

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

c/o Professor Michael Addo, Dr. Puvan Selvanathan and the Working Group's Secretariat

Date: August 2014

CALS-SMU Coalition on NAPs: Update & Input for Preliminary Guidance on National Action Plans

We are pleased that at its 26th Session on 23 June 2014, the UN Human Rights Council noted the "the important role that national action plans and other such frameworks on business and human rights can play as a tool for promoting the comprehensive and effective implementation of the Guiding Principles", and that it has tasked the Working Group to "develop guidance for the development and implementation of effective national action plans" (A/HRC/26/L.1).

We refer to your call for stakeholders to provide information on substantive elements of national action plans to implement the Guiding Principles on business and human rights, and our various related correspondence. We recall that in July 2013, in response to a call for proposals entitled "Developing National Policy Strategies for Implementation of the UN Guiding Principles ('National Action Plans')", the Centre for Applied Legal Studies at the Wits School of Law ('CALS') and the Singapore Management University School of Law ('SMU'), together with several other organisations (collectively the 'Coalition'), submitted a proposal to assist you in developing a template for national action plans ('NAPs') in Africa and Asia.

The Working Group selected our proposal on 5 November 2013.

Further to this appointment by the Working Group, this is our status update of our research for your reference and inclusion in the Working Group's preliminary guidance at the third annual forum on business and human rights to be held in Geneva from 1-3 December 2014 ('Preliminary Guidance').

CALS-SMU Coalition's Work on Substantive Elements

Although the funding for this appointment has not yet been secured, the Coalition has continued to take modest steps to advance this work with available resources. The Coalition has participated in several UN hosted business and human rights meetings, including the Annual Forum in Geneva in December 2013 and three meetings thereafter in Geneva. In this regard, we adopt and reiterate the speech and further comments made by CALS-SMU Coalition member Professor Joanne Bauer at the session on "Gaps, risks, regional considerations and identifying essential elements of process and substance with respect to guidance on NAPs" in Geneva on 8 May 2014.

In addition, the Coalition has undertaken research on NAPs and the possible implementation of the Guiding Principles with the following substantive thematic focus: (i) whether it is possible to have a wholesale incorporation of the Guiding Principles within developing economies in Africa; (ii) the challenges for states in conflict, and the degree to which such states are willing and able to adopt NAPs given the vicissitudes of destabilisation in times of conflict; and (iii) what would the ideal NAP look like from a gendered perspective. Similarly, in Southeast Asia, the Coalition has undertaken systematic research on: (i) elements of extraterritorial jurisdiction, such as trans-boundary haze pollution legislation; and (ii) the inclusion of transparency, environmental and social governance issues in investment agreements and law. It has also supported inter-governmental efforts, including the ASEAN Intergovernmental Commission on Human Rights (['AICHR'\) baseline study of business and human rights policies in the region](#).

This inaugural study was led by CALS-SMU Coalition member, Thomas Thomas. We understand that the study provides concrete examples of good practice concerning certain substantive elements identified by the Working Group. On 8 August 2014, [AICHR presented the study to the ASEAN Foreign Ministers Meeting](#). In our view, the conclusions and recommendations made in this study may, in time, inform a regional action plan of sorts for ASEAN states.

Area of Concern - Guidance should call for a Context-Sensitive Research Methodology

As a collection of organisations from jurisdictions within the Global South, the Coalition seeks to provide an alternative lens through which to understand the implementation of the UN Guiding Principles ('UNGPs').

Our proposed working methodology aims to engage some of the issues that have thus far been under-explored in the global conversation about business and human rights, particularly with respect to gender and imperatives affecting developing and conflict-affected economies. The Coalition is particularly concerned that such considerations, which are embedded in some of the UNGPs, should not be lost in NAPs. NAPs need to address the role of gender discrimination internal to a corporation's operations and to the gendered impact of the corporation's operations on surrounding areas. The NAPs must also consider how the UNGPs can be applied in the context of large-scale land acquisition in African countries such as Zimbabwe, which impact on cultural rights as much as they do economic ones. Moreover, we have commenced research on the care that must be exercised in ensuring corporate responsibility to respect rights in special economic zones in conflict-affected states in Asia, such as Myanmar.

It is commendable, as your consultation document indicates, that the Working Group is well aware that "there is no one-size-fits-all approach" in devising NAPs, especially when applied to groups that can be at heightened risk. However, central to our above-mentioned concerns is the fact that this noble refrain is far easier said than observed. In our view, the success or failure of NAPs in Africa and Asia will turn on the rigorous and context-sensitive empirical research methodology employed throughout – at their inception, periodic review and ultimate evaluation.

Avoid a 'thumb on the scale'

These alternative contexts provide rich perspectives to interrogate assumptions underlying the UNGPs and their implementation. Our ongoing research is designed to ensure that NAPs meet the goals of filling governance gaps. Simply put, absent concrete policies, regulations and laws, which is the purview of the state duty to protect, NAPs that exist and have been proposed can devolve into a 'thumb on the scale'. They may perpetuate the 'voluntarization' of corporate responsibility, without accompanying rules that makes that conduct mandatory. NAPs must have hard commitments; clear goals; performance indicators; timelines for completion; points of contact; and effective and inclusive periodic review and evaluation procedures.

Conclusion

Academic centers such as CALS, SMU and our partners are ideally situated to contribute to systematic research and to work with governments and other stakeholders in their regions to identify needs and build capacity on a country-by-country basis to meet them.

We hope that our work and contributions will be referenced in your various engagements with the UN General Assembly's Third Committee, the UN Human Rights Council, and within the document itself and in the course of your presentation of the Preliminary Guidance in Geneva.

We stand ready to be of assistance as you prepare the Preliminary Guidance on NAPs and, going forward, a structured template for implementation; and look forward to hearing from you.

Yours sincerely,



Bonita Meyersfeld
Associate Professor of Law
Director, Centre for Applied Legal Studies (CALS)
School of Law, University of Witwatersrand



Mahdev Mohan
Assistant Professor of Law
Director, Asian Business & Rule of Law Initiative
Centre for Cross Border Commercial Law in Asia (CEBCLA)
School of Law, Singapore Management University