, Congressman from the Liberal Party (LP) of the Philippines; 3) Francis Joseph 'Blue' Abaya, Congressman, also from the LP; and 4) Wong Chen, Member of Parliament from the People's Justice Party (PKR). The chapter and its recommendations are also based on informal consultations with the network in the course of CALD's work. This is an initial, pioneering foray into this topic.

For the purposes of this chapter, only the countries in Southeast Asia with previous or ongoing initiatives on the NAP are covered. These include Burma (Myanmar), Indonesia, Malaysia, Philippines, Thailand and Vietnam. A detailed account of their Executive-led experiences is presented in the next section, together with a regional analysis that hopes to draw lessons on how to move the NAP process forward. This is followed by a discussion of the current state of parliamentary participation in the NAP process, and how the non-involvement of parliamentarians can be addressed. The chapter ends with some conclusions and recommendations on the development process of the NAP.

2 Executive-Driven NAP Process in Southeast Asia: A Comparative Analysis

In order to place in perspective the role of parliamentarians and to build on Chapter 1, this section demonstrates that NAPs are ultimately drafted and launched by the Executive branches of government, with inputs and varying degrees of encouragement from National Human Rights Institutions (NHRI) and civil society organisations (CSOs). What is glaringly obvious is the absence of parliamentary voices in the NAPs processes thus far.

This section necessarily looks at the NAP development processes of Burma (Myanmar), Indonesia, Malaysia, Philippines, Thailand and Vietnam. The narrative is subdivided into: (a) country-level description of the NAP process, and the issues and problems accompanying it; and (b) regional comparison of NAP progress in Southeast Asia.

2a Burma (Myanmar): Not a Race, but a Process

The NAP process in Myanmar has been stalled because of the recent military coup on 1 February 2021. There had been some progress made in the previous democratically elected government, but key issues and problems remain.

After the 2015 National League for Democracy (NLD) parliamentary victory, there was a push to prepare a NAP initiated by the United Nations Development Programme (UNDP). In December that year, Professor Dr. Aung Tun The, former Chair of the Local Network and Economic Adviser to the President, announced that Myanmar would draft a NAP. In 2016, with the NLD at the helm of the first democratically elected government, the training and dialogue on BHR continued in cooperation with the country's National Human Rights Commission, Ministry of Investments, and ministry departments on company registration, investment commission, and environment conservation (Bowman, personal communication, 7 June 2021).

There were parallel initiatives as well to contribute to the awareness building campaign pushed by CSOs and human rights advocates. The Alternative ASEAN Network on Burma (ALTSEAN-Burma) and the International Corporate Accountability Roundtable (ICAR) jointly worked on the 'Shadow National Baseline Assessment (NBA) of the Current Implementation of Business and Human Rights Framework' to support NAP development in Myanmar and to identify and assess the policy gaps in relation to the UNGPs. The document, launched in December 2017, presented the critical challenges on the ongoing pattern of discrimination and inequality, land ownership and acquisition, labor, state-owned enterprises, and access to remedy and concrete recommendations to address these issues (Malabanan and Cerisier, 2017).

Despite plans and announcements of a NAP, there is no clear understanding of BHR in the government ministries and departments in Myanmar. According to Vicky Bowman (personal communication, 7 June 2021), Director of the Myanmar Centre for Responsible Business (MCRB), BHR is not part of the work plan of the government ministries and understanding is still unclear despite awareness building and training programs conducted by organisations advocating human rights and responsible business.

While the Ministry of Investment and Foreign Economic Relations (MIFER) has already conveyed that a NAP is not their priority at the moment, Bowman believes that the MIFER should take the lead in developing a NAP. 'It's a natural fit' and it understands the issues on responsible business and investments more than any other ministry (Ibid.). MIFER was established to improve responsible investments and to facilitate international economic cooperation (Ministry of Investment and Foreign Economic Relations, n.d.).

Several fundamental issues need to be resolved first before developing a NAP, including the government's lack of understanding of human rights and the legal frameworks that support it. Increasing awareness building initiatives and consistent dialogue with politicians and legislators from all parties can help build a good foundation on BHR. Bowman stressed that understanding the NAP development is not a race, but a process. It is about going through dialogue and analysis to address the core issues of business and human rights (Bowman, personal communication, 7 June 7 2021).

2b Indonesia: Output at the Expense of Process?

Indonesia is one of the first countries to publicly commit to the UNGPs on BHR, leading to preliminary work on NAP being done as early as 2014. That year, KOMNAS HAM, the national human rights institution of Indonesia, and the Institute for Policy Research and Advocacy (ELSAM), an organisation empowering civil society through advocacy and promotion of human rights in Indonesia, started working on the NAP, with the support of some government institutions.

Three years later, in 2017, KOMNAS HAM published Regulation 001 of 2017 concerning the adoption of the NAP, referring to the policy paper produced by the Commission with ELSAM. The paper, it was claimed, went through the process of public consultations with government agencies, the business sector, and civil society organisations (DIHR, 2021). The document produced by KOMNAS HAM and ELSAM, however, did not get the official endorsement of the Indonesian government.

In 2019, the UNDP provided a new impetus to the NAP by extending technical assistance to initiate discussions towards drafting a stand-alone NAP on BHR, which they refer to as 'BHR Roadmap of Indonesia'. The NAP process was initially led by the Ministry of Economic Affairs, however, the coordinator

transferred to the Ministry of Law and Human Rights where a National Focal Point on BHR was set up to drive the process forward. A taskforce was subsequently formed in coordination with various ministries, CSOs and UNDP representatives, but it has no fixed timeline and is expected to begin work once the 5th NAP on Human Rights (2020-2024) is approved (Muttaqien, personal communication, 9 June 2021).

On 25 November 2020, the Indonesian Ministry of Law and Human Rights, with support from the European Union (EU) and UNDP, launched a draft National Strategy on BHR that hopes to protect human rights in the conduct of business operations in the country.

The National Strategy aims to 'provide guidance to companies in Indonesia to integrate human rights standards in their employment processes, promote non-discriminatory practices, equality, and workplace safety for their workers' (UNDP, 2020a). The final draft is projected to be completed in August or September 2021 (UNDP, 2021).

In a way, the Indonesian government's stance on the NAP, to a certain extent, contributes to its delay even if the country was the first one in Asia to launch a draft in 2017. It was not clear why the government abandoned the 2017 draft, only to restart the discussion on it again in 2019. Part of the reason could be on how the government understands BHR, as originally it only wanted to do a chapter on BHR within the human rights action plan. After discussions, the government decided to have a stand-alone NAP.

It must be noted, however, that some aspects of BHR, such as the role and responsibilities of businesses are included in the 2020-2024 National Action Plan on Human Rights, which until now has not been approved by President Jokowi (Muttaqien, personal communication, 9 June 2021). This could be taken to mean that the debate on whether a stand-alone NAP on BHR is needed, or it could be integrated to a NAP on human rights, remains. Again, this could be because of different understanding of what the BHR entails, even among the members of the Task Force.

For one, there are still those who mistake BHR as CSR. Moreover, there are confusions between BHR and responsible business conduct. Some companies perceive human rights as 'shaming and blaming', while some government officials see human rights as stumbling blocks to investments. It must be noted, however, that 'BHR has a human rights aspect and the involvement of state obligation and duties. Responsible business conduct has no state obligations and focuses more on a company's ethical way of doing business' (Wahyuningrum, personal communication, 17 June 2021).

This difference of understanding could have an impact on the adoption of the final NAP. Even if the NAP is adopted, this issue could have an impact on the implementation.

In this regard, the country's success in developing a NAP depends on at least two factors. The first one is adopting a participatory, inclusive, and transparent process. Some CSOs claim that they have not yet seen the draft National Strategy on BHR launched in November 2020. If the timeline of August or September 2021 would be kept, it means that the Task Force should have been undergoing consultations already. Moreover, some members of civil society question whether a NAP, or even a National Strategy, could be adopted even in the absence of National Baseline Assessments (NBAs). They argue that NBA is important in drafting the NAP to analyse the general situation of BHR and to identify the priority areas that need more focus.

The second factor pertains to the engagement of the parliament. The recent passage of controversial legislations (i.e. Omnibus Law), or the revival of shelved ones (i.e. revisions in the Criminal Code) shows the important role of parliamentarians in ensuring policy coherence. Needless to say, policy coherence is important for the NAP or National Strategy on BHR to be effective. The lack of parliamentary involvement in the NAP process in the past could lead to issues and problems in the future. It is imperative, therefore, for the parliamentarians to be engaged, even in the process of finalising the National Strategy. Once the Strategy is adopted, the parliament can also play a role in monitoring compliance.

2c Malaysia: One Step Forward, Two Steps Back

Malaysia is one of the first Asian countries to publicly commit to develop a NAP in 2015 by welcoming the Strategic Framework for a National Action Plan on Business and Human Rights produced by SUHAKAM, the country's National Human Rights Commission, in partnership with the United Nations Country Team (UNCT). The Framework 'explains the rationale and provides an outline for the development of an NAP to ensure business conduct that respects human rights' (Human Rights Commission of Malaysia, 2015).

While the Strategic Framework was only published in 2015, it must be noted that SUHAKAM was looking at the issue of BHR as early as 2010. It carried out a number of activities on this issue such as a series of forum and roundtable discussions with stakeholders on BHR, research, the National Inquiry on the Land Rights of Indigenous People in Malaysia, and the investigation of alleged infringements of rights caused by business activities (Ibid.). These activities were undertaken largely through the initiative of Professor Dato Dr Aishah Bidin, former SUHAKAM Commissioner and now adviser to the Legal Affairs Division, Malaysian Prime Minister's Department (BHEUU).

The UNDP hails the role of Professor Aishah in championing the issue of BHR even before UNDP took on the issue in 2016 (Sarandrea, personal communication, 21 June 2021). Malaysia is one of the UNDP focus countries in Asia because of what appears to be a genuine commitment on the part of the government and business. 'Both governments and businesses understood the 'win-win' situation of BHR in terms of promoting its clean and green supply chains to global standards', says Livio Sarandrea, UNDP BHR Global Lead Advisor and Team Leader of B+HR Asia.

The B+HR Asia project, which commenced in 2018, promotes and supports the implementation of the UNGPs on BHR in Asia through regional efforts focused on advocacy, policy development, technical advisory support, capacity building, awareness raising, innovation platforms, regional peer learning events, and South-South cooperation.

B+HR Asia provided the impetus for Malaysia to hasten the development of the NAP in 2018. However, the unexpected general elections results which swept into power the Pakatan Harapan coalition meant a change of government which could have a new set of priorities. As what the UNDP (B+HR, 2018) observed: 'While a welcome development from a democratic governance and human rights perspective, the change also led to a pause in the process to draft a National Action Plan on Business and Human Rights. However, there are strong expectations that the new Government led by the Pakatan Harapan party will embrace the agenda given the party's strong human rights-oriented manifesto'.

In June 2019, in line with the optimism on Pakatan Harapan's human rights credential, the then Minister in the Prime Minister's Department, Yang Berhormat Datuk Liew Vui Keong, in a keynote speech delivered in

the National High-Level Dialogue on Business and Human Rights, said that the cabinet has approved and endorsed the recommendation for Human Rights to be under his portfolio, with the assistance of the Legal Affairs Division. This was interpreted to mean that the development of the NAP would now fall within the responsibility of BHEUU. Subsequently, the UNDP had an agreement with the BHEUU to support the latter in the NAP drafting process and organised two national dialogues in this regard. However, no systematic National Baseline Assessment (NBA) had been carried out until this time. From the perspective of the UNDP, this was not a major issue considering the information gathered by SUHAKAM and other supporting agencies (Sarandrea, personal communication, 21 June 2021).

Since 2019, the BHEUU is serving as the secretariat for the NAP on BHR development process. They are conducting awareness programs and technical consultations among stakeholders including local and international organisations, government departments, the academic community, civil society organisations as well as businesses and corporations. BHEUU also set up a core working group to support the development of the NAP and organised a training to focus on the relevant government ministries and agencies involved: 1) Ministry of Human Resources; 2) Ministry of Environment and Water; and the 3) National Governance, Integrity and Anti-Corruption Centre, Prime Minister's Department (UNDP, 2021).

The office also held virtual consultations on stakeholders, amidst the COVID-19 pandemic, which managed to identify three thematic issues that are to be recommended as focal areas in the NAP on BHR: labour, environment, and governance. Technical committees were also set up on each of the thematic issues, while the overarching NAP steering committee ensured coherence and coordination (Bidin, personal communication 30 June 2021; 3 November 2021).

Related to this, the *National Conference on Business and Human Rights 2021: Towards a National Action Plan* took place in September 2021. The overall objective of the event was to continue to promote the implementation of the UNGPs by bringing together the country's leaders, government ministries and agencies, regulators, enforcement bodies, business leaders, associations, investor organizations, civil society, and other relevant stakeholders for meaningful dialogue. According to Professor Aishah,

the National Conference has successfully provided a platform for sharing the status of the development of the NAP-BHR, highlighting persisting gaps and challenges and exploring potential whole-of-society entry-points for the BHR agenda. Further, the National Conference also provided an opportunity for stakeholders to participate in rich discussions around the proposed thematic areas under the NAP - labour, environment and governance - as well as cross-cutting elements including the impact of the COVID-19 pandemic and gender (Bidin, personal communication, 3 November 2021).

Based on the plans of BHEUU, the office should have done NBA this year, so that they could release a Zero Draft NAP by 2022. There should be another round of consultations on the draft, especially given the challenges brought about by the pandemic, so the launch could only take place in 2023. Recent developments suggest that the NBA can only be done in 2022. In the meantime, consultations and training sessions with the governmental ministries and agencies, and their related stakeholders, have been going on in 2021, and will continue until 2022 (Ibid.).

Professor Aishah, however, pointed out that the goalposts keep changing because of COVID-19 restrictions. For one, she said that they could not do in-person interviews and site visits, and this made it more difficult for them to understand the main issues of businesses and workers. There were also concerns on how the UN Working Group on BHR could give inputs on the draft given the continuing restrictions on

travel, which means that the body might not be able to conduct a proper assessment (Bidin, personal communication, 30 June 2021).

In summary, the issues and problems surrounding the NAP process in Malaysia can be categorised into two: changes in government and the COVID-19 pandemic.

The delay in the adoption of the NAP, despite the Malaysian government's commitment and common understanding among various stakeholders on its benefits, is largely due to the volatile political environment in Malaysia. The corruption allegations against Najib Razak's government shifted government priorities to emphasise political survival, setting aside human rights in the process. The electoral victory of Pakatan Harapan in 2018 encouraged optimism in terms of the human rights agenda, but the change in government means that those working on the NAP would have to engage a new set of political actors. The political coup in 2020 which resulted in another change of government, coupled with onslaught of the pandemic, provided a new set of challenges which would most likely further delay the adoption of the NAP. The ongoing changes in political alignments may again result in a new government in the coming months, which would of course have repercussions on the NAP adoption process.

On the other hand, the COVID-19 health pandemic affected the BHEUU's timeline, consultation process, and mechanisms in reaching out to various stakeholders across the country. This also caused delays in ministerial decision making and parliamentary deliberations, thus delaying Cabinet endorsements and policy decisions on the next steps in the NAP adoption process. The BHEUU, under the guidance of Professor Aishah, has been pushing through with the consultation process with different stakeholders, albeit virtually. The virtual format, however, poses some constraints on having a more in-depth understanding of all the relevant issues. Furthermore, it makes the conduct of NBA and other related processes more difficult.

As regards the next steps, Malaysia can consider the following as it proceeds with the development of the NAP: (1) assess the current legal framework to ensure adequacy of the laws and to avoid contradictions against other nationally enacted NAPs; (2) establish governance structure and institutional mechanisms to foster cross-sectoral cooperation and coordination on BHR issues; and (3) engage the parliament in addressing specific BHR state issues, as well as in pushing the NAP process forward.

2d Philippines: Persistence and Commitment to Human Rights

The Philippines does not have a NAP. Most references on BHR are implied in government laws and policies. In the executive, there is a Presidential Human Rights Committee (PHRC), under the leadership of Usec. Severo 'Nonoy' Catura, Executive Director of the PHRC. The PHRC 'serves as a presidential instrument under the Office of the President that assists in defining the State's overall human rights agenda; in monitoring, coordinating and ensuring the compliance by all Executive bodies concerned of their human rights duties and obligations under the same agenda; and in engaging, as appropriate and necessary, with multi-stakeholders on relevant human rights advocacy matters' (Presidential Human Rights Committee, n.d.).

Though the PHCR have conducted initiatives on BHR, there is no clear roadmap to develop a NAP. The Committee only continues to submit state reports to Human Rights Conventions as part of its cycle of reporting obligations. According to the government, BHR measures are already embedded in the pronouncements of the Executive and in the development and human rights agenda of the country, although these do not use the term BHR (Torres, personal communication, 17 June 2021). Currently, BHR is only moving through the efforts of the civil society, businesses, and the Commission on Human Rights (CHR), the country's national human rights institution.

The CHR has the mandate to handle complaints regarding alleged business-related human rights abuses based on Article 13 Sec. 18 of the 1987 Philippine Constitution, which states that CHR has the power to 'investigate on its own or on complaint by any party, all forms of human rights violations involving civil and political rights' (CHR, 2019).

For this reason, in February 2018, the CHR came up with a position paper upon the invitation of the Committee on Trade and Industry of the 17th Congress of the House of Representatives. The paper focused on the proposed amendments to the Corporation Code of the Philippines to integrate and put into the mainstream the UNGP on BHR in the law. This was done in parallel with the initiatives of the Securities and Exchange Commission (SEC), legislators and other stakeholders, to amend the Corporation Code.

The proposed amendments were guided by Pillar II of the UNGPs, which is the corporate responsibility to respect human rights. With the intention to align the Corporation Code with international standards and to introduce human rights principles in the legal frameworks of regulating businesses in the country, the recommended amendments were submitted to the Committee on Trade and Industry of the House of Representatives and to its counterpart in the Senate, the Committee on Constitutional Amendments and Revision of Laws and the Committee on Trade, Commerce, and Entrepreneurship.

On 20 February 2019, the bill seeking to amend the Corporation Code was enacted; however, the CHR's recommendations were not adopted. This implies that the revised Corporation Code will continue to impact only on the procedural and technical requirements which corporations have to comply with, without explicit reference to responsible business practises (CHR, 2020).

The CHR continues to organise activities and work on policy papers and publications, in partnership with stakeholders, to encourage the government to elevate discussions on BHR. In December 2020, the CHR launched the 'Guidance Document on Business and Human Rights' to inform the government and various sectors on the current standards and expectations under the UNGP on BHR. It is a result of the Multi-Stakeholder Forum on Business and Human Rights, organised in September 2019 by the Economic, Social, and Cultural Rights Center (ESCRC) of the CHR, which gathered stakeholders to produce a BHR agenda and set up the Multi-Stakeholder BHR Group to promote discussions on BHR and deepen the understanding of stakeholders in their human rights obligations and responsibilities (Torres, personal communication, 17 June 2021).

Among the key recommendations of the Guidance Document to achieve a more holistic understanding of the UNGP-BHP in the Philippines include (CHR, 2020):

1. The inclusive and participatory formulation of the Philippine NAP-BHR;
2. The review of the existing laws, business policies, and practises to determine and address the gaps;
3. Capacity building programs and knowledge transfers to strengthen appreciation and understanding of human rights principles in the business setting; and
4. Multi-stakeholder cooperation to ensure coherence in BHR policies and actions.

In the push to have a stand-alone NAP in the Philippines, there is a need to explore more avenues to move things along. Legislators would find it beneficial to invite the Executive to participate and listen to the discussions. Some representatives (Members of Parliament) from Congress, participate in human rights meetings internationally, albeit in their individual capacities. Strengthening partnerships and cooperation with them will help create opportunities to review and align legal frameworks and laws with international treaties and covenants, including the UNGPs.

Another avenue is to continue engaging the business sector in a way that is relatable, and to present the concept of human rights as something inherent in humanity. According to Atty. Jess Torres (personal communication, 17 June 2021), Chief of ESCRC, ‘we have to follow an appreciative inquiry approach to mainstream business and human rights to promote something new and not be condescending’.

The CHR aims to continue producing position papers and other substantive recommendations to sustain awareness and encourage the Executive to also write policy documents on BHR. CHR is also planning to work on a document focusing on Human Rights Due Diligence, which is under Pillar II of the UNGPs. This will help harmonise the different perspectives of companies on human rights and responsible business conduct for workers.

2e Thailand: Asia’s First NAP on Business and Human Rights

Thailand adopted the first NAP in Asia, and the process started as early as 2016. In May that year, Thailand accepted the recommendation of Sweden to develop and enact a NAP during the 25th Session of the Universal Periodic Review (UPR), a unique process of reviewing human rights records of UN member states to improve their human rights situation and address human rights violations. At the time, there were already an increasing number of complaints received related to human rights violations by Thai businesses. Thailand responded with a commitment to promote multisectoral partner collaboration to respect human rights and draft a NAP that complies with the UNGP (RLPD, 2019).

In January 2017, the Cabinet passed a resolution that assigned the Department of Rights and Liberties Protection (RLPD) of the Ministry of Justice to take the lead in the implementation of the UNGP and in the drafting and implementation of a NAP. According to Ms. Nareeluc Pairchaiyapoom (personal communication, 9 June 2021), Director of the International Human Rights Division of the RLPD, the directive was a new challenge to the Ministry of Justice because their function usually involves working with the police and prosecutors to address human rights violations related to law enforcement, and not with the operation of business enterprises. The NAP process gained traction under the guidance of the NAP National Committee that was tasked to provide direction in drafting and monitoring the NAP.

The Committee, chaired by the Director General of RLPD, includes representatives from the Office of the National Human Rights Commission of Thailand, Ministry of Foreign Affairs, Ministry of Commerce, Ministry of Finance, Ministry of Labor, among other relevant agencies.

The development of the NAP in Thailand can be divided into three phases. Phase 1 (2016-2017) involved the gathering of data based on regional consultations on the ground, with the objective of understanding real practises in the country. Nareeluc noted that challenges differed per region, namely: ethnic group, deforestation, and land eviction in the North; land rights and human rights defender in the East; and the absence of participatory process in Environmental and Social Impact Assessment (ESIA) in the South.

Phase 2 (2017-2018) focused on developing a draft of the NAP. The Zero Draft of the NAP was developed together with the Faculty of Law of the Thammasat University. This was followed by the first round of regional consultations to get feedback from relevant sectors on the Zero Draft. The Zero Draft, however, was received unfavourably, with stakeholders submitting more negative than positive comments on the document. Due to time constraints and a lack of resources, the RLPD decided to start from scratch and draft a new version on their own. This new draft was published online to gather comments and solicit more feedback from CSOs.

The government then invited the UNWG on BHR to discuss the NAP development with government ministries and departments, business enterprises and trade associations, and representatives of indigenous peoples and CSOs, among others, for comments and recommendations. According to the members of the UNWG on BHR, getting the process right is critical and 'it is indispensable that [NAP-BHR] be developed and implemented through an inclusive and transparent process with the participation of both civil society and business' (UNWG, 2018).

Phase 3 focused on finalising the NAP. This required a second round of consultations through cluster meetings and focus group discussions supported by UNDP. The updated draft was then published online for comments and after feedback was consolidated, the revised NAP was submitted to the Cabinet for consideration (RLPD, 2019).

On 29 October 2019, the Cabinet officially approved the NAP of Thailand. This marked Thailand as the first country in Asia to have a stand-alone NAP. Among others, the International Chamber of Commerce (ICC) commended the development as a critical step in establishing a unified approach to address persisting social and economic inequalities in global supply chains (ICC, 2019).

To allow an effective mechanism of monitoring the implementation of the NAP and to oversee the human rights-related work of Thailand, the Ministry of Justice established the National Committee to Drive Forward the Implementation of Human Rights Affairs. A Sub-Committee was also established to implement the NAP, raise awareness, evaluate human rights issues, and to ensure that the NAP is aligned with the national human rights agenda. The RLDP Director General and Chair of the Sub-Committee, Mr. Ruangsak Suwaree, engaged in high-level dialogues with concerned Ministries to improve their understanding of the NAP. The RLDP also selected ten pilot provinces, a mix of big and small cities, to test the best model in implementing the plan. Mr. Ruangsak also conducted high-level discussions with the governors of the ten pilot provinces. To ensure effective feedback mechanism, RLDP assigned justice offices in all 77 Thai provinces to monitor and report the full NAP implementation (Pairchaiyapoom, personal communication, 9 June 2021).

Thailand continues to monitor and improve its NAP implementation process. The RLDP conducts regular awareness programs for businesses and gathers more inclusive data for the midterm evaluation of its implementation process. By 2022, Thailand will prepare a new NAP. They will re-evaluate old priority areas and identify ones including COVID-19 issues, which were not part of the first NAP.

The development process and experience of Thailand reflects the ideal recommended steps and guidelines set by the UNWG to successfully establish and implement a NAP-BHR. However, there were challenges along the way that needed inclusive consultation and decision-making as well as a strong demonstration of political will. Though there were lapses and delays, identifying the most appropriate lead agency and relevant partners is crucial in the NAP development process. More importantly, the commitment, support and approval expressed by Thai Prime Minister H.E. Prayut Chan-o-cha, both at the local and international level, facilitated the successful establishment of a NAP for the lead Ministry and Thailand's cooperating partners and agencies. Apart from stakeholder initiatives to raise and sustain awareness, Prime Minister Prayut also talked about BHR in his weekly television program. This shows that the process was largely executive-driven, with no role for parliamentarians (Ibid.).

Another issue with the Thai NAP is that it contains a mix of mandatory measures for the government and voluntary measures for businesses. It is easier for government units to observe the prescribed measures because of the legal duty to implement the NAP. The challenge is in the monitoring of the implementation of the NAP by businesses because it is voluntary and many businesses are not aware of the importance of NAP, which only sets minimum expectations from business. Moreover, the implementation depends on the size of the business. Some businesses have full resources while others like small and medium-sized enterprises (SMEs) have limited resources. (Ibid.).

2f Vietnam: Towards Economic Growth and Responsible Business

Vietnam has developed CSR initiatives and is signatory to voluntary international CSR commitments, but it has not developed a policy framework focused on developing human rights-based approach to business activity (B+HR Asia, 2018). Developing a NAP-BHR is one area where Vietnam can improve industry operations to participate more effectively in the global value chain.

The Ministry of Justice of Vietnam committed to take the lead in the development of NAP, which is being discussed and developed under the umbrella of Responsible Business. Vietnam's government is sensitive to human rights issues and its partners are aware of the difficulties of using the term 'human rights.' Nevertheless, their vision of drafting a NAP is focused on making sure that business enterprises know their minimum responsibilities in respecting human rights. Ms. Phung Thi Thu Ha (2021), BHR Specialist of UNDP Vietnam, noted that Vietnam hopes to finalise its NAP by 2023. The Director-General of the Department of Civil and Economic Laws of the Ministry of Justice is very progressive, open-minded, and supportive of the process, which is important to realise the vision of a NAP (Phung, personal communication, 25 June 2021).

In 2018, UNDP organised capacity-building workshops and dialogue with the Ministry of Justice, Ministry of Planning and Investment, and the Vietnam Chamber of Commerce and Industry (VCCI), which strengthened crucial partnerships. The Ministry of Justice also requested UNDP's support to develop a road map towards a NAP process, but this initiative unfortunately did not push through (B+HR Asia, 2018).

In October 2018, the Ministry of Justice launched the 'Preliminary Assessment of the Regulatory Framework on Responsible Business in Vietnam', in partnership with UNDP Vietnam and the government of Sweden. The study promotes responsible business conduct in Vietnam and serves as a starting point in building a coordinated plan and in identifying priority areas for the development of a NAP on Responsible Business Practice (RBP). It also provides an analysis of laws and policies in relation to the adoption of the UNGP and Vietnam's commitments to international treaties and agreements.

Recently enacted amendments to laws such as the Law on Enterprises (2020) and the Law on Investment (2020), that took effect on 1 January 2021, help strengthen Vietnam's responsible business practice and further improve Vietnam's business environment. 'The amended Law on Enterprises simplifies the business registration process, redefines state-owned enterprise (SOE), and excludes household business from the scope of the current law. The amended Law on Investment provides updates on conditional business lines, investment incentives, support mechanisms while removing administrative approval for certain types of investment projects' (Nguyen, 2020). Vietnam has also ratified 25 International Labour Organization (ILO) Conventions as of 2021, which includes seven fundamental conventions covering the areas of collective bargaining, non-discrimination, child labor and forced labor (ILO, 2021).

Currently, the country is conducting a NBA on Responsible Business in Vietnam, akin to Thailand's NAP-BHR Phase 1, to assess the level of implementation of UNGP and to identify high-risk areas for responsible business and human rights. According to Phung, the NAP-RBP is expected to be submitted to the Prime Minister's Office during the first quarter of 2023. She noted some recommendations to improve the NAP development process:

1. Explore more opportunities and establish partnerships with CSOs to monitor the implementation of responsible business and respect of human rights;
2. Tap the expertise of the academe to educate new entrepreneurs on the mitigation of corporate violations of human rights;
3. Identify the right approach in sharing knowledge to a mix of formal and informal businesses in Vietnam, with special focus on SMEs. The formal businesses registered number approximately 900,000, but the informal ones are nearly 5 million and many of them are not registered; and
4. Engage the National Assembly of Vietnam, the country's top legislative body that has the mandate to draft and amend laws, after the approval of the NAP. The deputies can help revise laws as needed based on the NAP-RBP and its implementation. (Phung, personal communication, 25 June 2021).

2g Southeast Asia's Experience on Developing NAPs: A Comparative Analysis

To summarise the discussion above, a matrix is provided below which categorised the Southeast Asian countries according to the status (or 'level') of their NAP development process:

Table 3.1: Level of NAP Development

Country	Level	Initiatives	Next Steps
Burma (Myanmar)	3	<ul style="list-style-type: none"> Engagements and workshops with government ministries and businesses by CSOs and organisations like MCRB Publication by ALTSEAN-Burma and ICAR on Shadow National Baseline Assessment (December 2017) 	<ul style="list-style-type: none"> Build awareness of human rights and BHR amidst a political landscape of instability and uncertainty
Indonesia	2	<ul style="list-style-type: none"> Publication of a NAP-BHR by KOMNAS HAM and ELSAM (May 2017) Ministry of Law and Human Rights tasked as the national focal point on BHR (2019) 	<ul style="list-style-type: none"> Launched the first draft of the National Strategy on BHR in November 2020 Final draft is said to be completed by third quarter of 2021
Malaysia	2	<ul style="list-style-type: none"> Publication of a Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia" by National Human Rights Commission and UNDP (March 2015) Legal Affairs Division of the Prime Minister's Department Malaysia tasked to lead the NAP-BHR process 	<ul style="list-style-type: none"> Start National Baseline Assessment to be completed in 2021 Produce Zero Draft by 2022 Launch NAP-BHR by 2023
Philippines	3	<ul style="list-style-type: none"> Position paper published by the Commission on Human Rights on proposed amendments to the Corporation Code (February 2018) Publication of the Guidance Document on Business and Human Rights by the Commission on Human Rights (December 2020) 	<ul style="list-style-type: none"> Commission on Human Rights to work on Human Rights Due Diligence document
Thailand	1	<ul style="list-style-type: none"> Department of Rights and Liberties Protection (RLPD) of the Ministry of Justice tasked to take the lead in the draft and implementation process of the NAP-BHR (January 2017) Approval of Thailand's first NAP-BHR (October 2019) 	<ul style="list-style-type: none"> National Committee to Drive Forward the Implementation of Human Rights Affairs to continue monitoring the NAP-BHR implementation Draft a new NAP-BHR by in 2022 Set-up a Human Rights Academy in Asia envisioned to be a regional knowledge hub on BHR
Vietnam	2	<ul style="list-style-type: none"> The Ministry of Justice committed to take the lead in developing a NAP launched the 'Preliminary Assessment of the Regulatory Framework on Responsible Business in Vietnam', in partnership with UNDP Vietnam and Sweden (October 2018) Laws that strengthen responsible business conduct enacted (2019-2020) conducting a National Baseline Assessment on Responsible Business (2021) 	<ul style="list-style-type: none"> A NAP on Responsible Business Practice (RBP) is expected to be submitted to the Prime Minister's Office by 2023.

According to the UNWG's Guidance on National Action Plan (2014), there are four vital elements that a NAP should have to achieve impact. The first one is that the NAP must be in accordance with the UN Guiding Principles, which includes state duties to protect business-related human rights and provide an effective remedy. Second, the NAP must be tailored-fit to respond to challenges of the national context. Third, the development of the NAP must be inclusive and transparent. Finally, the NAP, once adopted, must be regularly reviewed and updated.

Thailand, as the first country to have a stand-alone NAP in Asia, appears to have met all the four elements. The first two chapters of its NAP take into account the UNGPs' three pillars, as well as the UNWG's guidelines in drafting the NAP. Moreover, they relate the relevance of the NAP to the country's national plans and international commitments where Thailand is a state-party. The process followed by Thailand in the formulation of the NAP was also largely inclusive and transparent. Finally, Thailand established institutions, such as the Sub-Committee to implement the NAP under the National Committee to Drive Forward the Implementation of Human Rights Affairs, in line with the last UNWG element of regular review and update.

The experience of Thailand may be instructive for Level 2 countries of Indonesia, Malaysia and Vietnam, which envision adopting a NAP (or National Strategy in the case of Indonesia) on BHR (or RBC in the case of Vietnam) in the next 2-3 years. In all the three countries, an executive agency is taking the lead in drafting the NAP – the Ministry of Justice and Human Rights in Indonesia, the Legal Affairs Division of the Prime Minister's Department in Malaysia and the Ministry of Justice in Vietnam. This appears to be in line with the experience of Thailand, where a department in the Justice Ministry drove the process forward.

While executive-driven, the success of Thailand in drafting the NAP can be largely attributed to the inclusive, consultative, and transparent process that RLDP adopted involving key stakeholders. In this regard, there may be some issues with Indonesia, which plans to finalise its National Strategy on BHR even without systematic NBAs. More importantly, the Zero Draft National Strategy launched in November 2020 appears to completely ignore the previous work done by KOMNAS HAM and ELSAM. It is also not clear whether they were consulted in the drafting of the National Strategy. With regard to Malaysia, the initiatives of BHEUU to comply with the inclusiveness and transparency element of NAP, despite the challenges posed by COVID-19 and political turmoil have been commendable. Through virtual consultations with stakeholders during the pandemic, the BHEUU has been able to drive the process forward. In Vietnam, it is not clear whether the process will be inclusive and transparent. It is also not clear whether the country would conduct systematic NBA before the target adoption of the NAP on RBP in 2023. In all these three countries, however, the absence of parliamentary involvement characterised the process.

As regards Level 3 countries of Burma (Myanmar) and the Philippines, the current political dispensation seems to be the biggest stumbling block in developing a NAP. In Myanmar, there was a window of opportunity to push through the process in the deposed civilian government, but even that became problematic because of the lack of understanding among government officials about what BHR entails. In the Philippines, the discussion on BHR is also being kept alive by CSOs and the Commission on Human Rights. However, the development of a NAP is currently out of the picture due to the Duterte government's insistence that BHR is already embedded in the pronouncements of the Executive and in the country's human rights agenda. Similar to Level 2 countries, the parliamentarians were also not part of the NAP process.

From the preceding, what can be gleaned is that NAP on BHR processes have been mainly Executive-driven and its progress and development in terms of policy adoption and implementation are dependent on the decisions of the leader of the state and the guidance of key institutions.

There have been significant gains at the Executive branch of government and prior commitments to draft a NAP were made in some countries in the region. However, there is still a lack of awareness and participation in BHR consultations, particularly in institutions that could speed up the process and elevate the level of discussion.

3 The Missing Role of Parliamentarians

The authors explored the awareness status and progress of BHR in Parliament. Through CALD, an alliance of liberal and democratic parties with active participation of former and current Members of Parliament, the authors conducted inquiries regarding BHR via electronic mail. Part of the consultation was through the BHR working group set up by the APHR.

'Parliament is the best place to provide check and balance in the implementation of both the NAP and the Labour Protection Act'

Thai MP, Kiat Sittheeamorn (personal communication, 28 October 2021)

One of the MPs interviewed said, 'I have never come across this topic in Parliament. To my knowledge, no such discussions were done, nor have I received any invitations to consultations and informal briefings by the Executive and other interest groups. I would have participated as I believe this is a matter of national interest'. Another MP also expressed, 'We have always contributed and worked on the general human rights agenda of the country, but never on human rights relating to business. This must entail a lot of political will to forge a successful implementation in the future'.

3a BHR Status in Parliament

Despite having the first NAP on BHR, the awareness in Thailand is limited and most politicians do not seem to be aware of BHR. There is also unclear distinction between the NAP and the Labour Protection Act B.E. 2541 as all principles of the NAP have already been included in the said Act. In terms of parliamentary interventions, Suwapan Tanyuwattana, Chairperson of the Senate Sub-Committee on Human Rights and Liberties, has considered including the NAP discussion in their meetings. However, the House of Representatives has yet to table any NAP on BHR discussions as of the moment (Sittheeamorn, 2021).

The Philippines is treading on a similar but more difficult path. There are indeed consultations happening in government, with CHR at the forefront of consultations. The business sector also has its share of initiatives to promote, respect and protect human rights. The House of Representatives and the Senate, likewise, continue to provide measures that are in line with human rights protection in business. But despite the commitment of the Executive branch in 2017, the decision to draft an actual NAP on BHR has been a recurring challenge. While there are House Committees that tackle issues on business, trade, and industries, no bills were drafted, no calls for discussion, and no parliamentary committees set up specifically to focus on NAP on BHR. (Belmonte, personal communication, 16 October 2021).

Malaysia has seen progress in its stakeholder discussions but is also experiencing absence of BHR dialogue in Parliament. In 2019, the late law minister Liew Viu Keong announced that his ministry will be in charge of the NAP process. Currently, the new law minister, Datuk Seri Dr Wan Junaidi Tuanku Jaafar, who

was appointed in September 2021, announced that a NAP will be launched by 2023, but nothing concrete has happened in Parliament (Chen, personal communication, 6 October 2021). Chen added that there is very limited capacity for the Parliament to get involved and only the law minister has the data and resources to lead the NAP consultations and draft process.

In Malaysia's Parliament, there exists a select committee called Fundamental Liberty and Constitutional Rights, but none of the members have discussed BHR. There has been no NAP briefing in Parliament, whether formal or informal (Ibid.).

Chen emphasised that a NAP could pave the way towards improving the Malaysian business environment daunted by three major issues, namely: a) the rights and protection of migrant workers; b) environmental sustainability; and c) crony capitalism. The drafting of a NAP has been rendered more urgent to address the bad publicity created by allegations of migrant workers' abuses and unsustainable practises in Malaysia (Ibid.).

3b Parliamentary Participation and Next Steps Forward

Stakeholders believe that a more inclusive participation would help deepen the knowledge on BHR and enhance the NAP process. Welcoming the participation of parliamentarians in the NAP on BHR process could provide:

1. Checks and balances to the administrative branch with the NAP functioning as one of the indicators of the conduct and performance of the government relating to human rights during policy and budget debates in the House. The MPs can also help promote the awareness on NAP and the Labour Protection Act of Thailand among stakeholders (Sittheeamorn, personal communication, 16 October 2021);
2. More inclusive channels to promote NAP on BHR through House Committees and could set frameworks for better working conditions and engagements among stakeholders. Members of Congress can also further enrich their understanding on BHR and reflect on future legislative actions that help fulfil State obligations in line with international human rights instruments and treaties that the Philippine Government is a party to (Belmonte, personal communication, 14 October 2021);
3. Assistance in the implementation of the NAP through the passage of legislation and aid in institutionalising BHR policies. The Philippine House of Representatives can also help create more regular mechanisms of engagements and secure the appropriation of funds and resources for the NAP process (Ibid.);
4. Independent avenues with business organisations and associations for engagements (Chen, personal communication, 6 October 2021); and
5. Deeper knowledge on BHR among parliamentarians, their constituents, and networks. Members of Congress would be able to invite experts in the field of BHR to share previous initiatives and clarify issues and concerns regarding parliamentary interventions (Abaya, personal communication, 2 October 2021).

Keeping the Parliament in the loop of discussions and consultations could tackle the gaps and challenges initially observed by the Executive branch in promoting and developing a NAP on BHR. Given the lack of parliamentary participation, the respondents recommended the possible next steps in the NAP process:

1. Provide clarity on the compliance of Thai Labour Protection Act to the NAP by presenting comprehensive periodic reports from UN member countries (Sittheeamorn, personal communication, 16 October 2021);
2. Review feedback and recommendations after implementing the NAP process (Ibid.);
3. Review the current status of business sector operations in relation to its adherence to human rights (Belmonte, personal communication, 16 October 2021);
4. Create information and education structure for the NAP on BHR and launch a multi-level support advocacy group that could cater to different sectors (Belmonte, 2021);
5. Create pressure on the Malaysian law minister by periodically questioning the progress of the NAP. However, the changing business environment and consumer demands might be a bigger influence to fast-track the ministry in charge to draft, table, and implement the NAP (Chen, personal communication, 6 October 2021); and
6. Provide parliamentarians reports and updates of Executive decisions concerning BHR and invite them to a dialogue to discuss possible avenues for cooperation and coordination (Abaya, personal communication, 2 October 2021).

4 Conclusion and Recommendations

The experiences of Southeast Asian countries in the development of the NAP shows that the process must be understood in the political context of the sub-region. In Southeast Asia, governance remains Executive-driven, even exclusionary. Generally speaking, representative institutions, such as the parliament, are either too weak or non-existent. CSOs, if they are allowed to exist independently, have very limited influence on policies. Even in the relatively more democratic countries of Indonesia, Malaysia and the Philippines, the parliament and CSOs can be overwhelmed by the powers of the executive branch.

It should not come as a surprise, therefore, that in the Southeast Asian countries included in this study, NAP development is most advanced in those countries where the Executive demonstrated strong commitment and took a leading role in the process. It can be argued that it is just natural for the Executive to be the focal point in drafting the NAP; after all, it is an action plan that will be implemented by the executive. While this may be true, the UNWG on BHR clearly stated in the guidelines on NAP that the process should be 'inclusive.' It is in this light that the absence of parliamentarians in NAP discussions becomes of relevance.

In all countries included in this study, with the exception of the Philippines, the engagement of parliamentarians in developing the NAP was noticeably absent. Even in the Philippines, the participation of parliamentarians in some BHR events was in their personal capacity, not as representative of the parliamentary institution. This is despite the consensus that parliamentarians can contribute, in a number of ways, to the process of drafting and implementing the NAP. Even UNDP, which is assisting in the NAP development of a number of countries in Asia, recognised that the exclusion of parliamentarians was an oversight.

While there may still be disagreements on what stage in the process the parliamentarians should be involved, it can be surmised that the parliamentarians can contribute on any of the following stages:

<p>Pre-Drafting</p> <p>Parliamentarians can pressure the Executive to commence NAP drafting</p>	<p>Parliamentarians can pressure the Executive to commence the NAP drafting process by drawing attention to its importance through vocal support in the parliament, in the media, or any other public events. In doing so, parliamentarians can also educate the public on what BHR is, and the public clamor that may result from such could eventually push the government to act.</p>
<p>Drafting</p> <p>Parliamentarians can help in ensuring policy coherence</p>	<p>Involvement of the parliamentarians in the drafting stage could help in ensuring policy coherence, especially since some of the country's legislation may need to be revised or amended so that they can be aligned with UNGP commitments. New legislation may also be needed to ensure compliance. Moreover, the parliamentarians can also provide contextualised information on business-related human rights issues in the constituencies they are representing.</p>
<p>Implementation and Review</p> <p>Parliamentarians can assist in monitoring compliance with NAP</p>	<p>Through parliamentary committees, the parliamentarians can assist in monitoring compliance with NAP. While the main responsibility for this should remain with the concerned government agency, investigations done in aid of legislation can spur public debate and push the government and/or business to comply with their commitments. The information gathered through these investigations can also become the basis for the drafting of the updated NAP.</p>

Much work still needs to be done for Southeast Asian countries to fully internalise BHR. After all, even the concept of 'human rights' is still misunderstood, if not stigmatised, in several countries in the subregion. Seen in this light, the mere fact that Southeast Asian countries have adopted, or in the process of adopting, a NAP on BHR is already an achievement. It is an important first step in the subregion's quest to protect and respect human rights, and to provide remedy to those whose rights have been violated.

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Chapter 4: The Role of Business Organisations in Developing National Action Plans On Business And Human Rights in ASEAN

Thomas Thomas

1 Introduction

Business Organisations (BOs), for the first time in centuries, face the prospect of accountability for their national and global operations that feed their profit making endeavours. The global Business and Human Rights (BHR) agenda, advanced through National Action Plans (NAPs) at the domestic level, seeks to inject ethical, notably human rights standards, into their strategies, planning, operations and entire value chains. Do businesses care about these NAPs? While they should, it is not clear that they do.

From ancient times entrepreneurs through enterprise, innovation and risk taking created wealth that enabled incomes to rise, states to collect more taxes and citizens to enjoy a better standard of life. It was the pursuit of wealth that brought about trade and exchange of people, cultures, religions, innovation and prosperity, to name a few benefits.

Capitalism also had negative impacts. The mindless pursuit of profits, without regard to ethics, principles or stakeholder interests, brought about corruption, distortion of markets, exploitation of people and environmental degradation. Empires were built, countries destroyed and people were enslaved in the process. It is therefore recognised that capitalism needs to be anchored on social values that moderate profit maximisation with good laws and a legal system that instils responsible business conduct.

In recent times, in the age of globalisation, States competed to attract investments in the pursuit of economic growth. They gave firms considerable rights to make economic profits with few obligations in return. These included tax concessions or lowering of labour and environmental standards. Businesses, particularly the Multinational Corporations (MNCs) have activities beyond the reach of States. Protection for people and the environment had not kept pace with a business-friendly regime.

The BHR framework is part of the global trend to increasingly examine how businesses make their profits. It is an extension of the Corporate Social Responsibility (CSR) efforts to hold businesses accountable for actions and impacts on individuals, workers and communities. BHR goes beyond CSR in holding businesses responsible to operate legally, ethically and contribute to positive impacts on Society.

The United Nations Guiding Principles (UNGPs) on BHR, introduced in 2011 is a historical turning point that is shaping business conduct globally. It is currently the most comprehensive instrument to offer guidance on how businesses respect human rights. (UNHRC, 2011)

The UNGPs has 3 Pillars: Pillar 1: State Duty to Protect is based on the HR obligations of States to protect individuals and communities against human rights abuses by third parties, such as businesses. This is done

through policies, regulation, monitoring and enforcement. Pillar 2: Business Responsibility to Respect is based on the recognition that societies and stakeholders expect businesses to comply with domestic law but, where it is inadequate or even conflicts with accepted human rights standards, to go beyond it by respecting international human rights law. Pillar 3: Access to Remedies is for victims of business-related human rights abuse. It entails both a grievance handling mechanism and compensation. It can be at an operational business context or state based. There is also a distinction between judicial remedies (courts) and non-judicial remedies.

Businesses implement UNGPs by having a policy commitment on human rights, conduct Human Rights Due Diligence (HRDD) and provide remediation when problems occur. HRDD is the core element and major part of Pillar 2. It is to help businesses identify and prevent or if necessary, mitigate and remedy adverse HR impacts. Unlike other due diligence processes, HRDD focusses on risks caused by the business on individuals and the community. It is meant to protect society from risks caused by the business.

In 2016, the United Nations Working Group on BHR issued guidance for developing NAPs. It defined NAPs as an 'evolving policy strategy developed by a State to protect against adverse human rights impacts by business organisations in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs)' (UNWG, 2016).

In ASEAN, only Thailand has a NAP. It was released in October 2019. Indonesia and Malaysia are in the process of formulating their NAPs. Governments as the State are the duty bearer for human rights. They have the responsibility to take the leadership in developing NAPs. NAPs, if done and implemented as intended, would remove obstacles and put in enablers for businesses to respect human rights. NAPs are the means and not the end itself of the BHR agenda.

This chapter is based on desk research of key documents and the author's extensive experience in regional CSR and BHR intergovernmental initiatives. At the time of writing no such analysis has been undertaken on BO's participation in drafting NAPS in Southeast Asia. While the evidence is scant, this chapter seeks to fill that gap and to stimulate further research into this important area. The chapter is structured in four parts. Part 1 looks at the context of ASEAN and business involvement in BHR. This is a global development and it affects ASEAN. Part 2 will examine the status of NAPs in ASEAN and the process. Part 3 will analyse business involvement in NAPs in ASEAN. It will look at opportunities, enablers and obstacles. Part 4 will draw some conclusions and make some recommendations to realise the UNGPs.

2 The Context

2a ASEAN and Economic Growth

ASEAN is an economic powerhouse with a UD\$3.1 trillion economy and population of 660 million. If the region was a single country, it would be the sixth largest economy in the world and is expected to be the 4th largest by 2050.

Foreign Direct Investment (FDI) inflows into ASEAN reached US\$182 billion in 2020 despite the Covid 19 pandemic (ASEAN Stats, 2021). Despite the decline in FDI outflows globally, Southeast Asian-based companies and entities are fast becoming an important investor to the region. ASEAN's share of global investment outflow rose from six per cent in 2019 to eight per cent in 2020. Much of the investment stayed

within the region, due to its attractive long-term growth potential. The region's economy is expected to double to US\$6.6 trillion by 2030 from US\$3 trillion in 2018 (UNCTAD, 2021). As business activity increased, it generated wealth, income and jobs for citizens. This in turn lifted millions out of poverty.

ASEAN's rapid rise over the past few decades has been driven primarily by what can be called 'Factory Asia'. As one of the world's largest workshops, the region provided cheap and abundant labour, producing many of the consumer goods the world demands.

2b The Price of Growth

ASEAN is also a vastly diverse region, in terms of political structures, governance, geography, economies, demographics and cultures. The region also faces challenges such as wide gaps in income and wealth, high poverty incidence, pervasive corruption, inadequate human rights and labour standards, and environmental degradation.

One of the biggest trade-offs in its surge forward for economic growth, as is documented, has been the sidestepping of human rights issues (Farhan, 2019). Vulnerable groups - including migrant workers, women, children and indigenous peoples - continue to face human rights risks. As business activities continue to expand in the region, ASEAN faces challenges such as land grabbing, forced labour and health disasters such as the transboundary haze. High profile cases of human rights in high-risk industries such as extraction, agriculture and energy continue to plague the region.

Almost 70 million ASEAN households are in the consuming class (ASEAN, 2019) and this could more than double to 163 million households by 2030 (Joshi and Potia, 2017). The share of the middle-income class in the overall population will leap from 29% in 2010 to 65% by 2030. It is a demographically young region with over 60% of the world's youth population.

With growing affluence, educational and social progress, there are expectations for better quality of life and social justice with a clean and healthy living environment. These expectations are reflected in the *ASEAN 2025: Forging Ahead Together* document that sets the direction for the ASEAN Community, 'to realise a rules-based, people-oriented, people-centred ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity'. These expectations would include higher standards of governance, responsible business conduct and higher standards of accountability and transparency, issues that are covered by the concepts of responsible business conduct and Business and Human Rights (ASEAN, 2015).

2c State of BHR in ASEAN

Factory ASEAN as part of the global supply chain is influenced by standards and expectations of foreign enterprises and standards imposed by host countries of Multinational Enterprises. ASEAN has to address social, environmental and governance issues while generating growth to offer its citizens a better standard of living.

A study on Business and Human Rights Disclosure by ASEAN CSR Network (ACN) and Mahidol University

in 2019 stated: 'At present, human rights disclosure among top-listed companies in ASEAN falls substantially short of the benchmark set by the UNGPs' (Mullen et al., 2019). It showed that very few ASEAN businesses exhibited awareness, readiness, compliance, and strategy relative to their responsibility to respect human rights in accordance with the UNGPs and on thematic subjects covered by the Global Reporting Initiative framework.

Studies on sustainability reporting of Singapore listed companies shows that human rights, labour practises and industrial relations are among the least disclosed indicators (Loh and Tan, 2021). A similar result comes out in a study of sustainability reporting disclosure of top 100 companies in Indonesia, Malaysia, Philippines, Singapore, Thailand, and Vietnam (Loh, 2020).

2d ASEAN Member States' Commitment to BHR

Assessing ASEAN's commitment to the BHR requires a brief review of its actions to date in the development of regional human rights norms, protection mechanisms and work in the area of CSR.

The ASEAN Charter of 2007, covered the 'respect for the promotion and protection of human rights and fundamental freedoms and social justice' in the Preamble, Purpose, Principles and in Article 14 to establish an ASEAN human rights body to promote and respect human rights and fundamental freedoms. However, there are no provisions in the Charter for action against non-compliance in respecting human rights.

In 2010, two human rights bodies were established - the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Rights of Women and Children. In November 2012, the ASEAN Human Rights Declaration (AHRD) was adopted as ASEAN's commitment to ensuring its implementation in accordance with its commitment to the UN Charter, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States (AMS) are parties. The AHRD covers the right to development as 'an inalienable human right' and that it 'meet equitably the developmental needs of present and future generations', which is sustainable development (ASEAN, 2012).

A baseline study on CSR and human rights was initiated by AICHR in 2012. It was presented in June 2014 at a regional workshop held in Singapore. The study found that all AMS had laws in place to promote CSR and human rights, but enforcement and implementation was weak. It made a number of recommendations and proposed a review on progress in 2 years' time (Thomas and Chandra, 2014).

This follow up regional seminar was held in Singapore in November 2016 with AICHR, Singapore Ministry of Foreign Affairs and ACN as co-organisers. The outcome was the 'Regional Strategy on CSR and Human Rights'. It spelt out support for BHR and NAPs and the role of governments, businesses, trade unions and civil society organisations in promoting CSR and BHR. This document has not progressed.

In 2016, the Thai Ministry of Labour initiated the ASEAN Guidelines for CSR on Labour with the ASEAN Senior Officials of Labour Ministries (SLOM), ASEAN Secretariat, International Labour Organisation (ILO) and ACN. A workshop to draft the guidelines was held in March 2016. The ASEAN Labour Ministers adopted the Guidelines in May 2016. In August 2016, the Thai Ministry of Labour, ASEAN Secretariat, ILO and ACN organised a seminar to socialise the Guidelines with tripartite representatives from the region. In the same year, ASEAN Business Advisory Council (ABAC) (with input from ACN) made recommendations to ASEAN leaders on the importance of recognising CSR and responsible business, including the decent work

agenda and migrant workers (ABAC, 2015).

In 2017, the ASEAN Inclusive Business (IB) Framework, which institutionalised and mainstreams IB into ASEAN's economic community building efforts, was endorsed by the ASEAN Economic Ministers.

In 2018, ACN was appointed as the Sector Champion for Responsible and Inclusive Business in ASEAN Business Advisory Council (ABAC). This role gave it an additional platform to promote CSR in ASEAN. ABAC and ACN made recommendations to the ASEAN Economic Ministers to support the responsible and inclusive business agenda. Both ACN and ABAC developed a Code for Responsible and Inclusive Business to provide a clearer definition of Responsible Business Conduct in ASEAN based on globally accepted standards. They also initiated the ASEAN Responsible And Inclusive Business Alliance (ARAIBA) to establish a business network of businesses for promoting and mainstreaming responsible, inclusive and sustainable enterprises. ARAIBA plans to address challenges facing businesses which lack the knowledge and resources to be responsible and sustainable (Kan, 2019).

The Thai Ministry of Social Development and Human Security organised the ASEAN CSR Workshop under the ASEAN Social and Welfare Development Sectoral Body, in July 2019. The workshop recommended better coordination of activities, an ASEAN CSR Fund to finance activities and that the priorities for CSR be:

- a. Protection and welfare for vulnerable populations.
- b. Livelihood and multi-dimensional definition of quality of life.
- c. Community participation. CSR should concretely include participation of communities and target populations such as children, youth and people with disability in identifying their needs and project implementation.
- d. Environmental preservation. Business sector should develop a policy on environmental preservation; develop R&D and innovation on energy efficiency and waste management for the entire chain of each business and households.
- e. Protection of workers' rights. CSR must contribute to the social protection of the employees and improve the quality of life of surrounding communities. Labour practice should be obliged by small and micro business organisations and supply chain.

ASEAN Labour Ministers had been proactive in adopting frameworks to promote good industrial relations (2012), transition of the informal sector to the formal sector (2015) and dialogue with Employers and Trade Unions. The promotion of the ASEAN Guidelines for CSR on Labour is included in the Labour Ministers' Work Programme 2016-2020, but no significant progress was made.

ASEAN is strong in its intent for CSR, Labour and BHR as reflected in plans and aspirations. There are gaps between intent, aspirations and reality.

3 National Action Plans on BHR in ASEAN

There has been a gradual, even reluctant uptake in NAPs in the region. While these are already described in previous chapters, a few salient points are in order in relation to each NAP process that is currently ongoing.

The UNWG released the guidelines for NAPs in November 2016. They proposed four essential criteria for effective NAPs. First, it must be based on the UNGPs, to adequately reflect the State's duties under

international human rights law. Second, it needs to be context-specific and address the country's actual and potential business-related human rights abuse. Third, it must be developed in inclusive and transparent processes. Relevant stakeholders need to be allowed to participate in the development, and update, of the NAP and their views need to be taken into account. Information needs to be shared transparently at all stages of the process. Fourth, NAP processes need to regularly be reviewed and updated. They must respond to changing contexts and strive for cumulative progress. Governments must lead the process and ensure it is inclusive and participatory for all the stakeholders, including government agencies, businesses, trade unions and CSOs.

AICHR, the Regional Strategy on CSR and HR and the ASEAN Guidelines for CSR on Labour had recommended for governments to develop National Action Plans for Business and Human Rights (NAP) with other stakeholders.

The Asia Institute paper on BHR in ASEAN (Nandyatama and Rum, 2020) argues that institutionalisation of BHR is hindered by the fragmented nature of governance in ASEAN, the silos between organisations, diversity of beliefs, approaches and views among Member States. Table 4.1 below summarises the status of AMS approach to NAPs and UNGPs.

Table 4.1: Responses of AMS to NAPs on Business and Human Rights

Country	Initiatives	Indications
Thailand	Circulated NAP for public scrutiny in February 2019. As scheduled, the government adopted the NAP on 29 October and introduced it publicly on 16 December 2019.	Transformational Approach: Government and AICHR representatives and civil societies are actively promoting BHR.
Malaysia	SUHAKAM has published a strategic framework in 2015. On June 2019, the government formally announced it would launch a process to develop a NAP on BHR.	
Indonesia	Still introducing BHR principles through multi-stakeholder involvement. BHR is supplemented in existing NAP on human rights.	Incremental Approach: AICHR representatives, CSOs, and government agencies have different preferences in introducing BHR; the result is often gradual adoption of BHR within existing national frameworks.
Philippines	Still introducing BHR principles through multi-stakeholder involvement. The Philippine Commission on Human Rights has pushed the Congress to adopt BHR in business codes and regulation.	
Myanmar	Still introducing BHR principles through multi-stakeholder involvement. The Government adopts BHR in business and investment regulation.	
Brunei	No indication of action on a NAP.	Sceptical Approach: AICHR representatives and the Government do not consider BHR as urgent.
Cambodia		
Laos		
Singapore		
Vietnam		

(Nandyatama and Rum, 2020)

Thailand is the only AMS with a NAP, when the Thai Cabinet approved it in October 2019. Malaysia and Indonesia announced plans to develop NAPs but progress had been slow. The Philippines and Myanmar also showed interest in drafting the NAPS, but this had not progressed.

Businesses are involved in the multi stakeholder NAPs process. There are insufficient published data on the process to answer questions on whether the participation was adequate or on the level of participation. Moreover, approaches differed among countries. As noted earlier, the degree of interest in NAPs on BHR depends on the particular governance systems across ASEAN. Likewise, the involvement of business organisations depends on the strength of commitment and leadership by the Executive. To date, with the possible exception of Thailand one cannot observe a strong commitment of BOs in the various NAP development processes.

Indonesia, is working on a National Strategy on Business and Human Rights (Aji, 2019; Globalnaps, 2021a). The first draft of the National Strategy on BHR was released in November 2020 and the final draft is expected to be released in 2021. In 2017, the National Human Rights Institution (NHRI), Komnas HAM and the Institute for Policy Research and Advocacy (ELSAM) launched the NAP on BHR after 3 years of public consultations. ELSAM (2020) reported that their NAP did not receive legitimacy and recognition from most of the Indonesian governmental institutions.

The role of business entities was noted in a report on Implementing the United Nations' Guiding Principles on Business and Human Rights: Insights from Indonesia (ISANET, 2021) in which the following insights on business involvement can be gained on the efforts of Komnas HAM and ELSAM:

- a. They ran a number of workshops on BHR which were attended by multinational companies and state-owned enterprises (BUMN) from the plantation and mining industries, as well as, other stakeholders, including UNICEF and various government agencies.
- b. In mid-2017, Komnas HAM and ELSAM tried to persuade the government to give the NAP a stronger legal foundation and its provisions binding on business and government. They reported that the Indonesian Business Council for Sustainable Development (IBCSA), the Indonesian Employers Association (APINDO), and the Indonesian Chamber of Commerce (KADIN) along with the Indonesian Global Compact Network (IGCN) committed to promoting the UN's Global Compact principles and actively engaged in and sought to lead discussions about the implementation of the UNGPs in Indonesia.
- c. There is a push to have a collaborative and multistakeholder approach. However, it did not effectively reach the local level. In Indonesia, much of the business activity is at that level.
- d. During the business consultations, businesses prefer "to focus on meeting existing legal obligations and voluntary actions that businesses can take in accordance with a voluntarist model of CSR. For instance, the viewpoints expressed by business representative associations have tended to privilege a CSR-based approach to UNGP implementation over a regulatory one' (Ibid.).

In 2017, the Ministry of Foreign Affairs released a similar policy document on BHR as Komnas Ham and ELSAM. A multi stakeholder dialogue led by the Coordinating Ministry for Economic Affairs, the National Focal Point for BHR, produced the Bogor Outcome Declaration, a roadmap for NAPs. The NAPs initiative is now being driven by the Ministry of Law and Human Rights.

The Indonesia Global Compact Network (IGCN), the Indonesian Chamber of Commerce (KADIN), Indonesia Business Council for Sustainable Development (IBCSA), the EU Chambers of Commerce and some businesses are involved in the process though their exact input is unknown.

While the government made a commitment to BHR and consultations were underway, on 5 October 2020, the Omnibus Bill on Job Creation was tabled in Parliament. It proposed amendments to 73 laws. When the Omnibus Bill on Job Creation was passed into law, labour leaders and environmentalists protested. They alleged that the new law would marginalise workers, threaten the sovereignty of indigenous peoples, and accelerate environmental damage. For example, the deregulation would roll back environmental protection laws regulating illegal timber sales. Investor groups criticised the Bill, noting that it provided insufficient guarantees for environmental and labour standards, heightening risk considerations. The intention of the Omnibus Law is to make Indonesia an attractive place for investors to maximise profits (Olson, 2020). This showed again the power of economic growth weighed against BHR, labour rights and environmental protection.

In Malaysia's ongoing NAP development process businesses are represented in the consultations. Malaysia was the first ASEAN Member State to start the NAP process when the National Human Rights Institution (SUHAKAM), published the Strategic Framework for a National Action Plan on Business and Human Rights in Malaysia in 2015 (SUHAKAM, 2021; Globalnaps, 2021b). This strategic framework was presented to the government. It provided a policy direction for the formulation of the NAP and it was accepted by the government. As noted earlier in this work, progress has been delayed due to changes in the political leadership.

In June 2019 the Minister of Law in the Prime Minister's Department, formally announced a cabinet decision to launch a process to develop NAPs at a SUHAKAM organised National High-Level Dialogue on Business and Human Rights in Malaysia. The Legal Affairs Division of the Prime Minister's Department (BHEUU) was the government body mandated to draft the NAP with stakeholders.

The High-Level Dialogue themed 'Towards a Malaysian National Action Plan on Business and Human Rights', brought together various stakeholders, including business representatives, to exchange knowledge on business and human rights and to discuss the approach to take on NAP.

Among the key issues and recommendations derived from the NHLD were (SUHAKAM, 2020):

- a. That the NAP must be aligned with existing laws, policies and must reflect the Malaysian situation. On the other hand, businesses need to be provided with adequate time and space to enable them to adjust their practises and operations in accordance with the UNGPs.
- b. That it is important for the business sector to understand the impact of their actions and to take appropriate measures in ensuring their operations are in-line with human rights principles and do not violate any laws and regulations in the country.

Since then, many consultation sessions were held with businesses and other stakeholders participating. The NAP is expected to be ready in 2022.

The NAP would cover 3 thematic areas: (1) labour, (2) environment and (3) governance. The Ministry of Human Resources leads the labour theme, while the Ministry of Environment and Water leads on environment. Governance is led by the National Centre for Governance, Integrity and Anti-corruption. Gender is considered as a cross-cutting theme under the three thematic areas. Issues concerning indigenous communities come under the environment heading.

Thailand became the first Asian country to have a NAP when it was released in October 2019, which has been outlined earlier in this work. Thailand had their third universal periodic review (UPR) in November 2021. In the government's report to the UN Human Rights Council, they proudly reported:

The NAP was drafted based on comments received from nation-wide public consultations between government agencies, state enterprises, businesses and civil society in all regions of the country and focuses on the three pillars of rights promotion which include actions to Protect, Respect, and Remedy which are deeply linked to Thailand's national context. The Government also ensured that the NAP was consistent with the National Strategy, the National Human Rights Plan, the human rights situation in Thailand, and related policies and regulations as well as international standards.

Its adoption underscores Thailand's commitment and intention to protect and promote human rights, which was further demonstrated in the follow-up and evaluation of the implementation of the NAP in early 2021. At present, discussions are ongoing with prominent business corporations regarding the possible elaboration of policies on Strategic Litigation Against Public Participation (SLAPP) (UNHRC, 2021a).

On the other hand, trade unions and CSOs highlighted their frustration with the lack of progress in implementing NAPs. They referred to the political climate with flaws, among others, in the constitution, rule of law and that nothing has changed.

Trade unions noted that 'Thailand's labour laws severely restricted freedom of association and collective bargaining and the lack of enforcement of existing weak protections, as well as retaliation by employers against workers attempting to exercise their rights and longstanding egregious abuse of workers. They also noted widespread labour trafficking and forced labour, and structural discrimination and vulnerability of migrant workers' (Ibid.).

They also 'highlighted that common challenges encountered by women workers, including migrant women, included discrimination on wages, occupational safety and health hazards, precarious work and gender-based harassment and violence' (Ibid.).

Whilst it is not clear if business entities had input in the drafting of the NAP, they do seem to have become responsive to the BHR agenda. CP Group, one of the largest corporations in Thailand, has touted its participation in the 2018 National Human Rights Planning meeting. The Group had previously announced its Human Rights and Labour Practices Policy and Guidelines 2017 as the NAP process was picking up steam. The Group 'has encouraged its suppliers and business partners to operate in strict accordance with international human rights standards and principles' (CP Group, 2021). It notes that it pays particular attention to SDG Goals 3 (Good Health and Well Being), 8 (Decent Work and Economic Growth), 5 (Gender Equality) and 10 (Reduced Inequalities).

4 Insufficient Business Input in NAP Processes and Triggers for Change

Businesses had not initiated the NAPs process and their participation had not been as active as CSOs. Thai trade unions and CSOs made submissions to the HR Council regarding the performance of Thailand for the 2021 UPR process while businesses had not made any submission.

The prevailing political, legal, social and economic situation influences the BHR and human rights generally in any country. In ASEAN, assessments of the state of freedom, rule of law, corruption and fundamental freedoms are not encouraging. Under these conditions, pushing for BHR is challenging. Businesses with their profit motive are not natural champions for human rights.

According to Freedom House’s 2021 survey none of the AMS are classified as ‘Free’. Indonesia, Malaysia, Philippines and Singapore are classified as ‘Partly Free’. The other countries are all classified as ‘Not Free’. Thailand moved from ‘Partly Free’ to ‘Not Free’ in 2021. Myanmar was ‘Partly Free’ between 2017 and 2019. (Freedom House, 2021)

The World Justice Project Rule of Law Index 2021 covers the rule of law situation in 139 countries and jurisdictions by providing scores and rankings based on eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. It is the world’s most comprehensive dataset of its kind and relies principally on primary data, including the perspectives and experiences of ordinary people.

The results showed an overall decline in the ranking. COVID-19 has also resulted in the closing of civic space and delays in civil and criminal justice as well as in administrative proceedings. Vietnam improved its ranking without any change in the score (World Justice Project, 2021).

Table 4.2: Rule of Law in selected ASEAN Member States

Member State	Overall Rule of Law Ranking	Change from Previous Year	Ranking for Fundamental Rights	Ranking for Absence of Corruption
Cambodia	138	0	131	138
Indonesia	68	Down 2	88	98
Malaysia	54	Unchanged	84	49
Philippines	102	Down 3	123	77
Singapore	17	Down 3	38	3
Thailand	80	Down 2	99	66
Vietnam	88	Up 4	104	92

(World Justice Project, 2021); ranked among 139 countries

All the three countries have National Human Rights Institutions (NHRIs) and they took leadership in driving for NAPs before governments were involved in the process. NHRIs have a unique position in that they investigate complaints, conduct inquiries and thus have knowledge of where and how human rights abuses take place. Their constitutional position to submit reports to the political leaders and general public, helps put the issues in the public domain. For example, the Thai NHRI had done work on extraterritorial abuses of Thai businesses outside the country and the need to regulate them. Their work is reflected in the Thai NAPs covering cross border investments and multinational enterprises.

While large enterprises were represented in the process, small and medium-sized enterprises (SMEs) were not adequately represented. This is significant as micro, small and medium-sized enterprises (MSMEs) account for between 88.8% and 99.9% of total establishments in AMS and between 51.7% and 97.2% of total employment. Their contribution to each AMS’ GDP is between 30% and 53% and to exports, between 10% and 29.9%. MSMEs are important as part of the global supply chain in Factory ASEAN and subject to social audits and standards imposed by buyers of their services. It is also recognised that it is difficult for MSMEs to participate even if they were invited due to limited resources, capabilities and other priorities

The NAPs process did not seem to have adequately challenged the status quo position of businesses. For example, Indonesian businesses tried to keep existing legal obligations and voluntary actions which included a voluntarist model of CSR and a CSR-based approach to UNGP implementation over a regulatory one (ELSAM, 2020). This is when globally, CSR has moved beyond philanthropy and charity. The EU definition of CSR no longer refers to it as voluntary action. It is now defined as 'the responsibility of enterprises for their impacts on society'.

In the Malaysian process, one of the ground rules laid out in December 2019 National High-Level Dialogue on BHR was that 'the NAP must be aligned with existing laws, policies and reflect the Malaysian situation' (SUHAKAM, 2020). Are existing laws and policies adequate to ensure compliance to basic expectations of BHR?

The importance of political will comes out strongly. Beyond reacting to external pressures that could have affected GDP numbers, the process will highlight problems and issues to be resolved. It requires political will to address the concerns of stakeholders. But how much of the status quo has changed if there is no willingness to change laws and policies?

More than the Plan itself, the implementation is where the problems are resolved and BHR has to be mainstreamed into business practises. This requires a mindset shift from moving beyond 'Environmental, Social, and Governance' (ESG) to BHR. The main difference is that HR issues cannot be managed as a checklist exercise by some department in the company with little or no transformation impact on the organisation. BHR can contribute to lasting improvements if they adopt the BHR culture and adopt a learning approach to change culture (Buhmann and Wettstein, 2017).

Another feature is the power relations between governments, business, the individuals represented by CSOs and trade unions. This power relations could stand in the way of dialogue as Kavi Chongkittavorn noted in a Bangkok Post article of 19 October 2021.

Reading through the reviews submitted by the Thai government, the experts and academics and civil society organisations for the upcoming UPR, one can easily conclude that Thailand could do a lot better if all concerned agencies worked together with the stakeholders to promote and protect human rights inside the country.

What has been amazing is the display of good intentions and common goals of the government and other stakeholders to see Thailand's human rights records elevated to universal standards. Somehow, this noble objective remains elusive because the government's agencies do not work in tandem with civil society organisations (Chongkittavorn, 2021).

Nevertheless, there may be some triggers for change that are complementary to achieving BHR through NAPs. These complementary triggers will enable or hinder BHR implementation as can be seen in three areas: labour rights, the fisheries sector and free trade agreements.

4a Labour Standards

One of the key elements for BHR are labour standards. In 1998, the ILO Declaration on Fundamental Principles and Rights at Work came into force. It covers ILO conventions on forced labour, child labour, non-discrimination and freedom of association and collective bargaining core conventions. Every country

had to implement the Conventions through a process of annual reviews, global reports and technical cooperation projects regardless of their status on ratification. This made the Declaration both core labour and human rights. It also meant that all businesses had to comply with the Conventions everywhere they operate.

The ILO Fundamental Principles and Rights at Work is cited by the UNGPs with the UDHR. One key measure of respect for labour and human rights standards can be measured by the ratification of the Fundamental Conventions of the ILO. The summary of ratification status in ASEAN is in the table 4.3 below.

Table 4.3: Ratification Status of ILO Fundamental Conventions in ASEAN

ASEAN Member States	Freedom of Association and Collective Bargaining		Forced Labour		Discrimination		Child Labour		Total
	C 87 Freedom of Association	C 98 Right to Collective Bargaining	C 29 Forced Labour	C 105 Abolition of Forced Labour	C 100 Equal Remuneration	C 111 Discrimination	C 138 Minimum Age	C 182 Worst Forms of Child Labour	
Brunei							✓	✓	2
Cambodia	✓	✓	✓	✓	✓	✓	✓	✓	8
Indonesia	✓	✓	✓	✓	✓	✓	✓	✓	8
Laos			✓		✓	✓	✓	✓	5
Malaysia		✓	✓		✓		✓	✓	5
Myanmar	✓		✓				✓	✓	4
Philippines	✓	✓	✓	✓	✓	✓	✓	✓	8
Singapore		✓	✓		✓		✓	✓	5
Thailand			✓	✓	✓	✓	✓	✓	6
Vietnam		✓	✓	✓	✓	✓	✓	✓	7
Total Ratified	4	6	9	5	8	6	10	10	

(ILO, 2021)

The status of ratification of fundamental conventions is mixed. The different political systems and level of economic development means the Member States have different priorities. The ASEAN Guidelines for CSR on Labour recognised these differences when it said implementation ‘should also take into account national circumstances’.

The ASEAN Human Rights Declaration [Article 27 (2)] affirmed that ‘every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations’. In practice ratification of relevant ILO conventions and laws to allow for freedom of association (C87) and the right to collective bargaining (98) have only 4 and 6 ratifications. This reflects the challenges in the conduct of industrial relations and thus low levels of disclosure on these in sustainability reports.

The Conventions on Child Labour, Convention 182 on the Worst Forms of Child Labour and Convention 138 on Minimum Age, are ratified by all 10 AMS as well as the UN Convention on the Rights of the Child. Convention 29 on Forced Labour has 9 ratifications.

The overall picture of ratification shows eight AMS ratified more than half the fundamental conventions. Three AMS (Cambodia, Indonesia and Philippines) have ratified all the 8 fundamental conventions, while Vietnam ratified 7 of the fundamental conventions. There is however no evidence that ratification would result in better performance in labour standards or in BHR. Violations of labour standards had been the biggest criticisms against ASEAN Member States.

4b Thai Fisheries Industry

The Thai fisheries industry faced many human rights abuses. The industry is important for the Thai economy. It is the world's third largest seafood exporter and one of the world's largest seafood processing hubs. Growth had been unregulated. Fleet size grew from 99 in 1961 to 57,000 in 2011 (Trent, 2019). Half of the 600,000 men working in the industry was estimated to be undocumented workers. Forced labour was used to keep costs low.

In 2014, the US State Department's Trafficking in Persons report ranked Thailand in the lowest tier for its human rights record. In 2015, the European Commission issued a 'yellow card' to Thailand, a warning that could lead to import bans to the EU.

Under international pressure, Thailand started to put its act together in the industry. It enacted the Thai Fisheries Act of 2015, which enhanced financial penalties for illegal fishing and enforced an inshore exclusion zone to protect the rights of small-scale fishers. The Department of Fisheries implemented mandatory vessel monitoring systems which addressed the risks of illegal fishing and illegal transfer of fishes and workers between vessels. A network of 30 'Port in Port out' inspection centres were also established to track vessels leaving or returning to port, and enable authorities to focus their efforts to police previously non-compliant vessels (Trent, 2019). The Department of Fisheries also introduced an e-traceability system for fish from Thai-flagged and foreign flagged vessels which enabled traceability from catch to exporting. In 2016, Thailand ratified the UN's Port State Measures Agreement, which committed it to improving inspection standards for foreign-flagged vessels entering Thailand.

In 2018, Thailand's efforts were recognised when the US State Department upgraded Thailand to Tier 2 while the European Commission lifted the 'yellow card' in 2019. Thailand became the first country in Asia to ratify the ILO Work in Fishing Convention 188 on 30 January 2019. Thai Union, the leading company in the industry, was taken as a model of change. The improvements were significant.

However, in July 2021, the US again downgraded Thailand from Tier 2 to Tier 2 Watch List due to forced labour issues. (Bangkok Post, 2021). There were still problems of indebtedness and abuse. This episode shows that when governments and industry put their mind to solving a problem, they can make good progress. At the same time, it is easy to backslide. Would respecting the right of the workers to form or join trade unions to represent their interests make a difference in consistent attention to these issues?

4c EU-Vietnam Free Trade Agreement - FTAs as a Driver

The EU sealed the second FTA with an ASEAN Member State, with the ratification of the Vietnam Free Trade Agreement in February 2020. The first deal was with Singapore in 2018.

As part of implementing the FTA, Vietnam would have to meet higher standards of labour, safety, environmental and consumer protection, ensuring that there is no 'race to the bottom' to attract trade and investment. Vietnam would have to implement the principles of ILO concerning fundamental rights at work, Paris Agreement on climate and other environmental agreements for the conservation and sustainable management of wildlife, biodiversity, forestry and fisheries.

Reforms made and pending include (S&Ds, 2020):

- a. The Vietnam labour code reform was ratified on 20 November 2019
- b. Detailed roadmap on both the implementation of the labour law as well as ratification of outstanding ILO conventions
- c. Ratification of ILO convention 98 (collective bargaining) in June 2019
- d. Ratification of ILO Convention 105 (forced labour) scheduled for June 2020
- e. Ratification of ILO Convention 87 (freedom of association) until 2023 latest
- f. Commitment by the EU Commission to closely monitor implementation of the agreements, in particular the commitments on trade and sustainable development, and promote continued reforms
- g. Strong Representation of Civil Society in the Domestic Advisory Group
- h. Close Involvement of the EU Delegation and Embassies in monitoring the human rights situation

Economic incentives, via FTA, can nudge countries in the desired pathway to align with international standards, by providing practical benefits to governments and businesses.

These three areas point to the need for international support for advancing the BHR agenda in Southeast Asia. However, this takes place in the backdrop of emerging legislation in the region concerning 'foreign interference'.

5 Analysis of the State of Business Participation in NAPs

NAPs have value in focusing attention and effort for BHR as in UNGPs. Its contents, process and implementation will determine its effectiveness. The take up of NAPs in ASEAN is low. Business interest is also low.

States have the responsibility to respect, protect and fulfil human rights as duty bearers. They ratify international human rights instruments and create mechanisms to safeguard human rights. Governments should lead the NAPs process and in implementing BHR. BHR is related to responsible business conduct and social responsibility. The UNGPs proposes the use of a smart mix of regulations and market incentives.

Laws, policies and practises that diminish respect for human rights will have to be amended together with the development of a robust system to remedy human rights violations. The importance of the rule of law must be emphasised. It is essential for good governance and for the systems to work, especially to ensure remedies will be available as intended under the UNGPs. With the general decline in freedom, civil space and access to justice moving NAPs has become more challenging.

Regulations that are enforced will be the most important driver for respect of BHR by businesses. In 2014, the Singapore government passed the Transboundary Haze Pollution Act to deter firms or entities in or outside Singapore from taking part in activities that contribute to transboundary haze affecting Singapore.

It acted as a deterrent to force companies to take action against forest fires that polluted the region with haze. Guidelines by regional stock exchanges for mandatory non-financial reporting have both improved the quality and depth of reports (Loh, 2020).

Businesses are sensitive to public opinion. Social media play an important role in influencing public opinion and influencing governments, businesses and other stakeholders. The movement against sweatshops and child labour were driven by consumers who were influenced by media. However, in this present digital age, truth is under more threat than ever before. Greenwashing, blue washing and impact washing are getting more common. HR defenders and regulators do act against misleading statements.

NAPs in ASEAN have featured labour issues as a priority in implementing UNGPs. The best way forward would be to ratify and implement the core Conventions listed in the ILO Fundamental Principles and Rights at Work document. The ASEAN Guidelines for CSR on Labour and ILO conventions provides guidance on implementing labour rights.

Social dialogue requires strong and capable representatives with strong institutions. So, effort must be spent to raise awareness, build capacity and improve relations between workers, employers and government representatives. As part of BHR impediments that hinder effective voice for workers and employer organisations need to be addressed.

Power dynamics among representatives could hinder trust and mutual respect. Treating everyone with respect and dignity has to be a basic expectation. MSMEs are 99% of enterprises in ASEAN. BHR within these enterprises will effect real change. So in the process it is essential to take into account the needs of MSMEs.

NHRIs played a significant role in encouraging governments to develop NAPs. NHRIs accredited to the Paris Principles need to be supported in their work as they can make a significant contribution to UNGPs and in implementing NAPs.

The most important ingredient for developing the BHR agenda is the political will, determination and persistence to develop a good plan. The biggest obstacle in implementing UNGPs is the profit at all cost mindset, followed by corruption. Businesses cannot use the business case argument only to respect human rights. There is a moral case to do the right thing.

The market incentives could be the promotion of sustainable procurement and access to finance. Businesses that uphold BHR should be treated more favourably for contracts from governments and other businesses as well as financing. The real success of NAPs would be the implementation of UNGPs by mainstreaming and embedding BHR within organisations. These will encourage adoption of BHR.

Free Trade Agreements with clauses for human rights would encourage the move towards BHR and UNGPs. The significant movement towards responsible business in ASEAN in 2015 and 2016 were against the backdrop of the Trans Pacific Partnership (TPP) with stronger language for environmental and labour clauses. The EU Vietnam FTA motivated amendments to laws to compliance with the requirements of FTAs. Opportunities for more business and profits are strong incentives for change for the better.

Negotiations for a 'legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' have been proceeding since 2014. The 3rd draft was agreed on in 2021. This treaty is expected to impose obligations on businesses regarding BHR.

The EU and many governments are legislating mandatory human rights due diligence. This will affect the global supply chain of MNCs and will have an effect on Factory ASEAN and enterprises in the region.

Another development that could move the agenda is from China. They released their Human Rights Action Plan in August 2021. The plan stated:

Promoting responsible business conduct in global supply chains. It will encourage Chinese businesses to abide by the UN Guiding Principles on Business and Human Rights in their foreign trade and investment, to conduct due diligence on human rights, and to fulfil their social responsibility to respect and promote human rights. It will participate and play a constructive role in negotiations on the UN business and human rights treaty (The State Council Information Office of the People's Republic of China, 2021).

China as one of the biggest investors in the region will impact BHR in the region, if they live up to their reputation of implementing their Plans.

The other enablers include the push for greater disclosure in non-financial reports of businesses. The regional stock exchanges had been pushing with success. Now with the climate crisis, the scope of reports will increase. This transparency will grow as consumers, investors and regulators push for greater transparency and accountability.

The BHR agenda faces many challenges. The most important is governance. Good governance is required to ensure proper implementation of decisions made. Poor governance is made worse with corruption. Corruption distorts markets and gives impunity to some of the perpetrators of human rights abuses. According to the Transparency International surveys, ASEAN countries, other than Singapore, do not fare well. ACN had worked on promoting business integrity with BHR, but faces challenges in getting funds and support.

The rule of law is also affected by corruption. Rule of law is an essential ingredient for implementation of BHR, both to ensure compliance and that remedies for violations are managed fairly and speedily.

The other challenge for ASEAN is that civil society and trade unions operate under many restrictions that affect their effectiveness. There is a need to ensure worker representatives and human rights defenders are protected and allowed to perform their work. Civil society and independent trade unions have an important role to work with governments and businesses to mainstream BHR.

Finally, BHR should be tackled under a multi stakeholder platform. Engagement and dialogue will contribute to mutual understanding and trust. ASEAN established the ASEAN CSR Network to promote and enable responsible business conduct in ASEAN. A similar network can and perhaps must be created on the BHR front. ASEAN has to invest in this venture of ensuring its citizens enjoy fundamental rights and freedom.

6 Conclusion

Business as usual by generating profits through the exploitation of land, labour and capital is not a long term viable option. There are limits to growth and mindless growth has generated many crises, including

climate, environmental, widening income gap, tensions in Society between the haves and have-nots, corruption, etc.

The world needs the moral compass of respecting humans and the environment. This requires respect for people and human rights with governments protecting human rights, businesses respecting human rights and providing speedy and adequate remedies when violations occur.

ASEAN has made tremendous progress economically and socially to improve the lives of citizens. BHR will enable ASEAN to build on the achievements for an inclusive, sustainable and equitable ASEAN. The challenge is to have the political will to remove impediments and introduce enablers for all stakeholders to protect and respect human rights. For business generating responsible profits by implementing UNGPs will have to be the norm.

The National Action Plans provide the framework to realise these BHR goals as in the UN Guiding Principles on BHR. As noted above, further research is necessary in this important area.

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Chapter 5: Conclusion - The State of NAPs in Southeast Asia: Recommendations and the Way Forward

James Gomez and Robin Ramcharan

1 Introduction

Guided by key themes noted in the Introduction to this work, the contributors have noted, starting in Chapter 2, the emergence of NAP processes in the last decade that seek to localize the UNGPs on BHR, whether undertaken by governmental or non-governmental actors. Consistent with the experience of NAP-drafting worldwide, the region must pay attention to some key challenges: conducting national consultations with all stakeholders to identify the priorities in each country, having a credible drafting process, having an inclusive process in which all stakeholders are included, aligning the NAPs with international human rights standards that are inherent in the UNGPs and having clear and resolute leadership by the Executive branch of government.

The Thai NAP process may serve as a useful model in these regards, though it must be noted the gradual inclusion of all stakeholder and responses to the latter's critiques, which necessitated three successive phases in the drafting process. While States have clearly enumerated duties and tasks, the language in relation to the responsibility of business organisations to adhere to national and international human rights standards is less resolute and commanding. The Thai NAP refers to the evolution of the process and to the key international instruments that the government is a party to in each substantive rights area: labour, land, natural resources and the environment, human rights defenders and cross-border investments and multinational enterprises.

However, in each area it avoids specifically enumerating the rights that businesses are bound to adhere to and adopts non-compelling language. This is the case with regard to fundamental labour rights under Pillar 2, as noted in Chapter 2. To its credit, with regard to Pillar 3 on remedies, it addresses important initiatives in the area of addressing complaints and providing remedies. It is to be seen if these bear fruit.

The non-compelling language, to add to the discussion of the Thai NAP in Chapter 2, continued with regard to business operations that may affect land rights, natural resources and the environment. The NAP states that 'State enterprises and the business sector *must review* the organization's rules and regulations and improve them to comply with relevant laws, standards and principles of human rights related to the environment, natural resources, community and land, especially the UNGPs, to prevent human rights violations'. State enterprises, '*must monitor* their subsidiaries and supply chains in relation to human rights standards, '*must cooperate* with government and international organisations in relation to monitoring, and they '*should* have appropriate measures and remedies provided in case of land expropriation from people, including coordinating with relevant government agencies to inform the public in advance. State enterprises and the business sector '*should provide* information about businesses and projects to the public' and '*should listen to the public comments* and respect shareholder demands, '*should* conduct

independent environmental assessments and they *'should'* conduct human rights due diligence and provide for accountability and remedial mechanisms (RLPD, 2019).

Specific tasks that are assigned, however, leave room for doubt over the commitment to respect international human rights obligations. It is stated that Ministry of Natural Resources and Environment, Ministry of Industry and the Ministry of Interior should *'consider creating a mechanism to monitor businesses'* actions that violate land rights, natural resources and the environment' contained in the National Strategy for Public Sector Rebalancing and Development - SDG 11, 13, 14 and 15 and UNGP Articles 1, 2, 3, 4, 5, 7, 8 and 10. The Ministry of Justice is tasked to *'study guidelines to develop laws, regulations or policies to promote businesses to respect human rights, containing the same National Strategy and with SDG 11 and 16, UNGPs Articles 1, 2, 3, 4, 5, 7, 8 and 10'* (Ibid.). While these are useful steps, it will be obvious that the SDGs, while aiming at core human rights goals, are not framed in the language of international human rights law.

With regard to human rights defenders (HRDs), the NAP provides, over the short term, for awareness raising. For the *'long term'*, Thailand is to *'enact laws or regulations of the Prime Minister's office regarding measures to protect human rights defenders.'* (Ibid.). State duties include clearly making a definition of *'human rights defenders'* by *studying* international standards to ensure compliance, once again, with the National Strategy for National Security, the National Strategy for Public Sector Rebalancing and Development, SDGs 11 and 16 and UNGPs Articles 1, 3, 5 and 7. Regarding Pillar 2, state enterprises and the business sector, inter alia, must comply with laws protecting HRDs, should promote awareness about laws protecting HRDs, must cooperate with government agencies and international organisations in monitoring prosecutions of HRDs and should understand the role of HRDs in protecting the rights of others. The business sector should *study and understand* the role of HRDs. In relation to Pillar 3, a range of provisions on remedies are provided, including: *'establish a mechanism for petition and effective, appropriate and sufficient assistance to resolve violations of human rights that may arise from conducting business'*. (Ibid.). Once again, compliance is to be measured against the same National Strategy, SDG 16 and UNGPs Articles 24, 25, 26, 27, 28, 29 and 31.

The emphasis on HRDs is nevertheless welcome as a UN Asia-Pacific Environmental Human Rights Defenders (EHRDs) conference was set to take place from 17-19 December 2021. The Concept Note for the event noted that 227 EHRDs were killed in 2020, of whom many were indigenous peoples. Of these, 18 percent were killed in Asia-Pacific; 29 persons were killed in the Philippines alone. (OHCHR et al., 2021)

It is important to note a significant difficulty with the NAP. The National Commission on Human Rights (NHRC), a key stakeholder in the Thai national human rights protection system, is not assigned a major role in the NAP protection of human rights. While the NAP acknowledges its important role in the preparatory phases, a progressive role is not evident in the following tasks of the NHRC enumerated in relation to business activities:

- The recommendations of the National Human Rights Commission of Thailand regarding amendments of the law on environment and the law related to public participation in public policy should be considered and implemented
- Promote the role of the National Human Rights Commission in examining human rights abuses in foreign countries by the Thai business sector where the parent company is registered or has its head office in Thailand
- Establish mechanisms or oversight of transnational corporations by allowing the National Human Rights Commission to do the management (Ibid.).

This kind of lacuna and the stronger rights language can be addressed by oversight by Parliamentarians. They are among the key stakeholders that must ensure that NAPs conform to international human rights standards. They have been surprisingly absent from NAP development processes in the region thus far. This work has shown that Parliaments played no role in the NAP processes. This is a weakness in the NAP drafting processes that must be remedied. Equally worrying is the prospect that parliamentarians are not fully informed or aware of the UNGPs on BHR. Parliamentarians are vital to holding the Executive to account and to the promotion and protection of human rights.

Contributors, in Chapter 3, have advanced recommendations for parliamentarians, including providing clarity on compliance with rights standards (notably labour standards in the Thai case), providing monitoring and evaluation on the implementation of NAP processes, assessing the compliance of the business sector with international human rights standards, creating an advocacy infrastructure on BHR issues, pressure the Executive in parliamentary sessions on its progress of NAPs and hold regular dialogues of parliamentarians to discuss progress and avenues for cooperation and coordination with Executive branches.

To these may be added the strong monitoring and evaluation process that is evident in the German experience, outlined in Chapter 2. Parliamentarians must be part of that kind of detailed monitoring exercise.

As the region, and indeed the world, emerges slowly from the COVID-19 pandemic, as globalisation resumes and as supply chains are re-animated, Parliamentarians in particular have an opportunity to cajole and progressively steer the ongoing NAP development processes and the review of the Thai NAP, as they should. A range of actions can be undertaken across the region, as shown in Table 5.1 below:

Table 5.1: Opportunities for Parliamentarians

Ensure that baseline studies are conducted	Call for the conduct, ab initio, of a national baseline study
Ensure inclusive and transparent processes	Ensure all stakeholders have access to drafts of NAPs or strategies on BHR.
Ensure policy coherence	Ensure policy coherence between various legislations and national policies on BHR. Ensure legal frameworks are adequate and avoid contradictions.
Ensure alignment with international human rights standards	Review and amend BHR policies, accompanying laws and strategies to ensure alignment with international human rights standards.
Foster cross-sectoral cooperation and coordination	Establish governance structure and institutional mechanisms to foster cross-sectoral cooperation and coordination on BHR issues
Activate parliamentary Review Mechanisms	Relevant Committees of parliaments must be seized to consider BHR and related policies, legislation that affects the conduct of businesses. Committees must call for regular reporting from the Executive and from business organisations.
Develop national monitoring and evaluation mechanisms.	Parliament can, in collaboration with the Executive, contribute to designing a scientifically sound and effective monitoring and evaluation process. This includes regular reports from BOs to parliament. Receiving reports and recommendations from National Human Rights Institutions are vital to this process.
Seek academic expertise on BHR policies and laws	Parliaments should establish institutionalised linkages with think-tanks to ensure they are equipped with the latest research and expertise.

Source: These are gleaned from the research of CALD, in particular, and collectively from the research of all of the contributors.

This role for Parliamentarians seems especially more important given that the key stakeholders that are the intended targets of NAPs, business organisations, seem to hold no interest thus far in the NAP development processes. Indeed, as noted in Chapter 4, business organisations have thus far not played an important role in shaping NAPs on BHR. The thrust of the analysis is that, as profit-seeking entities, business organisations appear not to be interested in additional 'encumbrances' beyond soft, brand-enhancing corporate social responsibilities and UN Global Compact initiatives.

Parliamentarians must be active more-so given the strong State-business nexus in the region. NAPs are therefore necessary, though they are not sufficient. In addition to market forces, such as consumer choices, it is noted that they can be assisted by additional triggers that can nudge BOs into the direction of upholding human rights responsibilities. These are external triggers that come from the international system such as the European Union, the United States of America and even China in their commercial and trade relations with regional states. In this regard, it is noteworthy that human rights is increasingly entering into free trade agreements of Canada, EU and the US (European Parliament, 2021) and in investment agreements. Whereas the former has enjoyed a longer discussion, the movement to incorporate human rights in foreign investment agreements is a newer phenomenon. As Choudhary notes, 'investment treaties have moved from referring generally to human rights to specifying common rights, such as health, labour or anti-corruption, and, more recently, to even more specific issues of human rights such as gender equality and indigenous rights'. (Choudhary, 2020)

2 BHR and NAPS Amidst a Global Pandemic

NAPs processes on BHR are not unwelcome in the light of a global pandemic in which, thus far some 5 million people have died across the world as of the time of writing, and this number will increase. Within Southeast Asia, the death toll has reached staggering amounts, especially in the following countries: Indonesia (143k+), Philippines (148k+), Malaysia (28k+), Vietnam (21k+), Thailand (19k+), Myanmar (18k+), have experienced the most deaths. (Worldometer, 2021)

Pharmaceutical companies, private and government-sponsored, bore the unique responsibility of producing and distributing life-saving vaccines that address the protection of the right to life and the right to health, both integral to the BHR framework. Pharmaceutical companies have responded with unprecedented speed in producing life-saving vaccines, building on prior knowledge gained from mapping of the coronavirus in previous pandemics.

Nevertheless it is the poor global distribution of such vaccines that has been the key stumbling block in addressing the rights to life and health, in developing countries in particular. Intellectual property considerations aside, the rich parts of the world have acquired adequate supplies while the less rich parts of the world continue to struggle with the vaccination of their populations. It is well known by now that failure to vaccinate a sufficient amount of the world population will enable further mutations of the deadly virus. In calling for vaccine equity, the WHO has noted:

Most manufacturers have largely spurned the opportunities to share technology and know-how and public health-oriented licensing, despite a number of mechanisms being set up including the COVID-19 Technology Access Pool and the mRNA vaccine technology transfer hub, which is now moving ahead in South Africa.

The global failure to share vaccines equitably is taking its toll on some of the world's poorest and most vulnerable people. New variants of concern mean that the risks of infection have increased in all countries for people who are not yet protected by vaccination (WHO, 2021).

It continued:

Contracts are in place for the remaining 5 billion doses. But it's critical that those doses go where they are needed most – with priority given to older people, health workers and other at-risk groups.

We can only achieve our targets if the countries and companies that control vaccine supply put contracts for COVAX and the African Vaccine Acquisition Trust – or AVAT – first for deliveries and donated doses (Ibid.).

To their credit, some companies have agreed to share royalty-free their newly developed antiviral pill. As the New York Times reported in October 2021, 'Merck has granted a royalty-free licence for its promising Covid-19 pill [the Medicine Patents Pool] in a deal that would allow the drug to be manufactured and sold cheaply in the poorest nations, where vaccines for the coronavirus are in devastatingly short supply'. (Nolan, 2021) Generic producers in developing countries may produce and market the drug for as low as \$20 dollar per treatment over a five-day course, compared to \$712 per course as per agreement with the US Government. (NYT, 2021) Merck has promised technical assistance in the event of difficulties in production. Charels Gore, Director of the Medicine Patents Pool, noted ongoing talks with Pfizer for a similar drug. He noted pertinently: 'from a scientific point of view, industry has done a really brilliant job – firstly, providing the vaccines, and now providing treatments. But the access side of it has let the whole thing down.' (Nolan, 2021) Countries in the Asia Pacific, including Malaysia and Singapore have rushed to purchase this drug, named Molnupiravir, (Yoon, 2021) however experts have warned against hoarding that took place earlier in the case of the vaccines. (Hollingsworth, 2021) This dilemma of access to medicines plays out at the national level as well, with unequal distribution of effective vaccines between rural and urban populations alongside poor planning.

Ineffective Government policies have aided and abetted the pandemic as well, allowing time for the virus to mutate – the current Omicron variant identified in South Africa being a case in point – and cause further deaths and economic damage. The Thai case is an emblematic and perhaps tragic example of this. The choice of a vaccine from China, known to be much less effective than other vaccines from Europe and North America, continued to be favoured for fear of upsetting local sensibilities as the local handler of this vaccine +is owned by the Head of State. Critics have been charged with the draconian lèse majesté law and face years of imprisonment for exercising their right to free speech (Bangkok Post, 2021).

Other countries in Southeast Asia have faced the dilemma of addressing a resilient Covid-19 virus that has had a devastating impact on globalisation, on national economies and on the most vulnerable across societies, notably migrant workers and women. The International Labour Organization notes that there are over 48 million migrants in the Asia Pacific, the majority of whom are migrant workers (ILO, 2021). Their health and livelihoods have been deeply affected by emergency measures that require work stoppages, quarantines and resultant loss of income. With borders closed, many could not return home and had to quarantine without adequate support. With little or no social protections, their lives were also at risk. In Singapore, for example, 90% of the cases in August 2020, were from migrant worker dormitories. Moreover, their families in their home countries also suffer due to reduced or no remittances.

Migrant workers occupied key 'frontline' sectors across economies, in agriculture, food processing, transport and logistics, seafaring and fishing. They 'have been working in harm's way to keep essential services and supply chains from grinding to a global halt' (Subramaniam, 2020). The Institute for Human Rights and Business notes further, the dramatic and widening gaps in the treatment of lower-paid and low-skilled workers who build our cities, farm our foods, deliver our products, and perform a wide variety of essential services. These are the workers often hired to perform jobs that can only be performed at the site itself, e.g. in farms, slaughterhouses, mines, oilfields, and construction sites (Ibid.).

Women migrant workers in particular, notes the ILO, are disproportionately affected, 'especially domestic workers who are often not covered by labour laws, where they have lost their jobs and have found themselves without shelter. There have also been cases of undocumented migrant workers being detained in crowded and unsafe conditions'. (ILO, 2021) In pre-pandemic Southeast Asia, the ILO and UN Women noted that 50% of the migrant workers were women, of a total of 10 million migrant workers. In addition to loss of jobs, no social protections and mental health issues, women faced the additional hazard of domestic and sexual violence (ILO and UN Women, 2020).

The overall dire situation of these low-skilled migrant workers is compounded by the prospect of increased job loss across the region due to automation of the workplace in the years ahead. As Nguyen (2021) noted in the Bangkok Post in September 2021, 'the post-pandemic world will see faster adoption of automation and AI, especially in work arenas with high physical proximity. Nguyen called attention to a 2020 global survey of 800 senior executives, 'two-thirds said they were stepping up investment in automation and AI as businesses prepared for a post-pandemic world'. A post-pandemic economy dependent more on automation, portends low job growth in low-wage occupations, and that 'more than half of displaced low-wage workers will need to acquire new skills to be employed'.

This bleak picture speaks to the need, in addition to the upgrading of skills by governments and firms, for all countries in Southeast Asia to embrace and ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Only sending countries have either ratified (Indonesia) or signed (Cambodia). Receiving countries have not yet taken any steps (OHCHR, 2021a). This convention affords migrant workers the full panoply of rights enumerated in international human rights conventions and under international labour rights conventions (OHCHR, 2021b). In a guidance note to Governments, the UN Committee on Migrant Workers established under this treaty and the Special Rapporteur on the Human Rights of Migrants admonished states that:

[I]t is of paramount importance that State emergency responses to the COVID-19 pandemic be necessary to achieve legitimate public health goals; proportionately apply the least intrusive means; and be non-discriminatory so as not to be used to target particularly vulnerable groups including minorities or individuals. (UN Committee on Migrant Workers, 2021)

This surely includes making sure that business organisations adhere to international human rights standards protecting migrant workers that are inherent in the UNGPs on BHR.

3 Overcoming Impediments to NAP Development

The uptake in NAPs on BHR in the region is welcome, notwithstanding the lacuna and gaps noted in this work. With the prodding of civil society and following the leadership of Thailand, a cascade of NAPs processes in the region seems to be taking place, temporarily delayed by the global health pandemic, as

an Indonesian national plan is set to be announced around the time of writing. It is to be hoped that their substantive content will include stronger language that will push business organisations towards commitments to upholding international human standards that are already part of domestic law.

It is especially important to hold governments to account for their obligations under international human rights law and to ensure that the region's BHR agenda is not mere window-dressing. As noted earlier this requires resolute involvement by parliamentarians who must be adequately informed and trained on BHR matters. Business organisations must also be fully and accurately apprised of the BHR agenda through sustained engagement with regional chambers of commerce.

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Notes on Partner Organisation



**FRIEDRICH NAUMANN
FOUNDATION** For Freedom.

Southeast and East Asia

The Friedrich-Naumann-Stiftung For Freedom (FNF) is a German political foundation. In Germany and in 60 countries around the world, FNF and its partners promote freedom, liberalism, democracy, human rights, pluralism, tolerance, curbing climate change, an open and digital society, social market economy, and the rule of law. FNF is a non-profit organization that focuses on civic education.

FNF has close ties to Germany's Free Democratic Party (FDP). FNF was founded in 1958 by Germany's President Theodor Heuss and is funded by Germany's Federal Ministry for Economic Cooperation and Development. The headquarter is in Potsdam, Germany, just outside Berlin. FNF advises decision makers, facilitates dialogue, holds conferences, funds publications and invites people from around the world to attend seminars and other events in Germany.

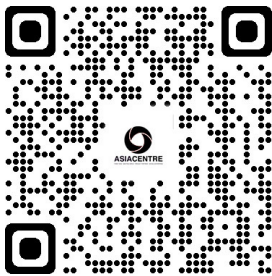
Abroad, FNF works with government institutions, NGOs, academia, political parties, researchers, students, journalists, activists, start-ups and artists who share our values and want to join us in promoting freedom. FNF work collaboratively and seeks long-term partnerships, highlighting the importance of individual freedom and strong democratic institutions. FNF promotes economic freedom and free trade, but wants businesses to respect human rights. FNF values privacy and data protection. FNF promotes curbing climate change by utilizing technological advances, for example in the context of smart cities.

FNF has worked in Southeast Asia since 1969. The first Asian office was opened in Jakarta, Indonesia. Today, FNF has seven offices in Southeast and East Asia: Bangkok, Hanoi, Jarkata, Manila, Seoul, Taipei, and Yangon. We also work in Malaysia.

<https://www.freiheit.org/southeast-and-east-asia>



ASIACENTRE



Asia Centre (asiacentre.org) is a not-for-profit social enterprise and seeks to create human rights impact in the region. Asia Centre's work focuses on issues related to civil society, democracy, elections, freedom of expression, freedom of religion or belief and human rights. The Centre believes that knowledge toolkits built from evidence-based research on critical human rights issues are important for designing activities for stakeholder capacity strengthening and making informed policy interventions. With this aim, Asia Centre was established in Bangkok, Thailand in 2015 and a second branch was registered in 2018 in Johor Bahru, Malaysia. On 21 May 2021, the Centre was recommended by the Committee on Non-Governmental Organizations of the UN ECOSOC for a Special Consultative Status at the UN.

To date, the Centre has been undertaking evidence-based research on key human rights issues to assemble knowledge tools such as books, reports, baseline studies, policy briefs, commentaries, infographics, videos and training programmes. These knowledge tools are often developed at the request of civil society, INGOs and parliamentarians for evidence-based research on critical rights challenges. These knowledge tools are then used to design capacity building programmes for stakeholders so that they can affect positive policy changes.



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