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3RD INTERNATIONAL CONFERENCE

# Business and Human Right
# Holding Governments Accountable in Asia

12-13 JULY 2018
BANGKOK THAILAND

ASIACENTRE

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CONFERENCE PROCEEDINGS

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## PREFACE

Experts from around the world have analysed the multifaceted linkages between business operations and international human rights norms but circled back to point out the duty of the state as the key actor in the protection of human rights. They highlighted policy and legislative challenges affecting the capacity of states to uphold such norms as stipulated in Pillar One of the UN Guiding Principles (UNGPs) on Business and Human Rights. With increasing attention to the issues of business and human rights, the role of government in human rights protection is increasingly important for the economies in the region.

These issues led to Asia Centre's 3rd International Conference, in partnership with Forum Asia, Thammasat University ASEAN-China program and support from the Taiwan Democracy Foundation titled "Business and Human Rights: Holding Governments Accountable in Asia". The event was held from the 12th to the 13th of July 2018, in Bangkok, Thailand.

During the two days, the conference hosted nine panels with over 20 presenters and over fifty participants from a variety of organisations including universities, NGOs and INGOs who came together to discuss the issue of business and human rights in Asia. The focus was to examine if the interest in business and human rights conveniently ignores the civil and political violations by the State and its responsibility to guarantee human rights protection.

The papers in this conference proceedings examine the duty of the state to protect human rights and regulate the behaviour of business organisations through a regional assessment of the issues, review of national strategies and policies, and the accountability of businesses themselves. All papers in this conference proceedings have been internally peer-reviewed and administered by the editors. The authors are responsible for the accuracy of facts, quotation, data, statements and the quality of the English language in their work. The papers are organised in the way it appeared in the conference program.

This conference was followed up by Asia Centre's publication: "Business and Human Rights in Asia: Duty of The State to Protect". It is set to be released at the end of 2020. The authors of this book examine the State's duty to protect human rights in Asia amidst rising concern over the human rights impact of business organisations in Asia. Click here for more info.

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# National Action Plans on Business and Human Rights in the ASEAN: Observations and Recommendations on the Procedural Aspects of NAP Development

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## Abstract

This report compiles our observations and lessons learned on the procedural aspects of the development of national action plans on business and human rights (NAPs or NAP BHR) in ASEAN member-states. In this report, we highlight practices from Indonesia, Malaysia, Philippines, and Thailand and offer analyses on practical issues that could support other countries that are developing their own NAPs. The report also includes our recommendations on elements and steps that could help ensure inclusive processes, strong action plans, and clear commitments towards implementation.

## I. Introduction

In 2011, the United Nations Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (UNGP) to help clarify the roles of governments and companies in addressing the human rights impacts of business enterprises. The UNGPs are founded on the following:

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 with appropriate and effective remedies when breached.

The UNGPs are implemented through various means, such as introducing relevant legislation and policies, changing corporate policy and practice, and providing remedies for victims of business-linked human rights abuses. Likewise, states implement the UNGPs through the development of national action plans on business and human rights (NAPs or NAP BHR).

The UN Working Group on Business and Human Rights' Guidance on National Action Plans on Business and Human Rights defines 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.*"[1]

[1] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva, 2016), available from http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf .

The development of NAPs in ASEAN is encouraging increased interaction among governments, civil society, and businesses—albeit with some groups still being heard more than others, and others still being totally excluded. Indonesia, Thailand, Philippines, and Malaysia have made significant progress towards developing a NAP on BHR. The idea has also been introduced in other countries, such as Myanmar, with various CSOs leading the call for a process that meets international standards and best practice.

Multi-stakeholder participation is critical in ensuring that NAPs are inclusive, rights-based, and victim-centered. ASEAN governments in the process of developing NAPs could all do better to ensure broader participation of communities, workers, and companies.

## II. Country commitments to the UNGPs as the foundation of NAPs

The UNWG on BHR has emphasized that it is essential and indispensable for an effective NAP to be founded on the UNGPs. It said:

> *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 business-related 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 and corporate measures to allow for access to remedy. Moreover, NAPs must be underpinned by the core human rights principles of non-discrimination and equality.*[2]

Thus, recommendations under NAPs should address the three pillars of the UNGP under its "Protect, Respect, and Remedy" framework:[3]

1. The state duty to protect against human rights abuses by third parties, including business;
2. The corporate responsibility to respect human rights; and
3. Greater access by victims to effective remedy, both judicial and non-judicial.

Based on these pillars, countries developing NAPs need to bring together stakeholders from government, businesses, and civil society in a process that should be constructive and solutions-centered. These actors usually encounter each other in more tense contexts where human rights abuses are being alleged and victims/survivors are seeking redress. The NAP process is a unique platform to address human rights issues before abuses occur, with proposals ideally coming from all key stakeholders.

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[2] *Id.*

[3] John Ruggie, UN "Protect, Respect and Remedy" Framework and Guiding Principles" (2008), https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles (last visited on June 4, 2018).

Between December 2014 and January 2015, the Business and Human Rights Resource Centre contacted over 100 governments and asked them to provide information on actions they have taken on business and human rights.[4] At that time, the response rate of governments from Asia and the Pacific was the lowest; out of the 19 governments invited to respond, only three governments did (i.e., Indonesia, Myanmar, and Japan).[5] This has started to change among ASEAN member-states, with more countries acknowledging the UNGPs and using it to guide national policy and strategies.

ASEAN is also doing its share to promote the UN Guiding Principles. In its report titled Baseline Study on the Nexus between Corporate Social Responsibility and Human Rights,[6] the ASEAN Intergovernmental Commission on Human Rights emphasized that its work has "strong reference with established internationally recognized frameworks, particularly the UN 'Protect, Respect, and Remedy' framework for business and human rights, the UNGPs, and other relevant internationally recognized tools and measurements to regulate corporate conducts."

Indonesia, Malaysia, Philippines, and Thailand have all publicly committed to ensuring that their plans are consistent with the UNGPs. Myanmar did the same in 2015,[7] but the process has lagged since, with most initiatives now coming from civil society.

Indonesia's National Human Rights Commission or Komnas HAM, in its 2016 Submission to the United Nations 3rd Universal Periodic Review,[8] reiterated the government's support to the UNGPs. When it launched its NAP in June 2017, Indonesia also included, as one of the objectives, the need to harmonize the perception of all stakeholders regarding application of the Guiding Principles.[9]

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[4] Business & Human Rights Resource Centre, Action on business & human rights: Where are we now? Key findings from our action platforms (2015), https://www.business-humanrights.org/sites/default/files/Action_Platform_Final.pdf (last visited on June 4, 2018).

[5] *Id.*

[6] Thomas, Thomas & Chandra, Alexander for Study Team on Business & Human Rights of the ASEAN Intergovernmental Commission on Human Rights (AICHR), Baseline Study on the Nexus Between Corporate Social Responsibility & Human Rights: An Overview of Policies & Practices in ASEAN (2014), http://asean-csr-network.org/c/images/ASEANBaselineStudyonCSRandHRFINAL.pdf (last visited on June 4, 2018).

[7] Business & Human Rights Resource Centre, *Myanmar & other govts. commit to develop National Action Plans on business & human rights, at ASEAN conference* (February 6, 2015), https://www.business-humanrights.org/en/myanmar-natl-action-plan#c115185 (last visited on June 4, 2018).

[8] The Indonesian National Human Rights Commission (Komnas HAM), Submission to the United Nations 3rd Universal Periodic Review 27th Session of the The Working Group on the UPR Human Rights Council, September 2016, https://www.komnasham.go.id/files/20160929-submission-to-the-united-nations-$F7UF4R.pdf (last visited on June 4, 2018).

[9] A copy of the NAP can be retrieved from http://pusdok.elsam.or.id/repository/download/national-action-plan-on-business-and-human-rights/ (last visited on June 4, 2018).

Indonesia's NAP is also structured according to the three pillars (i.e., protect, respect, and remedy) of the UNGPs. Each pillar includes discussions on the following: (1) description of the main principles; (2) mapping of policies, including analysis of existing policies that can be used as modalities to implement the principles of each pillar; and (3) policy plans/ initiatives that can be developed to encourage synergy in implementing each pillar.

Meanwhile, Malaysia's Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia, prepared by the Human Rights Commission or SUHAKAM, recommended the use of the UNGPs as the foundational reference for the country's NAP.[10] Further, it provides clearly the SUHAKAM's hope that "translating the Guiding Principles into concrete objectives and recommendations specific to Malaysia will provide entry points for obtaining the commitment of government and nongovernmental stakeholders to develop a NAP, and begin the process of obtaining the stakeholder input needed to formulate NAP action points".[11]

The Philippines' commitment to the UNGPs showed from early conversations around the development of a NAP, under the leadership of the Commission on Human Rights (CHR). In its 2015 Accomplishment Report, the CHR recognized that:

> *"The formulation of a National Action Plan by states is seen as a crucial step for its implementation of the UNGP. To date, a number of States have formulated their NAP on the UNGP implementation. For the Philippines, formulating a NAP on BHR will require calibrated steps considering that the UNGP has yet to be appreciated by the various agencies and branches of government.[12]*

The Presidential Human Rights Council (PHRC) was tasked to lead the development of the NAP. In March 2017, during the 1st Core Group Discussion-Workshop, the PHRC re-affirmed the government's commitment to use the UNGPs as anchor for the Philippine NAP.[13]

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[10] A copy of the document can be retrieved from http://www.suhakam.org.my/strategic-framework-on-a-national-action-plan-on-business-and-human-rights-for-malaysia-2015/ (last visited on June 4, 2018).

[11] *Id. at* page 2.

[12]Commission on Human Rights, 2015 Accomplishment Report, http://chr.gov.ph/wp-content/uploads/2018/01/CHR-2015-Annual-Accomplishment-Report.pdf (last visited on June 4, 2018).

[13] Hans Seidel Foundation, *PHRC holds 1st Core Group Discussion-Workshop for NAP BHR* (March 1, 2017) https://southeastasia.hss.de/news/detail/phrc-holds-1st-core-group-discussion-workshop-for-pnap-bhr-news1064/ (last visited on June 4, 2018).

For Thailand, commitment to the UNGPs was publicly made by Prime Minister Gen Prayut Chan-o-cha.[14] He expressed his belief that implementing the principles will be beneficial to businesses and the government. In a seminar, titled Disseminating and Driving Forward the UNGPs on Business and Human Rights in Thailand, the Prime Minister also witnessed the signing of a memorandum of cooperation to mobilize actions under the UNGPs. The memorandum was signed by the National Human Rights Committee, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Commerce, Federation of Thai Industries, the Thai Bankers Association, the Thai Chamber of Commerce, and the Global Computing Network of Thailand.

Thailand's NAP process was initiated as a result of Sweden's recommendation in Thailand's second Universal Periodic Review, which took place on 11 May 2016.[15] Thailand committed to "develop, enact, and implement a NAP on BHR in order to implement the Guiding Principles on Business and Human Rights."

ASEAN's and its members' commitment to the UNGPs should be taken as welcome developments. With ever-increasing intra-ASEAN trade, and with ASEAN positioning itself as a major investment hub, policies and practices must be introduced among states and businesses that will protect and promote human rights, and provide remedies for victims of rights abuses.

## III. Observations on the procedural aspects of NAP development in the ASEAN

While the UNWG on Business and Human Rights normally recommends developing stand-alone NAPs on BHR, it also recognizes the fact that in some states, other approaches may prove to be more effective. Examples include the integration of the NAP on BHR process to the development of a more general NAP on human rights, or the integration of policies that address business-linked abuses in the various initiatives of government.

This section looks at country NAP process along four critical procedural aspects: Seeking a formal commitment from government to engage in the NAP process, and designating leadership;

1. Creating a format for cross-department collaboration within government;
2. Establishing platforms of engagement and consultations with various stakeholders and providing resources for the process; and
3. Arriving at agreements on what to do with the outcome of consultations.

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[14] National News Bureau of Thailand, *PM affirms commitments to UN Guiding Principles on Business and Human Rights* (June 6, 2017) Published at https://business-humanrights.org/en/thailand-as-govt-affirms-commitment-to-guiding-principles-on-business-human-rights-groups-raise-concerns-about-continued-abuses-including-threats-against-rights-defenders (last visited on June 4, 2018).

[15] Danish Institute for Human Rights, *National Action Plans on Business and Human Rights (Thailand, https://globalnaps.org/country/thailand/* (last visited on February 20, 2018).

This section includes our observations and lessons learned from the processes in Indonesia, Malaysia, Thailand, and the Philippines.

### A. Seeking a formal commitment from government to engage in the NAP process, and designating leadership

The UNWG recommends that stakeholders seek a formal commitment from governments before engaging in the NAP process. Committed government leadership and a clear buy-in on the process are critical in bringing the private sector and civil society together, and ensuring that various sectors of government will cooperate in both the development and implementation stages is similarly critical.

#### *Indonesia*

Indonesia's NAP development is led by its national human rights institution, Komnas HAM, which recommended the development of a NAP primarily because the country's National Human Rights Action Plan for 2014–2019 still did not reflect the UNGPs.

Civil society support and monitoring were consistent and strong when Komnas HAM was developing the NAP. For example, ELSAM, a local NGO, worked closely with Komnas HAM to strategize on ways to build momentum and gather political support for the NAP.[16] The Human Rights Resource Centre and the Investment and Human Rights Project of the School of Economics and Political Science supported consultations and dialogues.[17] The early support from civil society encouraged significant participation from various stakeholders.

Komnas HAM launched the NAP in June 2017 (Komnas HAM Regulation No. 1but it immediately became clear that the ministries did not initially agree on the framework of implementation. In September 2017, three proposals were presented for discussion, namely:

1. That the NAP on BHR be integrated with the existing National Action Plan on Human Rights (RAN HAM); and/or
2. That the NAP on BHR be transformed from a Komnas HAM regulation to a presidential regulation; or
3. That the recommendations in the NAP on BHR be included in the strategies and initiatives of various ministries tasked to regulate the intersection of business and human rights concerns in the country.

In November 2017, Indonesia's government representative to the UN Annual Forum on Business and Human Rights in Geneva, announced that the country will be developing a national guideline on business and human rights—to be released in 2018. A focal person was

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[16] Saldarriaga, Andrea & Shemberg, Andrea, Implementation of the State Duty to Protect Human Rights in the context of investment policymaking (2015), http://blogs.lse.ac.uk/investment-and-human-rights/files/2016/04/Final-Indonesia-Report-Back-10-11-November-2016.pdf (last visited on June 4, 2018).

[17] *Id.*

assigned from the Ministry of Economic Affairs to spearhead the efforts. When asked what this would mean for the NAP developed by Komnas HAM, the focal person from the Indonesian government said that it will be taken into consideration as the national guidelines are developed.

### *Malaysia*

In Malaysia, SUHAKAM is leading the NAP process and started the effort by releasing a Strategic Framework for a National Action Plan on Business and Human Rights in March 2015.

As early as 2010, SUHAKAM was already studying issues related to business and human rights. It found out that there is "lack of awareness and recognition of the role and obligation of business entities to ensure that their operations do not in any way lead to human rights abuses".[18] Because of this, SUHAKAM recommended for the government to formulate a NAP on BHR in order to, among others, "create awareness on areas of business and human rights."[19]

After SUHAKAM released the strategic framework, the government made a public statement and recognized this document as an important step towards the development of the NAP on BHR.[20] The statement was made through Datuk Paul Low Seng Kuan, a minister in the Prime Minister's department in charge of governance, integrity, and human rights.

Although Malaysia's efforts to develop a NAP is temporarily stalled, SUHAKAM Commissioner A. Bidin emphasized that the country continues to work on human rights issues using the UNGP as a framework,[21] with the hope of developing its NAP in the next two years.

### *Philippines*

The PHRC is leading the effort to develop a NAP on BHR. Right now, it is finalizing an administrative order that outlines the responsibilities of various government ministries in relation to the NAP. If the president signs the order, the development of the NAP will begin.

While waiting for the president's signature, CSOs and university-attached centers in the country continue to organize alliance-building activities to gain more support and build capacity in engaging with the process of developing a NAP. Some notable and active players

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[18] *Supra* note 10.

[19] *Id.*

[20] *National Action Plan on Business and Human Rights to be drafted,* The Rakyat Post, March 24, 2015, http://www.therakyatpost.com/news/2015/03/24/national-action-plan-on-business-and-human-rights-to-be-drafted/ (last visited on June 4, 2018).

[21] This was part of her intervention during the UN Forum on Business and Human Rights in Geneva, for the session entitled *Moving Forward with NAPs and Implementing Pillar III in Southeast Asia* (29 November 2017)

in the development of a Philippine NAP are the Initiatives for Dialogue and Empowerment through Alternative Legal Services, Women's Legal and Human Rights Bureau, and the University of the Philippines Law Center Institute of Human Rights.

***Thailand***

For Thailand, the lead office for the development of a NAP is the Rights and Liberties Protection Department of the Ministry of Justice. This office is mandated to implement the Thai government's commitments on the accepted recommendations in its second Universal Periodic Review (UPR) at the UN Human Rights Council.

Alongside the Rights and Liberties Protection Department of the Ministry of Justice, CSOs that compose the Thai CSOs Coalition for the UPR, together with a new Asian regional organization, Manushya Foundation, are now actively participating in the consultations and preparation of national baseline assessments that will help inform the content of the Thai NAP.

Because the Thai government has been very vocal about its support to the NAP process, there is immense opportunity for Thailand to immediately implement NAP recommendations as soon as the action plan is completed.

**B. Creating a format for cross-departmental collaboration within government**

The UNWG recommends that once the government or the lead ministry has committed to engage in a NAP process, it should also ensure that there is an established format for cross-departmental collaboration because this is "crucial for the coherent implementation of specific actions and the NAP as a whole".[22]

A NAP is a guide on how states can protect and how businesses can respect human rights. It also provides a guide on how access to effective remedy can be granted to victims of abuses. Its implementation rests on the operationalization of the recommendations through changes in law and policies established by different ministries and offices in government. However, a NAP is rendered useless if cross-departmental collaboration is weak or absent. For example, when the UK NAP was developed, some stakeholders criticized the process and did not view the NAP as a working document because it provided limited information about the roles and responsibilities of other departments in government or a timeline and procedure for the implementation of the recommendations.[23]

To illustrate the need for a cross-departmental collaboration on the NAP, let us consider this scenario: the NAP can recommend laws that will require the disclosure of beneficial

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[22] *Supra* note 1, page 9.

[23]Scabin, Flavia, et. al., Preliminary Essay on National Action Plans on Business and Human Rights and Recommendations to Brazil (undated), https://direitosp.fgv.br/sites/direitosp.fgv.br/files/arquivos/gdhee_embaixada_do_uk_no_brasil_paper_en.pdf

ownership of extractive industry companies to ensure that when violations are committed, accountability can be demanded by both the actual and beneficial owners of the business. This law might require intensive collaboration between ministries/departments involved with the registration of corporations, privacy commissions, tax bureaus, and those involved in activities involving the environment, energy, and local/regional governments, among many others.

Without effective collaboration from all ministries, NAP recommendations will remain as unimplementable guidelines.

There are many reasons for weak or non-existent collaboration. For instance, because NAP is a human rights document, other departments/ministries would not have the legal mandate to participate in the process or even just the appetite to engage in a process that is traditionally viewed as outside their jurisdiction. It could also be because there is an optimistic belief that once the NAP is finished and adopted by the highest officer of the land, the necessary mandate will also be released, so that all government and non-governmental stakeholders can participate in the implementation of NAP recommendations.

In ASEAN, only Thailand has formalized cross-departmental collaboration by creating a national committee to work on the NAP. Various stakeholders have also signed a memorandum of cooperation to implement the UNGPs, including the National Human Rights Committee, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Commerce, Federation of Thai Industries, the Thai Bankers Association, the Thai Chamber of Commerce, and the Global Computing Network of Thailand. Thailand has a clear opportunity to respond to the necessity of bringing in all ministries together, not just the three that have signed the memorandum of cooperation. It must also clarify the roles and responsibilities of each government ministry or office in the development of the NAP and in its implementation and review.

Indonesia's case highlights the need for cross-departmental collaboration. Despite having already launched its NAP, Komnas HAM continues to have difficulty in coordinating with various ministries regarding recommendations that are related to their duties and functions. Another challenge is the fact that regional governments in Indonesia exercise local autonomy and, without a clear agreement to implement the NAP, Komnas HAM can do very little to ensure its implementation in the regions. With the announcement that Indonesia will be creating a national guideline on BHR, which will take note of the NAP launched by Komnas HAM, stakeholders should encourage the government to now establish a clear system of collaboration among government ministries/departments to avoid duplicating or wasting efforts.

For Malaysia and the Philippines, no format for cross-departmental collaboration has been developed at the time of writing.

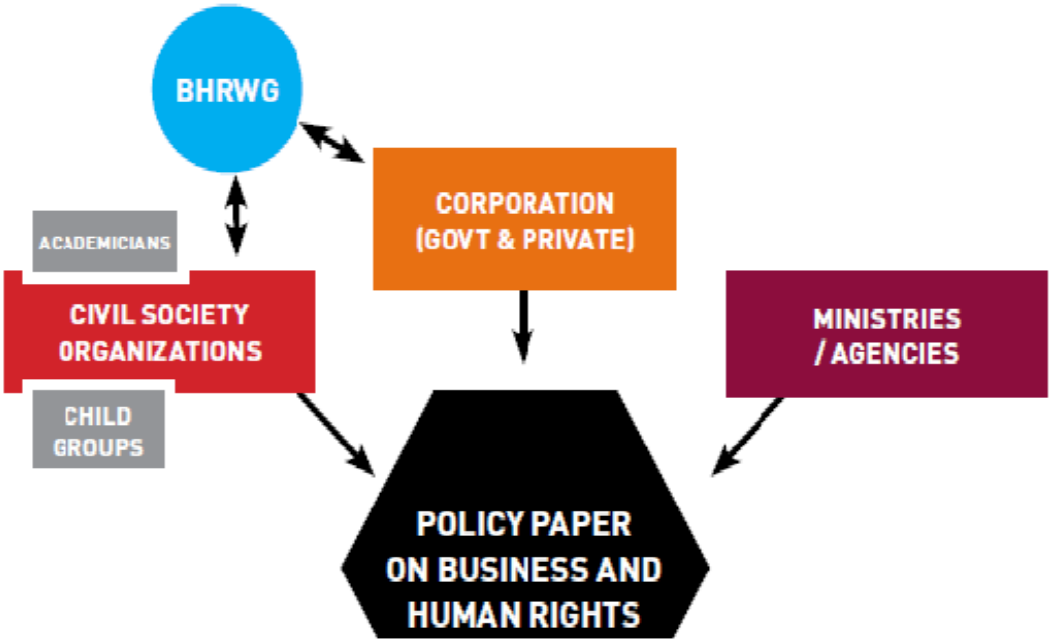
### C. Establishing platforms of engagement and consultations with various stakeholders

Engagement with non-governmental stakeholders is critical in the NAP process, and establishing a format of engagement is key.

In Indonesia, consultations were made possible through the combined efforts of ELSAM, Komnas HAM, and the Business and Human Rights Working Group (BHRWG). The BHRWG is an initiative of the Indonesia Global Compact Network, which is a multi-stakeholder entity composed of representatives from the private sector, CSOs, and the academe. The BHRWG aims to: "*(1) enhance the UNGPs into corporate values and (2) actively contribute in drafting the NAP on BHR*".[24] It became another platform for dialogue and consultation between CSOs and private companies, where they discussed initiatives and lessons learned from the implementation of the UNGP. The working group also co-organized several learning sessions with businesses and/or civil society to build capacity on UNGP implementation and to gather useful insights for NAP development.

The results of the engagements with various stakeholders helped shape a policy paper on business and human rights, which, in turn, influenced the design of Indonesia's NAP.

Figure 1: Consultation structure for the policy paper on BHR and the NAP process in Indonesia




[24] PT Rajawali Corpora, Communication on Progress (2016), https://www.unglobalcompact.org/system/attachments/cop_2017/386121/original/COP_Report_2016_to_2017_-_Rajawali_Corpora.pdf?1495422001 (last visited on June 4, 2018).

As shown in Figure 1, various stakeholders contributed to the policy paper on BHR, and this document contributed to and influenced the country's NAP process.

For Thailand, the platform to engage civil society and communities is through the organizations that form part of the Thai CSOs Coalition for the UPR. Working closely with the Ministry of Justice on the NAP, the format of engagement is clear and the obligations of the participating groups are well-established. CSOs and community organizations are tasked to create a National Baseline Assessment on BHR and propose policy recommendations for the development of the NAP. Likewise, they are currently conducting documentation missions and developing research papers that will form part of the baseline assessment. The structure of the baseline assessment has been agreed upon by CSOs and the Ministry of Justice.

Working together, sub-regional multi-stakeholder dialogues are now being conducted across Thailand to gather more data for the assessment. Manushya Foundation acts as convenor to ensure that initiatives are on schedule, consultative, and responsive to the objectives agreed upon at the start of the NAP process. At the time of writing, however, it remains to be seen how the government intends to proceed with the consultation of the business sector. There is also a need to establish guidelines for businesses, government, and CSOs to come together, engage with each other, and give feedback on the process and substance of the NAP, including each other's recommendations. In its early stages, the Thai NAP process already exhibits a promising degree of structure and collaboration, and there is plenty of room for them to ensure that multi stakeholder engagement and consultation is assured during all phases of the NAP process.

**D. Arriving at agreements on what to do with the outcome of consultations**

NAP consultations require time and resources. As more stakeholders participate and contribute, the credibility of the process is enhanced.

Groups and individuals consulted will expect that their inputs be considered and implemented; hence, there should be an agreement on what to do with the outcome of consultations.

During the first meeting of the Experts Advisory Group for the Thai NAP, the Ministry of Justice, through a representative, assured stakeholders that the national baseline assessments conducted by CSOs and community organizations will form the basis of the NAP. This encourages stakeholders, especially the marginalized, to continue participating in the development of the NAP because it sends the message that their contributions will be considered in the development of policies and recommendations for the NAP.

**IV. Recommendations and closing note**

The development of NAPs usually calls for a long and complicated process. Stakeholders must be fully aware of the importance of establishing credible and inclusive steps, so that the substance of the final plan is acceptable and—more importantly—responsive to the human rights needs and challenges of each country. The following recommendations are forwarded:

- States should strive to get the commitment of the highest-ranking officials in the country, who have control and/or supervision over various ministries and local or

regional governments that will eventually implement the action plans, to engage in the NAP process. Thailand's NAP process benefits from the support of the Prime Minister and the various ministries that have signified their commitment and cooperation to the process. The Philippine NAP, while temporarily stalled, will also benefit greatly if the proposed administrative order will be signed by the president.

- If the state is inactive or disinterested in engaging in the process of developing a NAP on BHR, CSOs should exert effort and pressure in order to encourage their government to start the process. CSOs should also explore the possibility of engaging with businesses that are leading in efforts to integrate human rights in their operations, and make them allies and partners to encourage the government to develop a NAP.

- It is important to get commitments on the needed technical and financial resources. Resources are needed to conduct comprehensive and inclusive consultation meetings, develop evidence-based research to assess the BHR conditions in the country, and prepare the final national action plan. In instances where the government budget has not been sufficient to support the entire process, some states have turned to agreements with donors that can provide the necessary technical and financial resources, while ensuring that the states maintain complete independence through the process. In Thailand, the UK Foreign and Commonwealth Office supports consultation sessions, as well as the first meeting of the Experts Advisory Group on the NAP process. The Office also extended financial support for the development of Malaysia's Strategic Framework on a NAP on BHR.

  In terms of technical resources, countries may consider referring to the NAPs of other states. Recently, the Danish Institute for Human Rights launched a comprehensive portal on NAPs around the world.[25] The site was developed in collaboration with International Corporate Accountability Roundtable (ICAR), which also regularly releases its assessment of existing NAPs—the latest of which was released in August 2017.[26] ICAR also published a toolkit for the development, implementation, and review of state commitments to BHR frameworks.[27] The toolkit has three components that may prove useful to states developing their NAPs: (1) the National Baseline Assessment template, (2) NAP Guide, and (3) monitoring and review of NAPs. The Thai NAP process uses ICAR's National Baseline Assessment template.

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[25] *See* https://globalnaps.org/about/

[26] International Corporate Accountability Roundtable, European Coalition for Corporate Justice, and Dejusticia, Assessments of Existing National Action Plans (NAPS) on Business and Human Rights: August 2017 Update, https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bfdf40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf (last visited on June 4, 2018).

[27] International Corporate Accountability Roundtable, National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks (last visited on June 4, 2018).

The BHRRC also has a dedicated page on NAPs, where it publishes latest news, commentaries, and other resources on the subject.[28] Its Documentation Checklist[29] is also currently being used by groups participating in the Thai NAP process to document the human rights impacts of businesses in Thailand, and its output will form part of the national baseline assessment. The checklist is currently available in 12 languages.

- States must begin the NAP process by clarifying a leadership structure. While it is expected that the country's national human rights institution will lead the efforts, states also have the option to consider other ministries as lead institutions. Thailand has chosen its Ministry of Justice, while the Philippines has placed the responsibility on the PHCR, which is under the Office of the President, instead of the Commission on Human Rights. A clear leadership structure with commitments from participating government bodies ensures clarity on which agency is responsible not only for the planning process but also for implementation. States must establish mechanisms that will prevent situations wherein multiple ministries or departments are engaged in similar efforts but are not coordinating. Duplicitous processes are inefficient, and they divert vital resources from important activities.

- NAP processes usually involve ministries from the executive branch of government. This is true for Thailand, Indonesia, and the Philippines. States may benefit greatly if the NAP process also involves representatives from other branches of governments because some recommendations to address certain abuses may require policy and procedural reforms that can only be developed by these branches of government. For states that grant local autonomy to its local and/or regional governments, it would also be useful to include representatives from these local governments. This ensures early commitments to both the process and the evolving recommendations that will arise from it.

- States must strive to establish mechanisms that will ensure inclusive and effective consultations with stakeholders. Among others reasons, online and offline mechanisms should be developed to: (1) educate stakeholders on the object and purpose of the NAP; (2) accept inputs and recommendations; and (3) publicly disseminate the NAP work plan, so that a broader range of concerned stakeholders are able to follow, monitor, and participate in relevant consultations and processes.

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[28] This can be accessed at https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last visited on June 4, 2018).

[29] This can be accessed at https://www.business-humanrights.org/en/checklist-documenting-corporate-human-rights-impacts (last visited on June 4, 2018).

- Despite the designation of one ministry/office as the lead agency for NAP development, states must nevertheless maximize existing networks of various ministries to conduct consultations with sectors covered by their mandate. For example, the agriculture ministry can conduct consultations with farmers and smallholders, and the environment ministry can consult communities where extractive, logging, and other similar industries operate. This not only maximizes available time and financial resources but also speeds up the process, considering that the businesses concerned are already known to and are already engaging with the ministries that have jurisdiction over their operations.

- Finally, states and stakeholders participating in the development of a NAP, must begin the process by agreeing on terms of reference. Parties must agree on priority issues and/or priority sectors. They must also agree on what to do with the outcome of consultations to build and sustain the credibility of the process. If people misunderstand the purpose of developing a NAP, and if expectations are not addressed, it risks the possibility of vital stakeholders losing interest and withdrawing participation.

  In the Thai process, for example, the government committed to ensure that the research and documentation from CSOs will form part of the National Baseline Assessment of the NAP.

  Governments must also anticipate the probability that stakeholders will participate in the NAP process to seek redress for specific business-linked human rights abuses. Government must not dismiss these allegations/reports and, instead, use the engagement to work with stakeholders towards possible remedies, while shaping national policy and strategy. Being dismissive of actual allegations of abuse could lead to diminished trust among stakeholders in the process.

The development of a NAP on BHR is an opportunity for states to convene various stakeholders from businesses and civil society to engage in continuous dialogue and consultations on human rights issues. It is an opportunity to establish policies that will prevent abuse and clarify the roles and responsibilities of various state and non-state actors with respect to human rights impacts of business and, more importantly, establish and improve mechanisms to provide remedies that are appropriate and effective for victims/ survivors of abuse. Strong commitments to develop and implement NAPs will help ensure that the economic growth of the ASEAN and its member-states does not cost the region the rights of its people, especially the most vulnerable.

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# Recent Development on the Access to Remedy in Business and Human Rights in Indonesia

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## Abstract

Since the adoption of United Nations Guidelines on Business and Human Rights (UNGPs) in 2011, States have been enacting national laws and regulations to prevent human rights violations by business entities. Indonesia is a member of the UN Human Rights Council when the council issued a resolution on the establishment of Working Groups on Business and Human Rights. Likewise, the Indonesian government has emphasised its commitment to implement UNGPs at the G20 Meeting in 2017. However, despite its role at international level in promoting UNGPS, the implementation of UNGPs at national level remains very slow. In 2017, the Indonesian Human Rights Commission took the initiative to launch the NAP on Business and Human Rights. Unfortunately, this NAP is difficult to be implemented because it does not come from the government. Nevertheless, there have been a number of recent positive initiatives taken by the government and court which may help to curb human rights violations by companies. This development is the enactment of The Supreme Court Regulation (SCR) 13/2016 on Procedures in Handling of Corporate Crime and the President Regulation (PR) 13/2018 on the Disclosure of Corporate Beneficiary Owner. This article will discuss these two instruments and analyse the opportunities and challenges in the implementation of these instruments to help victims of corporate human rights abuse to seek remedies. It is found that although the SCR 13/2016 may open the way to bring criminal cases against corporations, it remains difficult for the victims to obtain remedies. Likewise, despite the obligation for companies to disclose their beneficial ownerships under the PR 13/2018, the procedure to obtain information on beneficiary owners remains burdensome. This article proposes a revision to the SCR 13/2016.The prosecutor should be given authority to put restitution for the victim of corporate abuse in its indictment. Likewise, it also proposed revision to Indonesian Corporate Law 40/2007 to include obligation for companies to disclose beneficial owners, and sanction may be imposed for companies which fail to comply.

**Keywords:** Corporate Crime; Restitution; Beneficiary Owner

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## Introduction

As one of the member states of the UN Human Rights Council, which has encouraged the adoption of the UNGPs Resolution, Indonesia has a strong moral commitment to implement UNGPs. Moreover, Indonesia is actively involved in proposing the Resolution on the Legally Binding Instrument which aims to establish binding instruments of law at the international level, so that corporations can no longer avoid their obligation to respect human rights. At the international level, following the resolution on the adoption of UNGPs in 2011, in its Universal Periodic Review (UPR) report in May 2017, Indonesia received a number of recommendations,[30]of which four related to Business and Human Rights, which includes preventing child labour[31]and the need to further strengthen Indonesia's commitment on the human rights dimension in business activities and to lead regional efforts in this issue.[32]

Indonesia's position at international level is enough to show how important the issue of Business and Human Rights for Indonesia. In addition, several conditions at the national level also affect the urgency of UNGPs implementation in Indonesia. First, Indonesia is one of the favourite destinations for foreign investment in the world. The size of the population and the growing number of middle classes is an attractive market. In addition, the high number of population provides workers with competitive wages compared to other countries. More importantly, Indonesia has the abundant natural resources products.

BKPM data shows the value of investment (foreign and domestic) has increased from Rp612.6 Trillion (2016) to 692.8 Trillion (2017), where as much as 80.2 percent is a new investment. BPS data also shows Indonesia's economic growth in 2017 increased to 5.0 per cent, which is the highest since 2014 (5.02 per cent). This condition indicates an increase in economic activity supported by business activities of business actors and corporations in Indonesia.The increasing value of foreign investment in Indonesia, at the same time provides information on increasing the presence of foreign business actors. From the business and human rights perspective, this situation requires the Indonesian government to have the same business and human rights instruments for all business actors. Indeed, some home countries of foreign companies operating in Indonesia already have business and human rights standards that must be observed.

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30 United Nations Human Rights Council (2017) '*Addendum*, Report of the Working Group on the Universal Periodic Review Indonesia A/HRC/36/7/Add.1' at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session36/Pages/ListReports.aspx.

31 *Ibid.,* Recommendation proposed by Panama, Tunisia and Kenya (139.108, 139.128, 139.131).

32 *Ibid.,* Recommendation proposed by Myanmar (139.38).

Apart from the two urgencyes for UNGPs implementation in Indonesia as described above, there is one strong reason why UNGPs should be a priority. Indonesia has a binding international obligation contained in various ratified human rights instruments. All of these instruments require states to ensure that the fulfilment of human rights is not violated by any person, or group of persons, including corporations and business actors. This has also been emphasized by the United Nations High Commissioner for Human Rights during his visit in Jakarta on 7 February 2018. H.E. Zeid Raa'ad Al Hussein emphasised: "I urge the Indonesian government and corporations involved in mining activities of large-scale natural resources, plantations and fisheries business, to refer to UNGPs by ensuring that business activities are not carried out in ways that violate the rights of the community ".[33]

This article examines the latest development in Indonesian regulations which may promote respect to human rights by companies operating in Indonesia. In particular, this article analyse two regulations, namely the Supreme Court Regulation No. 13/2016 on Guideline in Handling Corporate Crime (SCR 13/2016) and the President Regulation No. 13/2018 on the Disclosure of Corporate Beneficiary Owner (PR 13/2018).This article seek to analyse to what extent these two regulations may help victims of corporate abuses to obtain remedies, and what are the potential obstacles. The first part discusses recent development in business and human rights regulation in Indonesia. It is followed by examination of both the SCR 13/2016 and the PR 13/2018 respectively. Conclusion and suggestion is presented in the last section.

**Business and Human Rights Situation in Indonesia: An Overview**

Referring to the three pillars in UNGPs, the general conditions of Business and Human Rights in Indonesia can be described as follows:

First, regarding the obligation of the State to protect. In general, the rule of law relating to business activities that can impact the fulfilment of human rights is spread into different laws and regulations. Legislation containing obligations for business actors can be found in environmental, labour, land, mining, industrial and forestry laws. Similarly, Indonesia has ratified almost all major international human rights treaties.

In terms of legal instruments, it is actually sufficient to ensure that business activities do not cause a negative impact on human rights. But the implementation of this law remains ineffective, so that corporate rights violations by corporations remain. The drawbacks of the implementation of this law is due to several factors, these are:

1. The regional autonomy is considered as one of the factors driving conflict induced by business activities. The transfer of authority to grant business permits from the central government to the local government makes an assessment of the compliance of business activities with environmental, labour and social regulations becoming looser. This is because local governments tend to facilitate the granting of business licenses, by reason

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[33] United Nations Human Rights Office of The High Commissioner (2018) ‘Opening remarks by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at a press conference during his mission to Indonesia Jakarta, 7 February, at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22637&LangID=E.

of increasing local revenue. In many cases, land concessions overlap, or granted on the land rights of local communities.

2. The length of the bureaucratic chains between the central and regional governments make the monitoring system inefficient. Oversight tasks are often assigned to civil servants in local government, without adequate training and resources. So that labour inspectors, environment, plantation and industry officials tend to allow violations to occur. This tendency appears from very few cases where business actors are given warning sanction or revocation of business permit. Weak supervision of law enforcement also creates new problems, namely illegal business activities. Cases of illegal mining, illegal logging, forest burning have an even greater impact than the consequences of licensed business activities. Often local governments have just taken legal steps after they have been victimized.
3. Some laws do not provide a sufficiently clear protection of human rights with respect to business activities. The Manpower Act, for example, has been filed several times with judicial review to the Constitutional Court. Similarly, the criminal article in the Plantation Law is declared invalid by the Constitutional Court. Even some legal regulations deliberately provide opportunities for human rights violations, such as granting mining concession licenses in protected forest areas. Unclear rules provide incentives for the emergence of environmental destruction, violations of the rights of workers and indigenous peoples.

In general, the remedies through courts still have some challenges for victims of human rights violations by corporations, among them are:

1. Access to the courts is still a problem, because the victims of environmental pollution and land acquisition for example are often located in areas far from access to transportation and communication.
2. The formal process of handling cases in courts is still a barrier to recovery efforts. These formal barriers vary from the standing of the plaintiff, to the obstacles of proof that are not easy for the victim community.
3. The enforcement of court decisions is still not effective so as to delay the recovery for victims. This is evident in the case of the Supreme Court's decision in the case of formulated milk formula, the case of the clean water law of Jakarta citizens and the disclosure decision of HGU information.
4. The court case investigation has not yet considered the aspects of human rights involved. A case is solely inspected in accordance with its material offense, such as environmental law, mining, land. It is rare for judges to consider that environmental destruction is a violation of human rights.

Till date, initiatives to encourage the implementation of UNGPs in Indonesia are carried out by a number of Ministries and civil society organisations. The Ministry of Foreign Affairs of Indonesia is one of the pioneers in introducing and encouraging the implementation of UNGPs at national level. At international level the Ministry of Foreign Affairs is also actively participating in the Annual Business and Human Rights Forum organized by the United Nations. However, there has been no action for the implementation of Business and Human Rights in the form of national regulations. In mid-2017, the National Commission on Human Rights (*Komnas HAM*) and the Institute for Policy Research and Advocacy (ELSAM)

initiated the launch of the Indonesian National Business and Human Rights Action Plan (NAP). This NAP is set forth in Komnas HAM Regulation No. 1 of 2017 on the National Action Plan on Business and Human Rights.

**Supreme Court Regulation No. 13 of 2016 on Guidelines in Handling Corporate Crime**

The Supreme Court Regulation No. 13 of 2016 (SCR 13/2016) is enacted to settle the main problem in the issue of corporate crimes in Indonesia. This problem is the lack of procedural law in dealing with corporate crimes. Based on a number of Indonesian laws and regulations, the court may find corporations responsible for criminal offences and may be imposed by various sentences, such as fines, compensation, and closure of business operations. However, although corporate crimes have been defined in almost seventy different laws and regulations, the practice among the law enforcement bodies (police, prosecutors, and the court) in handling the case vary.[34]One of the most contentious issues when handling corporate crime is in determining to what extent the company is liable for the offence committed by its executives. More importantly, how to separate the criminal act of corporate executives and the company itself.

In dealing with this issue, the SCR 13/2016 provides a guideline for the court in determining whether a company is at fault for crime. There are three situations in which the court may hold the company liable for committing crimes, these are:[35]

1. the company obtain benefit or interest from the crime or the crime was committed for the interest of the company;
2. the company was silent to a crime;
3. the company failed to take necessary steps to prevent, to prevent larger impacts from occurring and to ensure compliance with the law to prevent a crime from occurring.

If found guilty for committing a crime, a company may be sentenced to pay a certain amount of fines.[36] The court may order an imprisonment against the executives of the company, if the company fails to pay the fines.[37] Apart from fines, the court may also impose additional sentences, these includes:(a) the seizure of assets which obtained from the criminal offence;[38] (b) compensation; and (c) restitution.[39]A company may also be sentenced to restore the damages it caused arising out of the crime.[40] Victims of corporate crimes are entitled to

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34 Hukum Online (2017) '*Kisah di Balik Terbitnya PERMA Kejahatan Korporasi'*, 23 January, at: http://www.hukumonline.com/berita/baca/lt5885450dc44d7/kisah-di-balik-terbitnya-perma-kejahatan-korporasi.

35 Art. 4(2) SCR 13/2016.

36 Art. 28 SCR 13/2016.

37 Art. 29 SCR 13/2016.

38 Art. 31 SCR 13/2016.

39 Art. 32 SCR 13/2016.

40 Art. 33 SCR 13/2016.

obtain restitution in accordance with national regulation on restitution.[41]If a company fails to pay restitution within a certain period of time, the prosecutor may seize the company's assets and put them into public auction for the payment of restitution.[42]

In its face, the SCR 13/2016 is an important tool to provide an alternative remedy mechanism for the victims of corporate wrongdoings in Indonesia. As mentioned before, there are at least seventy laws and regulations that impose criminal liability for companies operating in Indonesia. This includes the Law on Environment Management, the Law on Forestry, the Law on Mineral and Coal Mining, the Law on Plantation, the Law on Fisheries, the Law on Human Trafficking and the Law on Anti Corruption. Indeed, corporations have been involving in a number of criminal offences which relates to environment pollution and degradation, forestry, plantation, fisheries and human trafficking. Unfortunately, since the enactment of the SCR 13/2016, there have been a small number of criminal cases brought by the prosecutor against companies. Likewise, out of this small number of criminal cases, it was only in one case that the victims of corporate human rights abuse succeeded to obtain restitution.

Before the SCR 13/2016 was enacted, there were two cases where corporations were found guilty for criminal offences. The first case was the corruption case involving PT Giri Jaladhi Wana, a company appointed to operate a public market facility in the city of Banjarmasin, South Kalimantan Province. The company was found at fault for violating the Law on Anti-Corruption, and to pay fines at IDR1.3 billion. Apart from fines, the company was also sentenced by 6 (six) month suspension of its business operation. The second case was an environment pollution case brought against PT Dongwoo Environmental Indonesia. The company operated a waste management facility, and polluting the underground water resources in the area near to its facility. The court sentenced the company's Director Mr. Kim Young Woo with imprisonment and to pay a certain amount of fines. Likewise, the court ordered permanent closure of the company's facility.

Since the enactment of the SCR 13/2016, there have been no criminal cases brought against corporations. In July 2017, the Indonesian Commission for Corruption Eradication (KPK) announced that it will resume criminal investigation against PT Duta Graha Indah–a construction company-and has made the company's director as the suspect for corruption. The company was charged by the Law on Anti-Corruption for marking-up the value of the project which caused loss to the state's budget.[43]This case would be the first case to use the SCR 13/2016. Unfortunately, the SCR 13/2016 has not been utilised in other public interest cases, such as criminal offences as stipulated under the environment, forestry, plantation, or labour laws.

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41 Art. 20 SCR 13/2016.

42 Art. 32(4) SCR 13/2016.

43 Danang Firmanto (2017) '*KPK Tetapkan PT DGI Tersangka Korporasi dalam Kasus Rumah Sakit*', 24 July, at: https://nasional.tempo.co/read/894051/kpk-tetapkan-pt-dgi-tersangka-korporasi-dalam-kasus-rumah-sakit.

On the other hand, the government has succeeded in pursuing civil liability of companies for causing forest fires.There are five cases in which the court was in favour of the Ministry of Environment and Forestry. For instance, in the case against PT National Sago Prima, the court ordered the company to pay fines and compensation for environmental rehabilitation at IDR1.07 trillion. In the case of PT Kalista Alam, the Supreme Court upheld the decision of the lower courts and ordered fines and compensation to the company totalling at IDR366 billion.[44]Likewise, in the case of PT Waringin Agro Jaya, the court found that the company is liable for the forest fire in the area of 1.802 hectares, and therefore must pay fines and compensation totalling at IDR758 billion.[45]

The above example shows that the government seems to prioritise civil liability mechanisms in holding companies responsible for the harm they caused, rather than pursuing criminal liability. However, despite the advantages of pursuing liabilities of a company in civil court, it has limitations. Based on the Law on Environment Protection and Management, the government can bring a lawsuit against polluters or any parties that caused harm to the environment, but the government is not able to claim for financial compensation. It is only able to claim compensation for the purpose of environment restoration and rehabilitation.[46] Thus, to obtain compensation, victims of environmental pollution and degradation must file an independent lawsuit or a class action.[47]Unfortunately, not many victims of environmental pollution or destruction cases have the resources to file a lawsuit.

Therefore, the SCR 13/2016 may provide alternatives for the victims of corporate abuse to obtain remedy, particularly through restitution mechanisms. As mentioned above, the restitution procedures under the SCR 13/2016 is subject to the related law and regulation. Under Indonesian law, restitution is a compensation provided by the perpetrator or third party to the victims or their family member.[48]Furthermore, the victims of criminal offences have the rights to obtain 3 (three) types of restitution, these are: (a) compensation for the loss of assets or income;(b) compensation for suffering injury arising out of the crime; and/or(c) recovering the cost of medical and/or mental health treatment.[49]Application to obtain restitution may be submitted by the victims, their family members or their legal representative. A victim may submit its application for restitution to the Protection of Witness

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44 Case Register No. 651 K/PDT/2015.

45 Hans Nicholas Jong (2017) 'Government wins in forest fire case', 9 February, at: http://www.thejakartapost.com/news/2017/02/09/government-wins-in-forest-fire-case.html.

46 Art. 91(1) Law No. 32 of 2009 on Environment Protection and Management.

47 Art. 87(1) Law No. 32 of 2009 on Environment Protection and Management.

48 Law No. 31 of 2014 on the Amendment of Law No. 13 of 2006 on Victim and Witness Protection.

49 Art. 19 Government Regulation No. 7 of 2018 on Granting of Compensation, Restitution and Assistance to Witness and Victim (GR 7/2018).

and Victim Body (the LPSK). The application may be filed before or after the perpetrator of criminal offence is found liable by the final judgment of the court.[50]

The LPSK will conduct substantive examination on the application, and will issue a recommendation to accept or refuse to continue the process of the application.[51] In the case that the application is submitted after the final court verdict to the crime is obtained, the LPSK will submit its recommendation for the granting of restitution to the relevant court. The court will examine and decide the granting of restitution in accordance with the Supreme Court Regulation.[52] On the other hand, in the case that the application for restitution is submitted before the final court judgment, the LPSK will submit its recommendation for restitution to the prosecutor. The Prosecutor will then include the application of restitution together with the LPSK recommendation in its indictment.[53] The court will then examine the criminal case in conjunction with the restitution application.

Nevertheless, despite the existence of legal instruments to obtain restitution for the victims of corporate crimes, obtaining restitution may not always be an easy task.The first challenge to the restitution procedure comes from the prosecutor itself. In the prosecutor's opinion, restitution has a similar character with fines imposed in criminal offences.[54] The second possible obstacle is that the victim bears the burden of evidence. Victims must provide evidence of damage and injury they have suffered.[55] In relation to crimes, most likely that the victims are lacking resources to gather relevant evidence. Finally, perhaps not many victims are aware that they have rights to obtain restitution in a criminal case, particularly when involving corporations.

Based on 2016 data, the LPSK facilitated 152 applications for restitution, with the total amount at IDR3.2 billion. The restitution application was dominated by victims of human trafficking, and followed victims of torture and degradating treatment.[56] In 2017, the LPSK succeeded in facilitating 55 restitution applications, amounting to approximately IDR1.08 billion. Out of these applications, 54 were human trafficking cases, and 1 domestic violence

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50 Art. 20(1) of the GR 7/2018.

51 Art. 26 of the GR 7/2018.

52 Art. 31 of the GR 7/2018.

53 Art. 27 of the GR 7/2018.

54 Hukum Online (2017) '*Penolakan Permohonan Restitusi dan Tantangannya di Peradilan Pidana*', 12 July, at: http://www.hukumonline.com/berita/baca/lt5965f975b0114/penolakan-permohonan-restitusi-dan-tantangannya-di-peradilan-pidana.

55 Art. 21(3) of the GR 7/2018.

56 Hukum Online (2016) '*Perdagangan Orang, Korupsi dan Kekerasan Seksual Dominasi Permohonan ke LPSK*', 28 December, at: http://www.hukumonline.com/berita/baca/lt5863727261a79/perdagangan-orang--korupsi-dan-kekerasan-seksual-dominasi-permohonan-ke-lpsk.

case.[57] These numbers indicates that, restitution mechanism has been utilised very dominantly in human trafficking cases, but very less in other criminal cases.

In 2013, workers of a cooking pan factory–mostly under age–located in Tangerang, Banten Province were found by the Police in bad conditions. They were locked in the factory without access to proper sanitation and food. The workers were forced to work 18 hours a day, yet they did not receive wages. The factory owner, Mr. Yuki Irawan was charged for violating the Law on Child Protection for employing children and the Industrial Law for operating without licence. The court found the factory owner guilty for committing crime. Mr. Yuki Irawan was sentenced to 11 years in prison and a fine of IDR500 million.[58]Unfortunately, the court rejected the Prosecutor's application for restitution which amounted to IDR17.8 billion.[59]

In 2015, an investigation by Associated Press journalists revealed modern slavery practices in Indonesia fishery industry in Benjina, an island located in Maluku Province. Fishermen from Myanmar, Cambodia, Laos and Thailand were forced in an excessive working hours in the fishing boats, suffered from mental abuse and torture, living in a bad condition and working without payment.[60]Following this investigation, the Indonesian Police arrested 5 (five) Thai nationals, identified as the captain of fishing boats. The Police also arrested 2 (two) Indonesian nationals, the acting CEO of PT Pusaka Benjina Resources–a company which runs the fishing operation in Benjina.[61]The court found the alleged suspects guilty for committing crimes under the Law on Human Trafficking and the Law on Anti Slavery. The fishing boat captains were sentenced for 3 years of imprisonment and to pay fines at USD12.2500,- each. Likewise, they also have to pay restitution for the victims totalling at USD67.8000,-. The personnel of PT Pusaka Benjina Resources were sentenced 3 years in jail and ordered to pay restitution ranging from USD3.700,- to USD26.000,- for the abused fishermen.[62]

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57 Antara News (2018) '*LPSK Catat 55 Penerima Restitusi Selama 2017'*, 10 January, at: https://www.antaranews.com/berita/676657/lpsk-catat-55-penerima-restitusi-selama-2017.

58 Multa Fidrus (2014) 'Tangerang 'slave' factory owner gets 11 years', 26 March, at: http://www.thejakartapost.com/news/2014/03/26/tangerang-slave-factory-owner-gets-11-years.html.

59 Hukum Online (2014) '*Tim Advokasi Buruh Kuali Kecewa dengan Putusan Hakim*', 27 March, at: http://www.hukumonline.com/berita/baca/lt53340cd488069/tim-advokasi-buruh-kuali-kecewa-dengan-putusan-hakim.

60 International Organization for Migration (2015) 'Human Trafficking in the Fishery Sector: The Benjina Case', 15 June, at: https://indonesia.iom.int/human-trafficking-fishery-sector-benjina-case.

61 The Jakarta Post (2015) 'Seven arrested in Benjina Case', 12 May, at: http://www.thejakartapost.com/news/2015/05/12/seven-arrested-benjina-case.html.

62 Daniel Leonard (2016) '8 men sentenced to 3 years in jail for enslaving fishermen', 11 March, at: http://www.thejakartapost.com/news/2016/03/11/8-men-sentenced-3-years-jail-enslaving-fishermen.html.

The above two cases show a different result in restitution claims. Restitution claim by victims in cooking pan factory was rejected, but restitution claim by victims of human trafficking in fishing industry was granted. The above cases also provide a good example which shows that victims in human trafficking cases tend to be more successful in obtaining restitution than in other criminal cases. To sum up, although SCR 13/2016 provides a clearer guide for law enforcers to hold companies liable for committing crimes, its implementation to help victims to obtain remedies remains challenging. First, SCR 13/2016 has not been used to hold companies liable for committing crimes which have significant impact on human rights, such as pollution and environment degradation, land grabbing, illegal logging, forest fires, children and women rights, and labour protection. Second, it is true that SCR 13/2016 guarantees victim's rights to claim restitution, yet not all victims of criminal offences are able to obtain restitution.

**President Regulation No. 13 of 2018 on the Implementation of the Principle of Knowing Beneficial Owners of Corporations in Relation to the Prevention and Eradication of Money Laundering and Terrorism Financing**

In March 2018, the government issued President Regulation No. 13 of 2018 on the Implementation of the Principle of Knowing Beneficial Owners of Corporations in Relation to the Prevention and Eradication of Money Laundering and Terrorism Financing Crimes (PR 13/2018). This regulation is established on the basis that corporations can be used directly or indirectly as a vehicle to commit money laundering and terrorism financing crimes.[63]The PR 13/2018 is aiming at identifying the ultimate benefit holder or Beneficiary Owner (BO) of a company. Under the PR 13/2018, BO is defined as an individual who may appoint or dismiss a board of directors, board of commissioners or other similar organ. It has the ability to control the corporation, directly or indirectly entitled to and/or receives benefits from the corporation and the actual owner of the company's funds or shares.[64]A corporation may include limited liability company, foundation, association, cooperative, limited partnership, partnership and other type of business entities.[65]

PR 13/2018 obliges the disclosure of information on BO to the competent authority. This obligation lies with the founder or the director (or similar organ of corporation); the notary or other party authorized by the founder or director.[66] The information of BO must be accompanied by a letter of statement on the correctness of the submitted information.[67] In addition, the corporation must disclose the information on BO when it has assigned the

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[63] Sekretariat Kabinet Republik Indonesia (2018) '*Cegah Pencucian Uang, Inilah Perpres Penerapan Prinsip Mengenali Pemilik Bermanfaat dari Korporasi*', 12 March, at: http://setkab.go.id/cegah-pencucian-uang-inilah-perpres-penerapan-prinsip-mengenali-pemilik-manfaat-dari-korporasi/.

[64] Art. 1 No. 2 PR 13/2018.

[65] Art. 2(2) PR 13/2018.

[66] Art. 18(3) PR 13/2018.

[67] Art. 18(2) PR 13/2018.

beneficial owner. In the event that the corporation has not assigned the BO at the time of the submission of (a) establishment;(b) registration; or (c) approval of business licences, it may submit a letter of statement on the corporation's willingness to convey the information on BO to the relevant authority.[68]

Furthermore, the submission of BO information is carried out through the Corporate Administration Service System, an online system operated by the Ministry of Justice and Human Rights.[69] For companies that have performed its business operation, the principle of recognizing the BO is performed by submitting any change of information to the Authority through the Corporate Administration Service System. This information must be submitted no later than three working days since the change takes place.[70]Companies must update information on BO regularly.[71] The information on BO is supervised by the competent authority, in cooperation with the Indonesian Financial Transaction Reporting and Analysis Center (INTRAC).[72]A Company that failed to comply with obligation to disclose its BO shall be subjected to sanctions in accordance with the provisions of relevant laws and regulations.[73]

Prior to PR 13/2018, the Ministry of Energy and Mineral Resources has issued a Ministerial Regulation of Energy and Mineral Resources No. 48 of 2017 on the Oversight of Exploitation in the Energy and Mineral Resources sector (MR 48/2017). MR 48/2017 was enacted in accordance with the Law No. 4 of 2009 on Mineral and Coal Mining and the Government Regulation No.35 of 2004 on Oil and Gas Upstream Business Activities. MR 48/2017 is a regulatory tool by the government to obtain information on the change of ownership and direct control of the oil and gas companies operating in Indonesia. These changes include the transfer of participating interest and/or share transfer and the changes of directors and/or commissioners.[74]

MR 48/2017 requires the disclosure of BO for all mining licences holders when submitting an application for the extension of mining license.[75] In relation to the ownership of shares, MR 48/2017 provides that all companies must disclose individuals/beneficiary holders, so as to counter tax evasion, money laundering and terrorism financing. Any transfer of

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[68] Art. 19(1) PR 13/2018.

[69] Art. 19(3) PR 13/2018.

[70] Art. 20(1) and (2) PR 13/2018.

[71] Art. 21 PR 13/2018.

[72] Art. 23(4) and (5) PR 13/2018.

[73]Art. 24 PR 13/2018.

[74] Art. 2 MR 48/2017.

[75] In addtion, the Minister of Energy and Mineral Resources has also issued a Circular Letter No. 16.E/30/DJB/2017 on the Licensing Service Requirements at Directorate General of Mineral and Coal.

participating interest in all mining companies must first obtain the Ministry approval, and assessed by the Special Taskforce for Upstream Oil and Gas Business Activities (*SKK Migas*).[76] The Minister's approval will only be given provided that the company disclose its BO.[77]The transfer of shares in a mining company operating in processing and/or purification of minerals must also obtain the Ministry's approval.[78]

Both PR 13/2018 and MR 48/2017 are significant for business and human rights interrelation in Indonesia. These regulations provide a mechanism for the government and the public to track down the person(s) who take advantage from the corporate business operations. Indeed, without these regulations it would be difficult to identify corporate owners. These owners are hidden behind the complex webs of corporate structure. Under PR 13/2018, investigation on BO may be commenced in an allegation of money laundering. Based on the Law No. 8 of 2010 on Countermeasure and Eradication of Money Laundering, money laundering is a financial transaction which involves money or assets which are suspected to be coming from criminal offences.[79] Criminal offences which fall within the money laundering practice are crimes committed in the environment and forestry.[80] This provision is in accordance with the criminal responsibility of corporations as stipulated by Law No. 32 of 2009 on Environment Protection and Management. Apparently, the PR 13/2018 is paving the path to identify the BO who is taking benefit from environmental crime committed by the company. Likewise, MR 48/2017 may also help to identify the real owners of mining companies who are taking advantage from environmental and forestry crimes.

However, tracking the BO may not be an easy task, this is due to several reasons. First, although the public in general may request the disclosure of BO,[81]acquiring this information must be conducted in accordance with the Law No. 14 of 2008 on Public Information Disclosure. Based on this law, an application to obtain public information must be submitted to the relevant public body.[82] Subsequently, the relevant public body shall record the name and address of the applicant, the subject and the format of the requested information. Likewise, the relevant public body will determine the method of providing the requested information.[83] If the requested party refuses to provide the information, the applicant may file a lawsuit to the civil court.[84]Likewise, the requesting party may file a lawsuit to the

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[76]Art. 3 MR 48/2017.

[77] Art. 3(3)(d) MR48/2017.

[78] Art. 14(2) MR48/2017.

[79]Art. 1 No. 5(c) Law No. 8 of 2010 on Countermeasure and Eradication of Money Laundering.

[80]Art. 2(1)(w) and (x) Law No. 8 of 2010 on Countermeasure and Eradication of Money Laundering.

[81] Art. 29 PR 13/2018.

[82] Art. 22(1) Law 14/2008.

[83] Art. 22(2) Law 14/2008.

[84] Art. 4(3) and (4) Law 14/2008.

administrative court if the requested party is a government body.[85]However, the enforcement of court judgement in the public information case may not be simple. There was a case where a government body refused to disclose the requested information. This was the case in the disclosure of a Map which shows the Land Concession for Business Purposes (*Hak Guna Usaha* or HGU). Forest Watch Indonesia (FWI) submitted an application to the Commission for Public Information Disclosure. The FWI requested that the HGU Map must be disclosed to the public. This Map is important because there have been a number of land conflicts between the local communities and palm oil plantation companies. The land concessions given for the palm oil plantations are overlapping with land rights of local communities. In July 2016, the Commission for Public Information Disclosure decided that the National Land Agency must disclose the HGU Map to the public. However, the National Land Agency seemed reluctant to provide the requested Map. Subsequently, the FWI brought the case to the administrative court. In March 2017, the Supreme Court handed down its judgment and ordered the National Land Agency to disclose the HGU Map. Unfortunately, the government has not disclosed the document.

Secondly, if information on BO is located in foreign countries, this information may be obtained through states cooperation.[86] This cooperation is conducted based on international treaties between states.[87]The exchange of information on BO between two different jurisdictions may be executed through the Automatic Exchange of Information (AEOI) and the Mutual Legal Assistance (MLA) mechanism. The AEOI is aiming at combating tax evasion. The AEOI mechanism provides an exchange of non-resident financial account information with tax authorities in the country of residence of the account holders, any countries which join the AEOI will send and receive information without sending special requests. The AEOI allows the tax office to detect tax evasion. Indonesia implements AEOI through Minister of Finance Regulation No. 39/PMK.03/2017 on Information Exchange Procedures under the International Agreement. To date, Indonesia entered into an AEOI agreement with Hong Kong on 16 June 2017.[88]

As for the MLA, it is regulated under the Law No. 1 of 2006 on Mutual Assistance in Criminal Matters and the Law No. 15 of 2008 on Ratification of Treaty on Mutual Legal Assistance in Criminal Matters. Unfortunately, not all countries have cooperation on the exchange of information in criminal matters with Indonesia. Up to present, Indonesia entered into MLA with Australia, China, South Korea, Hong Kong and India. Within the ASEAN framework, a Regional Treaty on Mutual Legal Assistance in Criminal Matters is signed by Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore and

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[85] Art. 47 Law 14/2008.

[86]Art. 27(2) (c) PR 13/2018.

[87]Art. 26(3) PR 13/2018.

[88] Baker McKenzie (2017) 'Indonesian Tax Authorities Finally Entered an Automatic Exchange of Information Agreement with Hong Kong', 18 June, at: https://www.bakermckenzie.com/en/insight/publications/2017/06/indonesian-tax-authorities-finally-entered/.

Vietnam.[89] Thus, other than these countries, it may be difficult to obtain information on corporate BO which is located in foreign jurisdictions.

**Steps Ahead: Opportunities and Challenges**

Based on the above analysis on both the SCR 13/2016 and the PR 13/2018 it is suffice to say that these legal instruments may help victims of corporate abuse to obtain remedy. The SCR 13/2016 for instance, provides guidance for the law enforcement bodies (Police, Prosecutor and the Court) in handling criminal cases against corporations. As mentioned above, there are a number of Laws in Indonesia which contain criminal liabilities for corporations. Companies can be criminally liable for causing pollution and environmental destructions, failing to pay minimum wages to their employees, or involving in slavery and human trafficking. Unfortunately, three years since the SCR 13/2016 was issued, there have been no criminal cases brought against corporations. There is only one potential case brought by the Corruption Eradication Commission, which is based on the Law on Anti-Corruption. Considering the negative impacts that companies may cause to the environment, labour, and indigenous/local communities, there should be more criminal cases brought against companies.

Similar situation may also occur with the PR 18/2018. This regulation provides the procedures to identify and track the benefit-holder of corporations. Although its main objective is to combat money laundering and terrorism financing, this regulation may be useful for the victims of corporate abuse in environment and forestry related crimes. In the context of business and human rights, information on the company ownerships is important in identifying who should be held liable for the company's abusive conduct. Indeed, companies have been taking the advantages of the complex corporate structure. It enables companies to hide financial transactions and the real owners who take control of the company's operations. However, since this regulation has just been issued early this year, its effectiveness remains to be seen.

Despite opportunities offered by both the SCR 13/2016 and the PR 13/2018, these regulations contain a number of potential hurdles for the victims of corporate abuse. Both of these regulations contain long procedures and are exhaustive for victims in obtaining remedies. This situation includes the long process in obtaining restitution, and information on corporate BO. The SCR 13/2016 offers an opportunity for the victims of corporate crimes to obtain restitution. However, obtaining restitution may involve a long administrative process and exhaustive court examination. Except in the human trafficking case, restitution has never been granted to victims of corporate crimes. Similarly, the PR 13/2018 contains a relatively complex procedure to obtain information on corporate BO. Although information on the company's BO must be opened for the public, there has been a case where the requested public information has not been provided. In the case where the requested party refused to disclose information, the requesting party must file a case to the court. Furthermore, the process to obtain information on corporate BO may become more complicated if the requesting party is located in foreign jurisdiction. Obtaining information on corporate BO

[89]General Elucidation of Law No. 15 of 2008 on Ratification of Treaty on Mutual Legal Assistance in Criminal Matters.

may be complex and resources exhaustive, therefore, is not accessible for victims of corporate abuse.

Having the above concerns in mind, we propose that the process of obtaining restitution and information on corporate BO must be made simple. In relation to the restitution process, we propose that the prosecutor office should be given authority to include the payment of restitution in its indictment. This has been implemented in the human trafficking cases. The Law No. 21 of 2007 on Human Trafficking provides authority for the prosecutor to submit restitution claim in its indictment. Providing the prosecutor with authority to include restitution claims will fast track the restitution process. Perhaps, there should be an amendment to the law and regulations which relate to the restitution process. In criminal cases which involve corporate abuse, there should be special procedures for restitution. The special procedure may be applied in particular criminal offences which are committed by corporations. This offence may include pollution, environmental degradation, labour rights, land grabbing, and forest fires.

Likewise, procedures to obtain information on corporate BO must also be made simple. One of the drawbacks in PR 13/2018 is that it does not contain sanction for companies who fail to disclose its BO. Indeed, under Indonesian legal system, sanctions may only be imposed by the Law. Therefore, we propose that the obligation to disclose BO should be included in the Corporation Law. Under this law, sanction may be imposed for companies that fail to comply with the obligation to disclose BO. With this sanction, legal suit to obtain information on BO will be unnecessary. Therefore, at the end it will shorten the process in obtaining the information on corporate BO.

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# All Carrots and No Stick: Human Rights Regulation of Companies in Japan

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## Abstract

Japan has been subject to criticism by civil society actors for being one of the only countries in the G8 that has not yet adopted a National Action Plan on Business and Human Rights (NAP). In a surprise move, the country announced at the UN Forum on Business and Human Rights in November 2016 that it would formulate a NAP, and the Foreign Ministry has reportedly commissioned baseline studies in relevant areas. Nevertheless, the scarcity of publicly available information gives rise to concern as to how open the NAP formulation process will be, in particular towards civil society. Japan has generally shunned mandatory regulations that require companies to fulfill human rights standards, and which would punish companies that do not comply. Rather, the country has leaned towards softer approaches, such as non-binding goals coupled with government certification of high performers. These approaches have by and large proven ineffective, and when the government does attempt to introduce binding provisions, as it appears to be preparing in the case of 'karoshi' (death from overwork), the standards are often so lax they call into question the seriousness in which the government views human rights as a whole.The lack of government leadership is problematic, especially given that most companies in the country still view 'human rights' in an extremely narrow sense. Indeed, it is important to note that broader context, namely that the government generally promotes a view of human rights that is not in compliance with international standards - and that is at times outright negative. This paper will examine these issues, using examples from areas such as karoshi, the rights of foreign laborers, the status of women in the workplace, illegal logging, and stakeholder engagement in development projects. It is submitted that an approach based on the 'good will' of companies and the purported benefits of human rights 'branding' will not be effective, without stringent mandatory measures requiring companies to comply with human rights responsibilities as per the United Nations Guiding Principles.

## Introduction

Though often thought of as a document aimed only at companies, the majority of provisions in the UN Guiding Principles on Business and Human Rights (UNGPs) are in fact directed at states, as the bearer of obligations under international law and the entity that can, so it is envisioned, both require and enable companies to improve practices having implications for

[90] The views expressed in this paper are those of the author only, and do not necessarily reflect the position of the Business & Human Rights Resource Centre.

human rights. The first foundational principle of the UNGPs, for example, states that states should take 'appropriate steps to prevent, investigate, punish and redress [human rights] abuse through effective policies, legislation, regulations and adjudication', with the second stating that states must 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.' Performing these duties includes, inter alia, '[enforcing] laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights'. (Office of the High Commissioner for Human Rights 2011: 3, 4)

As with most provisions of international law, how exactly the above provisions are implemented varies from country to country. Many countries have adopted legislation requiring companies to fulfill certain specified standards in human rights related areas, with penalties for companies that do not comply. Japan, however, has generally preferred a different approach, based largely on non binding standards and voluntary compliance. Laws and policies related to business and human rights issues have been adopted in Japan, but many of them have been little more than statements of intent, containing non binding targets and statements of principles, and lacking penalties for non compliance. Certification schemes and other incentives are often made to act as carrots for companies to perform well - however, sticks are lacking against companies that fail to live up to the required standard.

Presumably there are a multitude of factors that give rise to this situation. Unquestionably, the immense power of big business in Japan, in particular the mighty Keidanren, the Japanese Business Federation, is one. Besides lobbying politicians on issues of concern, Keidanren co-ordinates the hefty donations of Japanese companies to political parties,[91] ensuring a stable stream of funds for parties that promote pro business policies (mainly the Liberal Democratic Party, which has been in power more or less constantly since 1955). Keidanren's policy demands go far beyond deregulation and other issues directly related to the operation of businesses - for example, it has been a leading advocate for reductions in the welfare budget, raising the rate of value added tax, and increases in military spending.[92]

Trade unions are weak in Japan. The unionization rate, 55 percent in the late 1940s, currently stands at 17 percent, partially due to the exponential increase in contract employment (and the exclusion of contract employees by many unions) in recent years. Equally (or even more) relevant is the fact that the overwhelming majority of unions in Japan are company unions, and therefore often reticent to take strong stances against management. (Kosei Roudou-sho 2017: 2, 8) The media is equally docile (Kaye 2017), and the capacity of human rights and other NGOs is extremely limited. Therefore, there is a general lack of social forces that might be expected to counterbalance the influence of businesses in contributing to government

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[91] Japanese law allows for corporations to make donations to political parties, and, indirectly, to particular candidates.

[92] Keidanren's influence on human rights and other social issues has of course not been only negative. In 2017, Keidanren adopted a revised Charter of Corporate Behaviour, which makes reference to the UNGPs and states that corporations should, inter alia, '[respect] the human rights of all persons.' The manual for implementation of the Charter, also published in 2017, devotes a chapter to human rights. (Keidanren 2017)

policy. Many Japanese place more trust in companies than other actors, including the government, politicians, the media, and NGOs (with NGOs scoring last). (Edelman 2017)

At the same time, it is worthy to note that there is a recurring theme within Japanese discourse that ties this preference for carrots over sticks to the notion that companies (and people) are naturally inclined towards good. According to this narrative, the 'foreign' (meaning Western) paradigm is based on the assumption that people are inherently bad. This paradigm necessarily results in binding legislation, formal checks and balances, and a generally legalistic approach, since compulsory rules are needed to make sure that people do not engage in prohibited activities. In contrast, the Japanese (or, depending on the context, the 'Asian') approach is presented as one that trusts in the inherent goodness of people. In this paradigm, all people require is a goal (set by the government in the role of a benevolent father figure) and a nudge in the right direction, and they will embark on the correct path. Even in the unusual circumstance that deviant actions are taken, they are surely the result only of honest mistakes or simple misunderstandings between otherwise well intending actors. Those rare cases can be dealt with through gentle, subtle intervention by those with authority, together with the disapproving stares of the other members of the community. Harsh, public sanctions are not needed.

This narrative is often intertwined with the (seemingly mutually reinforcing) notion that Japanese society values harmony (wa) above all else. 'Foreigners' (i.e. Western people), so this narrative goes, are inherently adversarial, think only about themselves, and are too quick to demand their rights, even if this could disrupt the harmony of the collective. Japanese people, on the other hand, are more considerate of others, and elegantly give way wherever possible, ensuring that all members of society are happy.

Obviously, the above narrative gives rise to significant questions, including who defines what constitutes 'harmony' within Japanese society at any given time, which social actors benefit from said 'harmony', and what (if any) mechanisms exist to ensure the interests of vulnerable actors. These are broader questions that are out of the scope of this paper (and out of the expertise of this author): suffice it to say there has been little pressure on the government to adopt binding standards in areas of business and human rights.

Of course, even without penal provisions, law and policy can potentially act as a catalyst for social change, insofar as government positions can play a role in setting the tone of popular discourse. This paper will examine three areas of business and human rights in Japan: regulation of excessive working hours, the import of illegal timber, and the rights of women in the workplace, as examples of the non binding approach the government has adopted. By and large, the 'carrots but no stick' approach has proven inadequate, at least in the immediate term: efforts in the areas of working hours and illegal timber over recent years have been ineffectual in bringing about improvements, with certification schemes even arguably serving as a whitewashing effort. There has been some improvement in the area of women's rights, but that has been over the space of three decades, and Japan still remains at the bottom of the international league table in this area.

Japan had long been criticized by civil society for being one of only two G7 countries that had not adopted a National Action Plan on Business and Human Rights (NAP) in accordance with the UNGPs. In a surprise move, Japan announced at the UN Forum on Business and Human Rights in November 2016 that it would formulate a NAP, and the Foreign Ministry has reportedly commissioned baseline studies in relevant areas. Nevertheless, there remains a paucity of publicly available information regarding the direction of the NAP, and there is concern that it will continue with the current approach of providing only carrots, with no stick.

**Karoshi: death from overwork**

Japanese workers work extremely long hours, often described, quite literally, as 'murderous' (satsujin-teki). Data submitted by the government to OECD states that Japanese workers work an average of 1,713 hours worked annually, putting Japan at 23rd out of 39 countries - however, this data seems to include all workers in any kind of form of work, e.g. students working part time. (OECD 2018) Data collected by Keidanren, on the other hand, indicates that average working hours in member companies are in fact around 2000 hours, which would put Japan at fourth or fifth place in the OECD ranking. (Keidanren 2018b) However, even the Keidanren figure does not appear to include the massive overtime (hours worked beyond the normal 40 hour work week) that Japanese workers are routinely expected to perform, often without claiming overtime pay - a practice widely derided by Japanese as 'service overtime'.

Labour Ministry data indicates that only about half of workers take all their annual leave days (a minimum of 10 days per annum). (Kosei Roudo-sho 2018a) More fundamentally, most companies do not have separate provisions for short term sick leave, meaning that workers who are sick and unable to come to work are forced to take annual leave. In addition, Japanese graduates starting in the corporate world are regularly warned against taking more than one or two leave days at a time, making, for example, a week long holiday impossible.

The above practices make accurate accounting of actual working hours difficult. Nevertheless, there is universal recognition that Japanese workers are forced to perform too many hours, and that this causes a multitude of physical and mental health problems. Indeed, Japan is well known for the internationally infamous phenomenon known as 'karoshi' - the Japanese term for 'death from overwork'. In 2017, the Labour Ministry recognised 260 deaths as directly resulting from overwork.[93] In addition, 498 persons were also recognized as having mental health conditions resulting from overwork (including 84 suicides or attempted suicides resulting from overwork). The trend in recent years has been generally constant, meaning between 700 to 800 lives are either lost or seriously damaged every year from overwork.

These figures are widely understood to be a gross underestimate, as such recognition operates on the basis of very stringent criteria. Amongst others, the guidelines for 'karoshi' recognition

[93] Official recognition of a death or accident as having resulted from work carries with it payment from a government administered insurance scheme.

require that the worker had performed ‘around 100 hours of overtime’ over the month immediately preceding death, or ‘around 80 hours of overtime per month’ over two to six months before death. (Kosei Roudou-sho 2001: 7) This has resulted in both the 80 and 100 hour monthly overtime marks being commonly referred to as the ‘karoshi line’.

There is of course a multitude of factors behind these working practices, not the least of which, it is submitted, the fact that pulling in long hours has evolved to a symbol of Japanese masculinity. The image of Japanese as being diligent, hard working, and ready to sacrifice themselves (sometimes quite literally) for the good of the collective is often juxtaposed with the ‘foreigner’ (the Westerner). who is lazy, selfish, and quick to use his ‘so called rights' as an excuse to weasel out of hard work. There is no shortage of ‘blame the victim’ type narratives in popular discourse on karoshi, along the lines of how ‘young people nowadays are too weak’ and get sick or depressed at the drop of a hat. Other narratives aim at diffusing responsibility completely, arguing that society as a whole is to blame for having unreasonable expectations of ever faster services (therefore allowing companies to act as the victim and shirk any liability for the problem).

What is often overlooked is the fact that legislative and systemic protection for Japanese workers is utterly inadequate. Japanese labour law in principle provides for a 40 hour work week, but states also that workers may be required to perform overtime (or to work on weekends), subject to a limit agreed on by management and the relevant labour union in what is commonly referred to as an ‘Article 36 Agreement’ (after the Article in the Labour Law). Though this would appear to offer an element of protection against unreasonable demands on workers, the overwhelming majority of unions in Japan are company unions, i.e. they are made up only of employees of one particular company, and are often reticent of taking strong stances against management. This results in a situation where workers are vulnerable to ‘agreements’ that are, to put it lightly, not in their interest.

In 2017, it was reported that a large number of leading manufacturers allowed workers to perform overtime far beyond the karoshi line. For example, the ‘agreement at IHI reportedly allows for workers to perform up to 200 hours of overtime per month, Hitachi up to 150, and Sumitomo Heavy Industries up to 140. Toshiba allows 120, Mitsubishi Electrics 105, and Fujitsu, JFE Steel, and Mitsui Engineering and Shipbuilding all allow 100 hours of overtime per month. Toyota, Mazda, Nissan, Mitsubishi Motors, Kawasaki Heavy Industries, NEC, and Nippon Steel and Sumitomo Metal all allow for up to 80 hours of overtime.’ (Business & Human Rights Resource Centre 2017a) Indeed, 16 out of 17 companies on the Board of Keidanren in 2017 also had Article 36 Agreements that provided for overtime beyond the karoshi line, with NTT allowing up to 150 per month. (Business & Human Rights Resource Centre 2017b)

Even the Article 36 Agreements are often flouted by companies (with the acquiescence of unions) The Labour Ministry does raise working hour issues with companies on the basis of complaints, but their recommendations are not legally binding, and further action (in particular referral for prosecution) is extremely rare.[94] In addition, there is no public record of

[94] In 2016, the Labour Ministry raised issues with 23,915 companies. (Kousei Roudo-sho 2017d)

which companies the authorities have raised concerns with, making it extremely difficult for prospective employees (or the general public) to gauge the practices of a particular company. In 2016, the Ministry announced that official unemployment offices would no longer carry job adverts of companies that were the subject of persistent complaints. (Nikkei Shimbun 2016) This begs the question as to why this had not been the case before - and in any case the role of government unemployment offices in the Japanese employment system is not large, in particular with regard to new graduates.

Karoshi has been the source of much concern since at least the 1980s, but it was not until 2014 that the government finally adopted legislation aimed at combating the phenomenon. Nevertheless, the 'Promotion of Measures for Karoshi Act' is a prime example of diffusion of responsibility, stating in Article 3 that 'actual conditions concerning karoshi … are not necessarily sufficiently grasped, [and] this shall be done by encouraging public awareness of the importance of preventing karoshi … and deepening their interest in and understanding' of the phenomenon. Companies are required in the law only to 'endeavor to cooperate with the State and local public entities in promoting measures to prevent karoshi', and the general public appears to be equally responsible for the problem, with the law stipulating that 'citizens shall be aware of the importance of preventing karoshi …and endeavor to deepen their interest and understanding'. There is no mention of any binding measure on businesses, unions, or any entity: indeed, the only clear obligation in the law is for the government to prepare an annual report to parliament. The law has been a failure on its face, as, as stated above, the number of karoshi has remained constant in recent years.

The government also has a certification scheme under which companies that demonstrate measures aimed at shortening working hours and on other indicators related to worker safety and welfare can obtain official recognition from the Labour Ministry. This theme is heavily promoted by the government and the corporate world, and has an anime style logo to attract young, potential employees. However, the scheme has been the subject of widespread derision after a prominent 2015 case involving the suicide of a young worker, Matsuri Takahashi, at Dentsu, the leading advertising house in Japan. It came to light that despite the fact that karoshi cases at Dentsu had been recognized by the Labour Ministry as recently as 2013, Dentsu had still received certification under the scheme, in both 2013 and 2015. (Shimbun Akahata 2016) Takahashi, 24 years old at the time, had been forced to work 105 hours of overtime the month before her suicide. Takahashi's family sued Dentsu in court, and the company was ordered to pay a derisory sum of JPY 500,000 - approximately USD 4,400. (Business and Human Rights Resource Centre 2016a)

In late June 2018, over considerable public protest, the government rammed through parliament a bill that could weaken even further protections for workers. Though the bill would for the first time set a legal limit on working hours, the limit is extremely high - a total of 720 hours overtime per year, with a maximum of 100 hours overtime per month during 'peak times'. (Kosei Roudou-sho 2018b) While the establishment of a ceiling on overtime is clearly a positive step, there has been considerable outcry at what is arguably the normalization of working up to the karoshi line.

Perhaps even more concerning is the creation of a new category of workers who would be exempt altogether from any regulation of working hours. Under the bill, employees with salary levels over a specified amount could be designated as 'highly skilled professionals', who would be paid according to specified targets (and not according to the hours they work). (Kosei Roudou-sho 2018b see proposed revisions to Labour Law Article 41) Though the amount of salary above which workers may be designated as such is currently stipulated at the relatively high level of three times the average salary, Keidanren is on record as demanding that employees receiving above 4 million yen - approximately the starting salary of most university graduates - should be exempt from any overtime pay. (Hagiwara 2018)

In what is a seeming admission that an approach providing only for carrots has been insufficient, the bill provides for penalties for non compliance, including the potential of up to six months imprisonment. (Kosei Roudou-sho 2018b see proposed revisions to Labour Law Article 119) Only time will tell how strictly these provisions are enforced, and whether it will have an impact on the karoshi issue.

**Import of timber**

Regulation of the import of timber is another area where the government approach of carrots at the expense of sticks has, up till this point at least, proven ineffectual. As noted by Global Witness in a report published in April 2016, Japan is the only country in the G7 not to explicitly outlaw the import of illegal timber, and up to 12 percent of imported timber is estimated as potentially having been illegally felled, giving rise to serious environmental and indigenous rights concerns in areas of Malaysia. (Global Witness 2016: 5, 6)

In lieu of binding legislation to be enforced on companies, the government adopted in 2006 a voluntary scheme, under which companies that abided by government guidelines can receive the 'Goho Wood' ('goho' meaning 'legal') certification. The certification is widespread, covering most major importers, but as noted by Global Witness, 'the majority of companies only check documents that in practice don't ensure legality. … a wide range of documents are accepted … These documents are taken at face value.'. (Global Witness 2016: 6) For its part, the national government is required by legislation to purchase only legal timber, setting a good example: however, a survey conducted in 2014 found that over 26 percent of national government agencies and over 40 percent of local governments didn't even bother to verify the legality of imported timber. (Chikyuu Ningen Kankyou Forum and FOE Japan 2014: 5)

In May 2016, shortly after the Global Witness report, parliament adopted a new law on timber import, widely promoted by the government as the 'Clean Wood Act'. The law does state that all businesses 'must endeavor' to use only legal timber (Article 5): nevertheless, none of its provisions are formulated in binding terms, and there are no penalties for companies or individuals that violate the law.

The law provides for voluntary registration of companies that use imported timber. Companies that register will be bound by the law's provisions and guidelines on confirming the legality of timber they use - however, there are no measures envisioned to encourage companies to register, save a public information campaign to 'promote understanding'

amongst businesses and the general public. (Article 4.3) Unlike working hours, there is no large scale certification scheme with anime like characters, making the incentive to register in terms of companies advertising themselves as 'good citizens' arguably even weaker.[95] In any case, the guidelines issued by the government upon the law coming into force in May 2017 are extremely vague - they make no mention of human rights, and would seem to allow nearly any document as proof that particular timber is legal, essentially allowing registered companies to continue as they had done before. (Rinya-cho 2017) A group of 18 NGOs issued a statement upon adoption of the law, criticizing it as '[falling] far short of what is necessary' and noting that it 'fails to meet the standards already adopted by its G7 peers'. (Global Witness et al 2016: 1)

Only a few days before adoption of the May 2016 law, TOCOG published a sourcing code for timber to be used in the 2020 Olympics. The sourcing code was immediately criticized by several NGOs, who not only argued it was 'inadequate' and 'unsustainable', but also that the code did not even fulfill the standards of the 2016 bill. (Business and Human Rights Resource Centre 2016c) In October 2016, the quango organizing the construction of the new stadium for the Olympics announced it would not implement the new sourcing code, stating tender had already been issued. (Business and Human Rights Resource Centre 2016d)

As the new law has only come into force in May 2017, it is too early to tell what, if any, impact it will have on the import of illegal timber to Japan - though skepticism is certainly warranted. As of 31 May 2018, most, though seemingly not all, of the seven of the major importers examined by Global Witness in 2016had registered under the law. (Nihon Gas Kiki Kenya Kyoukai 2018)  Women's rights in the workplace

**Women's rights**

The advancement of women's rights in the workplace (and in society as a whole) has ostensibly been one of the main platforms of the second Abe government (in power since 2012), and PM Abe has been active in stating that women must be given more positions of responsibility in the corporate world. It is notable that the impetus (stated clearly) behind these efforts is the low birth rate and the perceived economic need to ensure that women are able to continue working after having had children, as opposed to any rights based principle. Nevertheless, there has also been widespread embarrassment at the fact that the country remains at the bottom of the heap amongst advanced economies in nearly every single indicator of women's empowerment.

Cited most often is the fact that only 13.0 percent of managerial positions in Japan are held by women. By ways of comparison, the same figure was 43.4 percent in the United States, 36.0 percent in the United Kingdom, and 34.2 percent in Singapore. (Naikaku-fu Danjo Kyodo Sankaku-kyoku 2018). Japan ranked a dismal 96th out of120 countries in 2015, and there has been little improvement since then. (International Labour Office 2015: 19, 21) The only OECD country that performs worse than Japan on this indicator is Korea (a fact

[95] Of course, some companies have used their registration under the scheme for promotion purposes; see Sumitomo Forestry 2017.

consistently highlighted by Japanese government and media reports on these issues). The civil service is even worse, with only 3 percent of managerial positions held by women. (Naikaku-fu Danjo Kyodo Sankaku-kyoku 2014)

Only 3.4 percent of corporate board seats in Japan are held by women (Naikaku-fu Danjo Kyodo Sankaku-kyoku 2018), as compared to between 10 and 20 percent in most other OECD countries. (ILO 2015: 11) According to data compiled by OECD, the wage gap between men and women in Japan in 2015 was 25.7 percent, nearly double the OECD average that year of 14.3 percent and once again putting Japan at the bottom save Korea. (OECD 2018) The issue of course goes beyond the workplace: for example, the poverty rate of families headed by working single parents (predominantly women) is an astounding 50.9 percent, almost 2.5 times the OECD average of 20.9 percent. The average annual income of these households is a paltry JPY 1,790,000 - not even USD 17,000. (Tokyo Shimbun 2014)

The above figures notwithstanding, Japan has made progress since it first adopted legislation in this area. The country ratified CEDAW in 1985, and adopted the Equal Employment Opportunity Act in the same year. Before this law, it was almost unheard of for women to have a non-support position in corporate Japan. Women were commonly referred to as the 'flower of the workplace', and it was widely understood that women who had graduated from two year junior universities had better job prospects than those who had degrees, as women who were younger than their male counterparts would be easier to supervise (and would be viewed more desirable as a marital partner). In that regard, the situation has of course improved significantly.

The 1985 law is limited in scope, and while it does contain language clearly prohibiting particular practices in the workplace, those practices are narrowly construed. In particular, thanks largely to advocacy by the corporate sector, there is no punishment for failing to abide by the law. While the law can be the legal basis for a civil lawsuit for a finding of unlawfulness and damages, this is of course incumbent upon the victim mounting the financial and emotional resources to take a case to court. Otherwise, the only real recourse a victim would have is to request the intervention of the Labour Ministry, which, as is the case with karoshi and other labour rights violations, usually makes only nonbinding 'recommendations for improvement' to the company concerned.

Japan does not have comprehensive legislation banning discrimination (on the basis of sex or other reasons) - an issue pointed out consistently by human rights treaty bodies - and Japan remains non state party to ILO Convention 111 (C111) prohibiting discrimination. Many observers point to the demands made upon Japan by the ILO upon ratifying ILO Convention 100 on equal pay for equal value work to reduce the wage gap between men and women, stating that this in turn led to lobbying by businesses to refrain from ratifying C111. (Tokyo Shimbun 2015) Japan is one of only 12 member states that have not ratified C111, and one of only two non state parties that are members of the OECD (the other being the United States). Japan has steadfastly refused to become party to the Optional Protocol to CEDAW (or to any of the individual complaints procedures in international human rights law), so that avenue for recourse is also closed for victims in Japan.

The above notwithstanding, progress has been made since 1985. Government data shows that, for example, women in middle managerial positions in companies over 1,000 employees was a mere 1.6 percent in 1985; in 2014, it stood at 9.2. percent. (Kosei roudou-sho 2015) Nevertheless, this figure is still extremely low by international standards, and it is fair to question whether it is at an acceptable level after more than thirty years after having adopted the 1985 law. An approach containing mandatory targets might have been (will be) more effective.

Though the public discourse on this issue has largely centred on the proportion of women in managerial positions, the current situation remains problematic in many areas. Sexual harassment and maternity harassment remain commonplace in corporate Japan; citing one government survey released in 2016, the Business and Human Rights Resource Centre noted that 'nearly a third of Japanese women have been subjected to sexual harassment at the workplace, including inappropriate touching and unwarranted advances. Nearly two thirds did not make any complaint about the harassment, either formal or informal, and approximately one in ten who did complain were penalized for having done so, including suffering demotion. In addition, over twenty percent of Japanese women reported suffering from pregnancy discrimination.' (Business and Human Rights Resource Centre 2016b)

The 1985 law prohibits 'unfavourable treatment' for women who married or gave birth during their employment (Article 9). Despite this provision, for years women who took maternity leave were routinely subject to demotions upon their return, in effect penalized for having had children. The government did nothing to address this issue, and it was not until a landmark Supreme Court judgment in 2014 that this was defined as being prohibited by the law. (Business and Human Rights Resource Centre 2015a) Subsequent to the ruling, the Labour Ministry issued updated guidelines stipulating that demotion was prohibited. (Business and Human Rights Resource Centre 2015b) In late 2015, an NGO demanded improvement for women with irregular contracts, stating that only 4 percent of women in that situation were able to take maternity leave. (Business and Human Rights Resource Centre 2015c)

As with the karoshi issue, there are of course copious amounts of narratives aimed at justifying current practices. Many of these are variants of the 'culture' argument, i.e. the notion that Japanese women have 'always' stayed at home while the men perform their duties as the breadwinners of the household. These arguments are nonsensical since, outside of the aristocracy, Japanese women were historically far more economically independent until 'modern' European norms were imposed by the Meiji government during the period of industrialization in the late 19th century. This is not to suggest that Japan was not a patriarchal society before then, but to point to the fact that the current model of a nuclear family, with the man working and the women staying at home performing a subservient role, is a relatively new phenomenon, and is hardly a mainstay of Japanese history and culture. Nevertheless, the government has made no attempt to point to those facts, choosing rather to justify its policies solely on the current economic realities. This is arguably unsurprising, since the right wing groups that are proactive in advancing the above unfounded narrative also form an integral part of Abe's support base.

In June 2014, the government announced it would set a target of 30 percent of all 'leadership' positions to be held by women by 2020. After a barrage of criticism, in particular by businesses, that the target was too ambitious, the government was forced to scale back its plans considerably. In late 2015, a five year plan was adopted aiming at women holding 15 percent of middle managerial positions in the corporate sector, and a somewhat meagre 7 percent in central government by 2020. (Business and Human Rights Resource Centre 2015d) One observer writes that 'while the Cabinet Office insists the 30 percent figure remains its general aim, the drastic lowering of expectations acknowledges poor progress to date'. (Aoki 2015)

Also in 2015, parliament adopted the 'Act on Promotion of Women's Participation and Advancement in the Workplace'. The law obligates companies with more than 300 employees to prepare and submit to the government action plans on improving the position of women at the workplace. (Article 8) The action plans are compiled by the government and published on a web based database. There are no penalties for non compliance, but an incentive scheme is built into the law itself, with provisions specifying that companies that show particularly effective measures can, if they wish to apply, receive certification by the government and receive preferential treatment in the awarding of public contracts. (Article 9)

The government stated in 2016 that 85 percent of required companies (a total of 13,087) had submitted action plans. Of those over 13,000 companies, only 46 received certification. It is unclear whether this is because the criteria for certification are strict (which may be desirable) or because most companies have not bothered with applying in the first place. A cursory examination of the database shows that the action plans of even the certified companies are general, even vague, and rarely go over one side of a page in bulleted text format. (Kosei Roudo-sho 2018) As with the other two areas examined in this paper, it is too early to gauge the efficacy of the 2015 law, but skepticism is warranted.

**Conclusion**

In terms of business practices impacting on human rights, the Japanese government has generally shunned binding legislation and strict enforcement for an approach based largely on voluntary standards and incentives. This approach has overall been ineffective, at least in the three areas examined in this paper - excessive working hours leading to karoshi, the status of women in the workplace, and the importing of illegal timber.

This is not necessarily to argue that certification or other methods are by definition ineffectual. The reasons for why the Japanese schemes have fallen short are no doubt complex, and warrant further research. However, it is the contention of the author that regimes based solely, or even predominantly, on positive incentives are bound to fail. Whether or not companies have inherent good will towards human rights is an open question, but regardless of intentions, serious efforts towards human rights on their part cannot simply be assumed. Carrots have a place, but without a stick to accompany them, they will always be insufficient in the arena of business and human rights.

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# Multinational Corporations and Human Rights

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## Abstract

There is a regional trend in Southeast Asia regions of allegation of human rights violations by large scale corporate projects such as plantations, mining and other forms of extractive industries. In this regard, one example is a case on forest and peatland fires across Sumatera Island and Kalimantan Island for several months over 2014-2015 . The fires claimed taken millions of hectares of forest and peatland and ten of thousand of lives including to the most impacted to indigenous peoples who stay in and near the forest and peatland areas, moreover toxic smoke impacted to respiratory infections then smoke spread across the country, reaching as far as neighboring Malaysia and Singapore ( Cifor report, 2017). In this regard, a finding from an NGO, Friends of the Earth in 2016 states that the company and multinational corporations are involved in those forest and peatland fires, and some private banks and other EU countries also contributed in providing financial services to the palm oil plantation sector . Therefore, this complex issue must include the responsibility of multiple stakeholders from the local and national government, smallholder farmers, communities and multinational corporations (MNCs). However, the long standing problem is that state-owned regulation, national and regional mechanisms such as in ASEAN are not strong in bringing the responsibility of MNCs on human rights impacts and lack on managing large scale projects from MNCs moreover MNC is not the entity who knows and is an expert in human rights. The research questions are to what extend human rights accountability can be carried out by the State where the MNCs operate and the State of origin of MNCs in international human rights law? to what extend implementation under the UN Guiding Principle on business human rights in a country's business policy can be conducted by government and civil society effectively? This paper elaborates recommendations for the government in policy in making accountable Multinational Corporations.

**Keywords** : Human Rights Accountability, Multinational Corporations responsibility, UN Guiding Principle on Business and Human Rights

## Background

Transboundary haze pollution because of forest and peatland fires is considered one of the most serious environmental problems in Southeast Asia including Indonesia. Singapore had sued Indonesian plantation company deemed responsible for the burning of forests and

peatland causing haze pollution that endangers the health of Singapore's population.[96] While Malaysia has agreed that diplomacy is a better option than enacting a law similar to Singapore's Transboundary Haze Pollution Act after observing the city-state's experience.[97]

According to Singapore's Transboundary Pollution Act of 2014[98], then Singapore may impose a fine of SGD 100,000 to local companies or multinational corporations that contribute to harmful haze pollution for the health of the population. From some research findings including an NGO, Friends of the Earth in 2016 states that the company and multinational corporations contributed to those forest and peatland fires, some private banks and other EU countries also contributed in providing financial services to the palm oil plantation sector. Another factor is lack of supervision over burning to clear the land for other development purposes such as for growing agricultural crops like plantation trees such as oil palm, rubber, or pulpwood, lack of legal enforcement including having weak judicial systems, lack of capacity on the part of concerned authorities , lack of awareness and adequate information, limited resources on human resources, the lack of political will to handle the problem, and the associated businesses and individual profit motives including corruption practices at the expense of environmental and social costs.[99]

The recent trends in addressing transboundary environmental harm show that States prefer to adopt and implement a prevention and cooperation regime particularly in Southeast Asia and less emphasize on human rights accountability. Furthermore, criticism of the company including multinational corporations has also been conveyed by the UN High

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[96] Singapore sued five Indonesian companies which are Rimba Hutani Mas, Sebangun Bumi Andalas Wood Industries, Bumi Sriwijaya Sentosa and Wachyuni Mandira, in September 25, 2015 including a multinational corporation, Asia Pulp and Paper (APP) proven to burn forest which triggered haze pollution based on the evidence collected by the National Environment Agency in Singapore, available at https://www.cnnindonesia.com/internasional/20150926093725-106-81046/singapura-sebut-empat-perusahaan-indonesia-pemicu - APP is the pulp and paper subsidiary of the Sinar Mas Group, and is one of the largest pulp and paper corporates in the world. The Sinar Mas Group was established in 1962 by Eka Tjipta Widjaja. It is an Indonesian conglomerate with activities in the pulp and paper, food, palm oil, and finance sectors. APP's first paper mill, Tjiwi Kimia, started production in 1978. This was followed by the 1986 acquisition of the pulp and paper producer Indah Kiat. The APP Group produces more than 19 million tons of pulp and paper annually, and operates in China and Indonesia .

[97] https://www.businesstimes.com.sg/government-economy/malaysia-prefers-to-use-diplomacy-to-fight-haze-causing-fires

[98] Transboundary Pollution Act 2014 (No. of 2014) states that Criminal Liability for haze pollution in Singapore : (1) An entity shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding $300,000, if (a) the entity (i) engages in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; or (ii) authorises or condones (whether in or outside Singapore) any conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; and Civil Liability for haze pollution in Singapore (1) It shall be a duty of an entity to ensure that (a) it does not engage in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; and (b) it does not authorise or condone (whether in or outside Singapore) any conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore.Where any entity engages in conduct that is in breach of any duty (..... ) other incidents applicable to actions for breach of statutory duty, that is actionable conduct at the suit of any person in Singapore who, in consequence of that breach ; (a) sustains any personal injury, contracts any disease, sustains any mental or physical incapacity or dies; (b) sustains any physical damage to property; or (c) sustains any economic loss, including a loss of profits. A cause of action for any actionable conduct (.....) shall be actionable in Singapore, whether or not that conduct is also actionable in the foreign jurisdiction where that conduct occurred.

[99] See Apichai Sunchindah, ERIA Discussion Paper Series , " Transboundary Haze Pollution Problem in Southeast Asia: Reframing ASEAN's Response", December 2015, ERIA-DP-2015-82, pp 4-5

Commissioner for Human Rights, Zeid Ra'ad Al Hussein[100] who has urged the Indonesian Government to ensure business activities are not done by violating the rights of the people. He urged the Government and corporates involved in the extraction of natural resources, plantations and large scale fisheries, to comply with the UN Guiding Principles on Business and Human Rights.[101] The UN High Commissioner for Human Rights states that land grabbing, environmental degradation and water source contamination have led to the emergence of hazards to health .[102]

This paper examines the human rights accountability of the Multinational Corporations at the host State and the responsibilities of the home State of MNCs and examines the implementation of the UN Guiding Principle on business human rights in relation to the accountability of human rights of MNCs.

**Multinational Corporations and Human Rights Accountability**

Multinational Corporations (MNCs) are one of the non-state actors that have an important role in the development of the world's economy. Then, the role of MNCs in international capital flows has grown substantially in recent years through Foreign Direct Investment (FDI), generally to developing countries because the latter has been recognized to be an important source of development.[103] Therefore the role of MNCs in the development of global politics can not be avoided. On the one hand the presence of MNCs also creates a dilemma, MNCs can support developing countries in their economic growth through creating jobs, technological transformation and economic income , but the existence of MNCs also have a negative impact on the environment and even increases the number of human rights violations.

For the purposes of this paper, Multinational corporations (MNCs) are corporates that perform economic activities in two or more States which have legal status both in the home state of the MNCs and in a host state which MNCs is running its business which is

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[100] Zeid Ra'ad Al Hussein assumed his functions as United Nations High Commissioner for Human Rights (OHCHR) on 1 September 2014, following the General Assembly's approval on 16 June 2014 of his appointment by the United Nations Secretary-General. Zeid Ra'ad al-Hussein, visited Indonesia from 5 to 7 February 2018. The mission of the Office of the OHCHR is to work for the protection of human rights, empower people to realize their rights, assist those responsible for upholding such rights in ensuring that they are implemented, available at https://www.ohchr.org

[101] The Guiding Principles on Business and Human Rights were developed by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011, available at : https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[102]https://www.cnnindonesia.com/internasional/20180208021554-106-274696/pbb-sebut-industri-ekstraktif-indonesia-sarat-pelanggaran-ham

[103] See M. A. Hussein, 2009

established either by individuals or groups. [104] MNCs are large industrial companies with extensive business networks or branches and subsidiaries which are scattered throughout the countries. [105] The two main characteristics of MNCs are large size and the fact that they have a parent company centrally controlling their worldwide activities. [106]In addition to that, a corporation is a company, identified as such by the law, and owning municipal legal personality. Hence a MNC , then, is one that operates in multiple jurisdictions.[107] The State in which the corporation is incorporated is its "home State", and the nation in which it conducts its activities is the "host State" or "territorial State". However, determining the nationality of a corporate is quite difficult. In some cases , nationality is determined by reference to the home state or place of incorporation. But nationality can also be determined by reference to the principal place of business or the seat, or to the nationality of the controlling interest .[108]

On the other hands, International law and international human rights law standards may be incorporated into national law that regulates individual and corporate activity in many conditions for example is international instrument is directly integrated into national law or when a State signs or ratifies an international covenant and then adopts it into national law to give national impact to the obligations that arise because of signing or ratifying that covenant.[109] Hence a national law would establish new penalties or offences for individuals or corporations that engage in conduct in contravention of relevant UN covenants with strict liability for corporations.

In addition to that, the international actors that have responsibility under International law are those that have extra territorial capacity, which are; (1) Multinational Corporations;

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[104] See United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003

[105] See H. Lalnunmawia, 2010.

[106] Most MNCs' parent companies are to be found in almost all the industrialised countries, such as the United States of America,Canada, France, the United Kingdom, and Germany, among several others, Ibid.

[107] See B Kogut "Multinational Corporations" in Neil J Smelser and Paul B Baltes (eds) International Encyclopedia of the Social & Behavioural Sciences (Pergamon, Oxford, 2001) 10197 for an in depth discussion of the definition and history of multinational corporations.

[108] See Peter Muchlinski, " Corporations in International Law" in Max Planck Encyclopedia of Public International Law Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press 1, 2012 . The application of the nationality test has been rejected by the ICJ so far as international law is concerned. This situation has arisen in the two cases of the ICJ dealing with the admissibility of shareholder claims brought by their national State, namely, the Barcelona Traction Case (1970) and the Diallo Case (2007), available at; www.mpepil.com

[109] See Amrei Müller, " Relationship between national and international law " ,Public International Law, University of Oslo, 2013, available at ; https://www.uio.no/studier/emner/jus/jus/JUS5540/h13/undervisningsmateriale/nat-int-law_14oct2013.pdf

and (2). Other business enterprises[110]; also comprises of several business entities, which are companies in transnational corporations, contractors, sub-contractors, suppliers, licensors or distributors, corporations, partnerships, or other legal companies operating in the international as well as at national level including their officers, managers, members of corporate boards or directors and other executives and persons working for them.[111]

Recent development in numbers international forum is the increasing participation of corporations and many non-state actors. They have contributed in the making of international law including the making of international trade and investment law through investor state adjudication. [112]

**The Legal Basis of Human Rights Accountability in Indonesia**

According to the Indonesian law, corporation is a legal subject, in other words corporation is an artificial person form of a human being who can have legal rights and obligations. However the difference is that corporations can not be imprisoned or criminalized . Hence the judge may impose a penalty on the corporation or the management of the corporation either alternatively or cumulatively. Therefore the principal punishment that can be imposed on the corporation is a fine . Whereas the additional criminal sanction imposed on the corporation shall be in accordance with other laws and regulations.[113]

In addition to that the Indonesian Criminal Code does not recognize corporate criminal liability. In the draft version of the Criminal Code 2015,[114] there has been a regulation of corporate criminal liability in which the board of corporation and or corporation may be held liable when conducting criminal offenses. However, the draft of Criminal Code does not provide the scope of corporate responsibility for human rights deliberations, so that when corporations commit human rights violations, the mechanisms of human rights accountability can not be imposed on the corporation.

Then, multinational corporations conducting their activities within the territory of Indonesia must be referring to Law No. 25 Year 2007 on Capital Investment. The law provides the legal basis for MNCs , stipulates that "companies in foreign investment are required in the form of *limited liability corporate* under Indonesian law and domiciled within

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[110] Other business enterprises are all business enterprises that have transnational characters in their operational activities, and do not apply to local businesses. See United Nations, General Assembly, Human Rights Council, Twenty-sixth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Resolution adopted by the Human Rights Council, 26/9 Elaboration of an international legally binding instrument, A / HRC / RES / 26/9, 14 July 2014

[111] See José"E."Alvarez, " Are Corporations "Subjects" of International Law?, in 2010, p, 8 available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_069097.pdf

[112] Ibid , p. 9

[113] Supreme Court Regulation No. 13 of 2016 on Criminal Procedures, hence for criminal cases committed by corporations is an additional principle of punishment and or criminal penalty.

[114] http://dpr.go.id/dokakd/dokumen/K3-26-2ea83388ece0ae0d13b3977bebb049c1.pdf

the territory of the Republic of Indonesia, unless otherwise provided by law". Furthermore, the Law states that "In an investment, a corporate must be based on the principles of: a) legal certainty, openness, accountability, equal treatment and no distinction of national origin, fair efficiency, sustainable environmental concerns, i) independence, and j) balance of progress and national economic unity.

Furthermore, Law No. 40 of 2007 concerning Limited Liability Companies has explained that any Multinational Corporations which will conduct its business activities in Indonesia shall refer to the provisions of Article 5 point (1) which reads: "the corporate has the name and place of domicile within the territory of the Republic of Indonesia as determined in the articles of association". Then multinational corporations engaged in forestry industries and plantation have a social and environmental responsibility in the area of their business or concession area, including if the business is conducted in a local community furthermore the corporate should take more responsibility to the most marginalized community or indigenous peoples. The responsibilities of this corporate are, among others, as stipulated in Article 74 of Law No. 40 of 2007 regarding a Limited Company which states: (1) The corporate carries out its business activities in the field or related to natural resources shall carry out the Social and Environmental Responsibility; (2) Hence, social and environmental responsibility shall be the obligations of the corporate which should be allocated the budget and calculated as the corporate' s expenses which its performance shall be carried out with due consideration of " proper" and " fairness " . (3) A corporate that does not perform its obligations will be sanctioned in accordance with the provisions of laws and regulations.

Then, the national regulation on environmental protection in Law No.32 of 2009 has anticipated every form of activities either individual or corporate that conduct their activities directly or indirectly related to the problem of environmental pollution. Article 1 point (14) explains that environmental pollution is environmental damage due to human activities and other ways that exceeded the established environmental quality standards. In Law no. 32 of 2007, article 76 states that sanctions are administrative in nature relating to violations of environmental permits. Hence administrative sanctions consist of: a. written warning; b. government coercion; c. freezing of environmental permits; or d. revocation of environmental permits.

From the explanation of some policies and regulations above therefore the national regulations still lack to sanction corporations on the impact of burning the forest and peatland that could cause environmental pollution and harm the local communities, including indigenous peoples who are living in the forests and peatlands areas. Next , national law is needed to be strengthened in order to empower the oversight function of government to monitor forest and forestry management in the region, including to empower the role of local governments to endorse the laws and ensure the safety of local communities including indigenous peoples. Moreover, civil society organizations and the corporate 's supervisory commission needs to provide the data on the adverse impacts of the corporate's activities to the local community and to provide sustainable empowerment activities for community directly affected by forestry business activities and are entitled to:

a. obtain appropriate compensation for any damages in the operation of forestry activities;

b. file a lawsuit in the court against the damages resulting from the corporate violating

the terms and agreement;

C. Under the supervision and guidance of the government due to the impacts of forest and peatland fires of indigenous peoples, therefore it is necessary to develop new instruments to protect the rights of indigenous peoples in their land, among others by requiring MNCs which already operated and based on concession licenses from the central government should rehabilitate on the environmental damaged and to pay health compensation for local community.

**UN Guiding Principle on Business and Human Rights**

The United Nations Human Rights Council (UN HRC) in June 2011 endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) [115]. The UNGPs was developed by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (SRSG). [116] Hence the UN Guiding Principles were designed to operationalise the UN 'Protect, Respect and Remedy' Framework.[117] Then, the endorsement by the UN human rights body, along with other stakeholders extensively consulted during the drafting process, made UNGPs the first globally accepted standard on the responsibilities of states and businesses for preventing and addressing business-related human rights abuse. The UNGPs became the authoritative point of reference that had been previously missing in the polarised discussion on the best way forward to guarantee that business activities do not cause or contribute to human rights violations. Hence SRSG pointed out, the UNGPs endorsement marked 'the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built'. [118]

Some States have adopted a range of approaches with the application of national measures with extraterritorial implications. For example include requirements on "parent" corporates to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD) ;[119] and performance standards required

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[115] UN Human Rights Council, 2011a and 2011b

[116] The mandate of the SRSG on Human Rights and Business was created following the UN Commission on Human Rights resolution 2005/69 on Human rights and transnational corporations and other business enterprises (OHCHR, 2005).

[117] The 'Protect, Respect and Remedy' Framework developed by the SRSG on Human Rights and Business was endorsed by UN member states in the UN Human Rights Council Resolution on the Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (UN Human Rights Council, 2008) 3 See for example Kinley & Chamber, 2006 for insight into the heated discussions concerning the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (United Nations Economic and Social Council, 2003) approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in its resolution 2003/16 of 13 August 2003 (UN Sub-Commission on the Promotion and Protection of Human Rights, 2003) but was refused endorsement by the then Commission on Human Rights.

[118] Ibid

[119] OECD Guidelines for Multinational Enterprises, 2011 edition , available at http://www.oecd.org/daf/inv/mne/48004323.pdf

by institutions that support overseas investments. Other States have approaches amounting to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Furthermore various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

According to the report from Business and Human Rights Resource Centre (BHRC), in 2011 states that 73% of governments refer to the UN Guiding Principle as international standards in their responses, sometimes they particularly citing on how their actions relate to State duty to protect human rights , as stipulated by Guiding Principles , however, at least 18% of respondents of government particularly stated that they have not taken action on business and human rights since since the UN Guiding Principles adopted. It is said by the report that 60 percent of governments do not communicate anywhere else on their actions on business and human rights.[120]

In Indonesia's case, the implementation of the UNGPs' in the broader sense have been led by the National Human Rights Institutions ( Komnas HAM) and Indonesia also the first country in Southeast Asia to launch the NAP (National Plan of Action) Business and Human Rights . This NAP on Business and Human Rights was regulated under Komnas HAM Regulation No. 1 Year 2017 on Ratification of the National Plan of Action on Business and Human Rights, State News No. 856. [121]This is not surprising as Indonesia and other southeast Asia NHRIs were already engaging actively in this topic at the stage of the UNGPs' development and were undertaking numerous efforts as follow-up to the UNGPs' endorsement.

In addition to that, the following table will explain factors impeding Indonesia government's ability to take action on Business and Human Rights, according to the responses provided in the individual states' responses to the Business & Human Rights Resource Centre questionnaire administered in 2015. [122]

| No | Factors | Categories |
|---|---|---|
| 1. | Lack of understanding or awareness of business and human rights in governance | The most significant factor |
| 2. | Challenges of coordinating across government departments | Significant factor |

[120] Action on Business and Human Rights; Where are we know, key finding from our action platform, Business and Human Rights Resource Centre p.5, available at https://www.business-humanrights.org/sites/default/files/Action_Platform_Final.pdf

[121] http://elsam.or.id/2017/06/komnas-ham-lauches-national-action-plan-on-business-and-human-rights/

[122] See Business & Human Rights Resource Centre, Government Action Platform, Individual country responses to the BHHRC survey 2015 , all responses are available at https://businesshumanrights.org/en/government-action-platform,

| | | |
|---|---|---|
| 3. | Lack of resources for enforcement, monitoring and prosecution | The Most Significant factor |
| 4. | Opposition by economic interest groups or business associations | Significant factor |
| 5. | Opposition or lack of consensus within government | Significant factor |
| 6. | Other opposition by influential people or group outside government | The most significant |
| 7. | Political limitations imposed by foreign governments or multilateral institutions | Significant factor |
| 8. | Lack of capacity and capability of government | Significant factor |

In addition, the UN Guideline mentioned that the corporation as a business entity, is positioned as the subject who has responsibility for the process and the impact of its business activities in the community. These principles are supported by a number of corporates , including civil society organizations, trade unions, and other stakeholder groups.According to UN Guiding Principles on Human Rights that business enterprises including MNCs have the responsibility to respect human rights requires ;
Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. [123]

Moreover, the responsibility of MNCs applies to respect human rights regardless of MNCs size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which MNCs meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts [124]

In order to meet their responsibility to respect human rights, hence MNCs should have in place policies and processes appropriate to their size and circumstances, including ; a ) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their

[123] Implementation of the UN Guiding Principles on Business and Human Rights , Directorate General for External Policies, Policy Department, European Parliament 2017 p. 14

[124] Implementation of the UN Guiding Principles on Business and Human Rights , Directorate General for External Policies, Policy Department, European Parliament 2017, p 15

impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[125]

**Summary and Recommendations**

Human rights law was developed to universally protect the individual and also its dignity . However the recent policy and legislation are not sufficient to protect individuals from new international non-State actors, particularly multinational corporations. There is a need to provide and enforce human rights mechanisms and to regulate human rights accountability for MNCs from mere norms such as the UN Guiding Principle on Business and Human Rights to become a norm of binding legal force.

Hence the National Action Plan (NAP) for Business and Human Rights which regulates a legal obligation for ministries, government institution, local governments in accordance with the scope of their authority needs to be further regulated through the Presidential decree , given the great dimensions and dynamics of business and human rights linkages that need to be legislated in a separate regulation as well as to regulate further norms of human rights law in order to have more operational power .

Moreover, a State's territorial responsibility has proven to be insufficient for human rights protection since new forms of globalized political, economic and financial and relation have emerged. Hence the entire international community has an obligation to ensure that human rights are protected, and must ensure that the States directly or indirectly involved in violations are made accountable. In the case of MNCs' wrongful behaviour for example on transboundary haze pollution and impact to the health of inhabitants in the city and local community therefore it should be linkaged a concurrent responsibility between the home and host States, depending on the situations. International law has already accepted regulatory frameworks for some types of corporate misconduct, such as the ones punishing and preventing environmental harm and corruption .

The government shall encourage MNCs to create proper remedies, compensation and enforcement mechanisms. To conclude in the process of achieving a comprehensive and complete international law for the protection of human rights equally, each social actor must work together in the promotion of corporate accountability and incorporation international human rights law in national legal systems. States should guarantee protection to rights holders who have been violated by MNCs.

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[125] Implementation of the UN Guiding Principles on Business and Human Rights , Directorate General for External Policies, Policy Department, European Parliament 2017, pp 15-16

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# Analysing National Voluntary Guidelines with particular focus on human rights commitments of Top 100 listed companies in India based on disclosures in public

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## Abstract

Using Rights-based language does not make an instrument rights-based, even if the instrument emanates from the State. National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVGs) is a government-facilitated guideline for business, which even has one principle exclusively on Human Rights. That the instrument emerged almost along with UN Guiding Principles on Business and Human Rights (UNGP) indicates that the State of India was willing to use Human Rights language in redefining the relationship among business, State and community in terms of human rights. However, seven years hence, there has not been much progress in this domain, other than mandatory submission of Business Responsibility Reports by top 100 companies. The sections below analyses effectiveness of the voluntary guidelines based approach, while also providing insights on how the top 100 companies in India fare in terms of their commitments to human rights in their own policies and mechanisms.

### *Background: From Philanthropy to Human Rights*

In Indian context, post liberalisation in the 1990s, there has been an exponential expansion of the private sector and inroads by multinationals, including a scenario where a large number of welfare roles have been privatised. Markets are taking lead in the domain of delivery of social good. This has its pros and cons, as in the market led approach there is a lack of moderation in delivering social good agenda. With increased role of business in society in parallel to governments and other societal actors, and with greater awareness of the links between business and human rights, there is a critical need to de-mystify the concept of Corporate Social Responsibility (CSR).

CSR as a practice is not new to the Indian context. Some of the family-based businesses such as Tata, Birla and Godrej had traditionally been engaged in developmental activities among the communities and were largely confined to the domain of Corporate Philanthropy. On the other hand, Public Sector Undertakings (PSUs) had also been undertaking CSR activities as part of the Department of Public Enterprises Guidelines. The Indian narrative around CSR has remained focussed on two kinds of approaches – one wherein the company responds to issues beyond their core business and focuses on national development while the other has been focussed on a rights-based approach within the core business domain.

The unveiling of National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVGs) by the Ministry of Corporate Affairs (MCA) in 2011 is a watershed moment in defining the role of businesses in India, recognising the fact that a purely philanthropic approach to business responsibility will be no more than a partial

solution. On a positive note, MCA has sharpened its focus on encouraging businesses to play a proactive role in ensuring sustainable and inclusive growth. The NVGs define the responsibilities of businesses and in a way provide a strong background for defining CSR in India, settling the contestation as referred to in the above paragraph. The NVGs include nine principles ranging from ethics and transparency to customer value, broadly defining CSR, bringing in exclusive focus on Human Rights as stated in principle five (Ministry of Corporate Affairs, 2011).

Subsequent to this there was a silver lining in the form of introduction of Business Responsibility Reports (BRRs) by one of the primary market regulators in India – Security and Exchange Board of India (SEBI). SEBI through its circular in 2012 made it mandatory for top 100 listed companies as per the market capitalisation to report mandatorily as per the BRRs format in their annual reports, setting a ground for mandatory disclosures by businesses on non-financial aspects in India (Securities and Exchange Board of India, 2012). SEBI though mandated these disclosures, did not establish any systems for monitoring and assessing the same. Corporate Responsibility Watch (CRW), a consortium of around 14 Civil Society Organisations took an initiative and started analysing the disclosure levels of the BRRs. Moving forward, from 2015 onwards, CRW launched[126] an India Responsible Business Index (IRBI) as a mechanism to use BRR disclosures and NVG principles to rate the top 100 businesses in India. So far three rounds of scores have been unveiled by CRW through IRBI (Corporate Responsibility Watch, Oxfam India, Praxis, 2015).

Against this background, in 2013, the Companies Act was enacted and this mandated businesses within a certain financial category to spend 2 percent of their profits on community development activities. Unfortunately this shifted the entire focus from NVGs to CSR, which also meant a shift from the concerns related to the core business functions and responsibilities. Discussions around expenditures done on social welfare activities to a large extent sidelined the core business agenda as envisaged in NVGs. At the same time a large number of corporate foundations have come up to carry out the CSR activities as mandated in the act (Mukherjee, Paduwal, Mehta, 2015).

In a positive move recently, MCA has shared the revised draft version of the NVGs called National Guidelines (NG). The word voluntary has been removed. Government has sought views of general public on NGs and has announced its intent to launch the revised guidelines (Ministry of Corporate Affairs, 2018). This can also be seen as a precursor to the development of National Action Plan (NAP) on Business and Human Rights (B&HR) in India; even Government has shown positive signals towards this move. Globally, the UN Working Group strongly encourages all states to develop, enact and update a NAP on B&HR as part of the state responsibility to disseminate and implement the Guiding Principles on Business and Human Rights. The NAPs are expected to articulate priorities and actions to be taken by the states to support the implementation of national, regional and international commitments and obligations related to businesses and human rights.

*National Voluntary Guidelines and BHR Agenda*

[126]In partnership with Praxis, Partners in Change, Oxfam India and Change Alliance

The debate about the roles and responsibilities of business enterprises with regard to human rights became prominent in 2011 with endorsement of UNGPs. In the Indian context, parallels can be drawn with NVGs. In particular, there is an evident overlap vis-à-vis principle five of the NVGs and the objectives of the UNGPs. The pillar two of the UNGPs expects the businesses to respect human rights and carry out due diligence to check any kind of infringement and address adverse impacts on human rights. On other hand, principle five of the NVGs expects businesses to respect as well as promote human rights in their sphere of influence including third party relations. In the Indian scenario it is pertinent to understand the role played by NVGs and the extent to which they have been integrated into business policies and commitments.

IRBI is an effective tool to understand the integration of human rights into core business aspects particularly in terms of policy commitments. The index provides company level analysis of policy commitments to Human rights, based on the NVG principles in the domains of (a) workers, (b) supply chain, (c) affected communities and (d) CSR beneficiary communities. The IRBI 2017 is based on self-reported and publicly available disclosures of the top 100 Bombay Stock Exchange (BSE)-listed firms by market cap as on 31 March 2016. As part of the analysis, data from annual, business responsibility and corporate social responsibility reports, and any other company policies, published until 30 November 2017, was used to answer 116 questions. The businesses were graded on five elements: Non-discrimination at the workplace, respecting employee dignity and human rights, community development, inclusive supply chain and community as business stakeholders. Some of the key data insights at element level from the IRBI have been explained further (Corporate Responsibility Watch, Oxfam India, Praxis, 2018).

The element on Community Development (Corporate Responsibility Watch, Oxfam India, Praxis, 2018:28-31) focused on commitments in terms of defining focus areas of intervention, processes incorporated for the implementation and identification of marginalized identities as beneficiaries. On a positive note, out of the top 100 companies 86 had identified vulnerable identities as target groups for their CSR interventions in their policies. However, only 18 companies identified backward regions as their focus area. Around 80 companies disclosed the number of beneficiaries who had been part of their CSR programmes. As a matter of concern, only 27 companies had mentioned about conducting independent impact assessment of the CSR programmes while this number was dismally low for carrying out needs assessment as only 16 companies mentioned about the same. None of the companies mentioned about carrying out stakeholder consultations while formulating their CSR policy. This element had an overall average score of 0.60 and 86 companies were above the halfway mark among the cohort companies.

The element on Non-Discrimination at the Workplace (*Ibid*., 2018:14-17) included commitment to non-discrimination in recruitment and career advancement, systems to ensure diversity and measure the same. Out of the top 100 companies 75 recognised extending equal opportunity in recruitment. In Indian context, caste and tribe identities are critical and play a vital role in defining social identities and related access to opportunities. Over the last three years it was observed that businesses in India have taken nascent steps with 48 companies

recognising caste while 18 companies recognised tribal identity as important for creating ground for non-discrimination during recruitment. On the other hand, 56 companies recognised People with Disabilities (PWD) while 61 companies recognised women as identities to be proactively included in the workforce at recruitment stage. Only 53 and 32 companies recognised religious minorities and sexual minorities respectively as identities that need to be proactively included during recruitment. In spite of mandated provision for creating Anti-Sexual Harassment policy, four companies among the top 100 had not disclosed any commitment towards the same. A mere 27 companies recognised the need for diversity in board composition in their policies of which only 7 actually disclosed steps and mechanisms to ensure diversity in the Board. This element had an overall average score of 0.51 and 53 companies were above the 0.50 score.

Elements related to Employees' Dignity and Human Rights (*Ibid*., 2018:20-25) encompassed aspects such as fair wages, freedom of association, condition of labour, extension of benefits to contractual labour and systems to measure workers' rights. Out of the top 100 listed companies, 68 companies recognised freedom of association as one of the principles and merely 16 companies disclosed systems and mechanisms to implement the same as part of their policy commitments. None of the companies mentioned about extending these principles to contractual labour. Fair living wages as a concept still seemed elusive to Indian businesses, as a small number of 6 companies committed to this principle. Contractual labour was the worst off among the labour force as again mere 6 companies recognised extending social benefits like medical benefits and provident funds to contractual employees. On a positive note 91 companies committed to ensuring health and safety but again they fell short of promises as only 59 of them disclosed systems to assess the same. Only 51 companies provided details on providing safety training to contractual labour. It was unfortunate to note that in spite of global focus on due-diligence processes only 9 companies disclosed assessments being done about the situation of workers' rights and labour. This element had an overall average score of 0.42 and had 36 companies crossing the halfway mark.

The element related to inclusiveness in the supply chain (*Ibid*., 2018:34-38) consisted of integration of sustainable practices in the supply chain, extending employment policy and systems for assessing workers' situation in the supply chain. One of the key aspects in understanding inclusiveness is to understand how much local resources are being integrated into the supply chain. The analysis of company policies showed that 57 companies recognised priority to local suppliers in procurement. Out of top 100 companies, 65 recognised extension of policy on elimination of child labour to supply chain. Only 49 companies extended their human rights policies to the supply chain while 24 companies extended their employment policy to the supply chain. The situation of labour in the supply chain was not found to be a priority area among the top 100 companies as only 4 companies mentioned about assessing workers' rights situation in their supply chain while 6 companies assessed capacity needs of local suppliers, vendors and producers. This element had an overall average score of 0.33 and only 18 companies crossing the halfway mark among cohort companies.

The last element, which was also the worst performer among all the elements, was Community as Business Stakeholders (*Ibid*., 2018:40-44). This element mentioned aspects

such as assessment of local issues, Free Prior Informed Consent (FPIC), assessment of impacts of business activities on communities and extension of similar or better living conditions for the Project Affected People (PAPs). Out of the top 100 companies, only 54 companies recognised the need for impact assessments of business activities on the environment as well as the communities. Only 3 companies recognised the principle of FPIC, but none reported having a system to enforce it. Only 4 companies recognised their responsibility for provision of similar or better living conditions and services and access to PAPs, with only 1 having a system in place to enforce it. On a positive note, 70 companies recognised judicious use of local resources of which 44 companies provided systems for ensuring the same. Only a small number of 13 companies recognised respecting local culture and systems while engaging with communities during the course of business and only 4 companies recognised investing in local heritage and culture. Only 6 companies in their policies recognised Public hearing and communication of project impacts with communities. The overall average score for this element was 0.07 and none of the companies from the cohort scored above the halfway mark.

The comparison of scores across elements clearly shows that as of now businesses in India have low commitments vis-à-vis policies related to Human Rights among labour force, supply chain and project affected communities. In the domain of CSR, there is an apparent high commitment as depicted by the higher scores and disclosures related to the element of community development. Communities affected by the business activities remained out of focus with elements concerning them performing the worst among all the elements. The reasons for better disclosures and commitment vis-à-vis CSR and employees is also rooted in the mandatory legislations related to the same while other aspects are still largely dependent on the proactive role played by the companies out of their own will. This in a way builds the case for having mandatory provisions in place, instead of leaving the inclusion agenda to businesses' own understanding of good and bad. (*Ibid*., 2018:45-48)

*Disclosures, Violations and the role of State*

There is a need to place commitments and disclosures made in public domain vis-à-vis the actions of the businesses. As already seen, disclosures and commitments in relation to Human rights principles do not seem to be very encouraging. As a first step we need to analyse NVGs from the rights-based framework to understand to what extent it can be effective in integrating the Human rights agenda in business commitments and action. NVGs in terms of language are rights based but this does not translate into its framework. There is an attempt to use "language" which makes it rights based. The NVG per se does not create any "entitlements" for the communities and just provides a framework. However, it was the introduction of BRRs as a mandatory reporting provision for top 100 companies which later got extended to top 500 listed companies that makes the disclosures a statutory requirement and in a way creates an "entitlement" for providing information across 9 principles of the NVGs including Ethics Transparency and Accountability, Product Life Cycle Sustainability, Employees' Well being, Stakeholder Engagement, Human Rights, Environmental Responsibility, Public Advocacy, Inclusive Growth and Customer Value. It further needs to be noted that BRRs do not cover NVGs in totality and only mandate disclosures on some particular aspects of NVGs.

Any engagement with corporates to create effective policies on human rights may not always lead to creation of provisions for "entitlements" for communities. In this instance we can quote the case of Nestle. In 2015, After 18 months of testing, re-testing and validating, the Food Safety and Standards Authority of India (FSSAI), on June 5, 2015, indicated three major violations – (a) Presence of lead detected in the product in excess of the maximum permissible level of 2.5 ppm; (b) Misleading labeling information on the package reading "No added MSG"; and (c) Release of non-standardised food products in the market without risk assessment. A quick analysis based on NVG principles shows that Nestle has violated not one or two but five of the nine principles of the NVGs. But NVGs do not have any enforcement clause. Nestlé's defense was more from technical ground; blaming of the testing protocol. It said that the product contains two parts. It had to be tested in the way it is consumed, i.e., after boiling the mixture of the noodles and tastemaker in water. Nestle said that the Government laboratory had tested the two components separately. The second response was that the "No added MSG" label reflects that the company had not added MSG; and that they followed this practice as the industry in India generally follows this practice. The company though later agreed that they would remove the label from the next lot (Corporate Responsibility Watch, 2015). In this case, Nestle used the laws of the land to protect its irresponsible behavior. This raises the question whether efforts for making progressive policies within businesses have any utilitarian value for the affected communities? From the above case the answer is very much negative. It brings us back to the question of whether the NVGs provide a reasonably comprehensive guideline to ensure that business is run responsibly and that any unethical practices, be it in national or multinational businesses, are brought to account.

In another instance from the pharmaceutical sector, the Uniform Code of Pharmaceutical Marketing Practices (UCPMP) was issued by the Department of Pharmaceuticals in the year 2012; it became effective from 1 January 2015. It was initially proposed to be voluntary, on the condition that the Government would make it a statutory code if not implemented properly by Pharmaceutical Associations and Companies. The code provided for certain provisions that govern the activities of the companies and other related bodies, with regard to product related claims and comparisons, free samples, textual and audio, video promotional materials, medical representatives, gifts and freebies to health care professionals, relationship with health care professionals, complaint redress mechanisms and formation of the Ethics Committee. The code was extended through five circulars until further notice. The Government had taken efforts to make the code effective by imposing certain responsibilities on the eleven associations that represented various manufacturers from the pharmaceutical industry (Partners in Change, 2017).

The lackluster response of the association to these efforts could be assessed from the fact that, though called for, only three associations uploaded the UCPMP on their website. Only two associations disclosed the name of the member companies. One association mentioned about the creation of the Ethical Committee for Pharmaceutical Marketing Practices (ECPMP) while the other ten did not mention anything. Out of the eleven associations, only one association mentioned the procedures of complaint in its Code of Pharmaceutical Practices. None of the associations mentioned anything about the creation of Apex ECPMP on their

website. Lastly, none of the associations mentioned about any complaints received, the nature of the complaints received or the status of the same. This clearly shows that the associations representing certain sectors are also not willing to enforce voluntary guidelines such as UCPMP. In the end, there are discussions going on in the concerned Ministry to enforce the law rather than keeping this as a voluntary system for the pharmaceutical and diagnostic devices industry. The government recently evolved a draft regulation - proposed Order, Essential Commodities (Control of Unethical Practices in Marketing of Drugs) Order, 2017. In its object and reasons, interestingly, the State acknowledges the presence of an 'unholy nexus between certain companies and medical practitioners to create a virtual monopoly at the cost of the general public and patients'. This becomes pertinent when the pharmaceutical and healthcare industry is marred with stories of gross violations (Partners in Change, 2017).

In yet another case, in the year 2015, the CAG released its report, Performance Audit on Assessment of Assessees in the Pharmaceuticals Sector for the year ending 2013-14. They audited 2,868 assessment records pertaining to the Central Board of Direct Taxes assessments of Pharmaceutical companies. The Audit pointed out that there were 246 cases with deficiency in the system or in compliance with the laid down provisions involving total tax effect of Rs.1,348.44 crores. Among them, 36 cases pertain to such instances where the Assessment Officers have not disallowed such expenses, which are in the forms of gifts to doctors. The Audit report states,

> As per explanation to Section 37(1) of the (Income Tax) Act, any expenditure for a purpose which is an offence or which is prohibited by law is not an allowable business expense. MCI vide its regulations, Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, provided that medical practitioners should prescribe generic drugs as far as possible. It inter-alia prohibited them to solicit or receive any commission, gifts etc. for any approval or recommendation, endorsement of any medicine or drug for advertisement purpose or for referring or recommending any patient any medical, surgical or other treatment. Video amendment dated 10 December 2009, Pharmaceutical companies were specifically prohibited to give any consideration in the nature of gifts, travel facilities, hospitality, cash or monetary grants etc. CBDT issued a circular in 2012 and clarified that such expenses would not be allowable. Judicial pronouncement, (Confederation of Indian Pharmaceuticals Industry Vs. CBDT (Himachal Pradesh High Court), also clarified that this circular had retrospective effect.

Incidentally in January 2017, the pharmaceutical companies won the case on grounds that the MCI regulations are not mandatory for pharmaceutical companies (DCIT versus PHL Pharma Ltd.). While the case may go up to the higher courts, it is clear that the companies would not adhere to the spirit of the laws of the land, on a voluntary basis, unless the law is made very specific (Partners in Change, 2017).

These are some of the instances where procedural gaps have been used by businesses to get away with violations. There are instances where companies vehemently violated human rights and used State machinery to suppress dissenting voices. There are at least two major instances of killing of protestors by police when people were standing against the oppression

in the hands of the companies. Two years back protestors were killed while protesting against the land acquisition in Jharkhand. In a recent incident in Thoothukudi, police killed 13 protestors when they were protesting against the plans to expand Vedanta's copper smelter plant capacities and its environmental ill effects (Express Web Desk, 2018; Jayaraman, 2018). What is surprising in both instances is that people are pitted against the State rather than the corporate entity against which they are standing. There are a number of instances related to land acquisition violations by the corporates. State becomes the garb behind which corporates resist the protesting voices. These scenarios pose a different kind of challenge, which cannot be dealt with by the disclosure and transparency framework. These excesses require fixation of accountability against businesses involved in the cases. State needs to act as the protector of justice rather than safeguarding corporate interests.

*Strategies to create accountable relations*

Efforts to create and sustain voluntary guidelines for businesses, of course, have their importance. NVGs clearly built a progressive narrative around Corporate Social Responsibility, and the inclusion of human rights as one of the nine principles did bring 'human rights' formally in the business responsibility discourse as a partner of business. Until then, most of the debates surrounding business and human rights were largely as business versus human rights. The entire narrative of NVGs as progressive is to some extent correct, but its inability to create entitlements for workers in the supply chain and affected communities, renders it toothless. This is a critical area, where the B&HR discourse has to create an effective mechanism. As of now the mechanisms to measure and check for alignment with B&HR related provisions are labeled under the name of "due-diligence", "certification" and "labeling" which are mostly in the control of corporate actors which assumes the need for "informed and empowered consumers". This very assumption is put to tests in the Indian scenario where the consumer movement is not well developed and is under constant threat due to the trade off because of hosting of production processes. The role of the State in ensuring integration of Human rights principles in Businesses is not well articulated, despite the State being the largest customer of the goods and services and calls for the need for responsible public procurement.

When the country is embarking on NAPs, the basic premise should be to strengthen pillar 1 and 3 of the UNGPs as much as pillar 2. Pillar 1 of the UNGP focuses on the State duty to protect Human Rights while pillar 3 is about access to remedy, both judicial and non-judicial (Kaur, 2017). The fear is that in the garb of "ease of doing business", there will be reduced efforts towards creating entitlements for the workers and affected communities. In India, pillar 1 is not really weak, if one looks exclusively in terms of *presence* of policies and legislation. The weakness is in terms of enforcement of these laws and policies. What is worrying now is that pillar 1 is being weakened through dilution of legislations and regulation – all in the name of ease of doing business. There have been repeated attempts to ease labour laws, to exempt businesses even from social impact assessments or public hearing, or repeated dilution of environment regulations. This trend is rarely even contested in public media (Praxis, 2017: 17-23).

It is important that all three pillars are given equal importance. Pushing businesses to have a core role in protecting human rights in their operations cannot be made as an excuse to undermine the State's role. The nexus between State and business needs to be challenged through concentrated efforts towards encouraging critical examination.

The discourse on pillar 2, which centers on business responsibility to respect human rights, needs to be broadened to include promotion as well as protection of human rights. This calls for extending the provisions of Right to Information to the private sector. As already discussed, due diligence processes in many instances are found to be eyewash and act as checklist items. The access to critical information for communities can go a long way in strengthening the constituency of communities and consumers to effectively challenge business actions. But this also cannot function in isolation, need is for regular checks from regulatory authorities on business disclosures and actions against violations with stringent norms. Today, we can see that statutory disclosures are also not being monitored on a regular basis and without effective enforcement the information being delivered is not trustworthy.

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# Learning From Map Tha Phut: A Look At Government Priorities

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## Abstract

Environmental governance is the mechanisms, tools, and policies that steer the relationship between society and the environment. An increasingly important factor is the government-business-community relationship. This paper pulls from a larger research project that examined how environmental governance changed since 2009 in Map Tha Phut, Thailand (MTP). The residents of MTP successfully brought the National Economic Board to court for violating their rights under the 2007 Thai Constitution. This was the first successful lawsuit of its kind in Thailand. Despite early successes, the communities continue to express human and environmental concerns. The study identified three stakeholder groups - government, businesses, and NGOs/CSOs/community leaders. This paper briefly discusses policy shifts created by the first stakeholder group that suggest UNGP on Business and Human Rights (UNGP BHR) may have influenced policy. The paper then discusses the later two stakeholder groups and identifies major themes in the research: trust, CSR implementation, transparency and Section 44. This paper argues policy creation is not an environmental governance failure in MTP and that there is evidence of UNGP BHR's influence through NESDB policy and the AEC. Issues with enforcement, lack of public participation, and failure to properly engage the communities suggest a lack of genuine desire to fully incorporate human rights perspectives in favor of other government priorities in the region.

**Keywords:** Business and Human Rights, environmental governance, Map Tha Phut, Thailand, CSR, NESDB

## Introduction

For decades, human rights and environmental concerns have been an instrument used in regional dialogue. These two seemingly separate fields form a nexus through which development should and indeed have been examined. Human and environmental exploitation, poverty, vulnerability, climate change impacts, etc. are influenced by the ecology-human society interactions. Development at large scales, such as the Dawei Special Economic Zone in Myanmar and Map Tha Phut's (MTP) industrial estate in Thailand, changes not only the economic linkages in the region; it has the potential to negatively transform society and the environment as a whole.

In 1997, a high profile human-health scare in Rayong marked a significant turning point in the focus of Thai environmental literature. Then a seminal 2009 court case[127] brought national focus to environmental, social, and economic policies in the region and reshaped the environmental governance landscape of the nation. Much of the academic literature thus

[127] See: The Supreme Administrative Court Order No. 592/2552 Anti-Global [Stop Global] Warming Association vs. National Environment Board.

turned its attention to the environmental and social challenges in and around MTP. While numerous human-health and environmental-health studies have occurred, little has been researched in terms of understanding effectiveness of changed policies, or how the different stakeholder groups identify with environmental governance shifts or lack thereof.

This study used a political ecology framework through which to investigate relationships between stakeholders. Political ecology is defined as, in short, a process of thinking or contextualizing of the environment as being inherently political - in other words, the environment is inseparable from socio-economic and socio-political spheres (Iossifova, Doll and Gasparatos, 2017; Robbins, 2011). Environmental governance is defined broadly as mechanisms and policies that influence decision making on environmental issues. As such, it is how to steer the relationship between society and the environment (Evans, 2012). Environmental governance then should place an emphasis on a participatory approach towards the decision-making process that is multilevel, multi-sector and multi-actor based (Gibbs and Lintz, 2016; Ioppolo et. al, 2016). By framing environmental governance in this way, especially in an urban context, the decision to exclude community participation has the potential for huge negative social impacts and highlights the importance of a business and human rights dialogue.

The broad nature of human rights, its challenges, and the many forms the debate takes is beyond the scope of this paper. Instead, this pulls from a larger research project that explored environmental governance changes following the court case. This paper briefly describes the history, socio-environmental, economic and industrial development direction of MTP. It delves more deeply into the policies surrounding industrial development and briefly examines the links between the UN Guiding Principles on Business and Human Rights (UNGP BHR) and Thailand's policy direction, especially through the National Economic and Environment Development Board (NESDB) via ASEAN's influence. The literature suggests environmental governance policies have been in place well before the UN Human Rights Council endorsed the UNGP BHR in 2011. The study identifies five major themes that emerged from the interview data and concludes that environmental governance, specifically policy creation, have in fact changed significantly since 2009 but that the UNGP BHR is not likely the main driver. The continued grievances into the present day, therefore, stem from other causes that are explored more deeply in this paper.

**Background**

The complex history in Map Tha Phut has led to major shifts in social, environmental, and policy focus over the past two decades. Thailand established MTP in 1962 as a small sanitation district and then to a town in 2001. The city is home to one of the world's largest industrial estates and rests along the eastern seaboard in Rayong Province. Within this province alone there are 16 industrial estates and over 350 factories which include: Hemaraj Eastern Seaboard 2, 3, and 4, Amata City, Map Tha Phut Industrial Estate (I-EA-T, 2017).

In 1997, nearly 40 students and teachers in a school in Rayong reported respiratory problems, nausea, and vomiting with some being hospitalized from toxic fumes; the school was later shut down due to air quality concerns (Vajirakachorn and Phoochinda, 2014). In 2012 a petrochemical complex exploded killing 12 people, injuring over 100 others and led to the evacuation of ten communities (Fredrickson, 2012). That same year Wangcharoenrung (2015: 8) stated the Pollution Control Department found contaminated community

groundwater and soil nearby a waste collection site. Then in 2013, the Petroleum Authority of Thailand Global Chemical (PTTGC) reported 50,000L of oil spilled off of the coast of Rayong Province (Hume and Kocha, 2013). Despite these environmental and health issues MTP is experiencing industrial expansion and transitioned from the eastern seaboard project (ESB) to its inclusion as part of the eastern economic corridor (EEC) (NESDB, 2016).

The majority of the existing literature focuses primarily on environmental degradation or human health impacts in and around MTP. Abnormally high levels of $NO_x$ and $SO_2$ were reported from the petrochemical industry (Chusai et al., 2012). Other studies suggested air pollutants lead to MTP's irregularly high levels of genetic damage, which may include high numbers of cancer rates due to carcinogens[128] (Hurights, 2012; Buakamsri et al., 2005; Pangsapa, 2014). While a 2016 study suggests children living near industrial zones are at higher risk of developing respiratory symptoms (Asa, and Jinsart, 2016). Others contested these findings and suggested little correlation between air pollution levels and the reported health problems as well as no relationship between chronic respiratory symptoms and residential proximity (Tanyanont and Vichit-Vadakan, 2012). According to Teerapattarada, Vathanapanich, and Jinsart (2016) short term simulations suggested low levels of VOCs were actually present in the surrounding industrial area and Thawonkaew, et al. (2016) suggested the assimilative capacity of $SO_2$ and $NO_x$ did not exceed those set out by Thailand's present regulatory standards. Conflicting scientific evidence on human health impacts and its connection to the petrochemical industry created scepticism among communities on research conducted in the region.

**Social and environmental context**

One of the longest on-going challenges in Map Tha Phut has its roots in the 1997 school closure. In the years that followed the Thai National Human Rights Commission received a number of similar complaints from the region. By 2009 community representatives and the Eastern People's Network filed a lawsuit against the National Environment Board (NEB) for failure to comply with the 2007 Constitution (Order No. 592/2552, 2009). There were two distinct court cases brought against them. The first was a petition to designate Map Tha Phut as a pollution control zone and the second was to challenge 76 projects that did not comply with the constitution (EARTH-Thailand, personal communication, 2017). The latter case specifically addressed requirements for environmental impact assessments (EIA) and community involvement in each project. The Central Administrative Court ruled in favour of the communities and suspended the projects, of which 74 resumed operations by mid-2010 (Economic Intelligence Center, 2009; NHRCT, 2015). The remaining projects were designated hazardous to human health but later allowed to continue following a new EHIA and shifting production to other countries (Bantillo, 2013; Wiriyapong, 2011; Viboonchart, 2010).

So, why were some projects allowed to continue? Eleven projects were granted permission because they were designated eco-friendly with no human-health impacts

[128] At the time twenty-one facilities use carcinogenic substances in their production process and other toxic substances were found to impact the respiratory system (34 projects), neurological system (24 projects), reproductive system (10 projects), fetus development(4 projects), blood system (8 projects), liver and renal (25 projects) and skin and eyes (33 projects): see Hurights, 2012.

(Clifford, 2010). Partially constructed sites that posed a risk to the communities and neighbouring facilities if left unmanaged were permitted to continue as were those granted permits before the 2007 Constitution (ibid). The ruling also established an independent panel for an environmental review that recommended 18 development project types labelled as hazardous to human health, later reduced to 11 types (Pangsapa, 2014).

The court case itself and the requirements following the case should have been an indicator of successful environmental governance. However the eventual approval of all projects, despite community resistance and unclear explanations for why only 11 development project types are considered hazardous suggest conflicting government priorities.

**Economic context**

Insecurities from past geopolitical and economic pressures as well as domestic policies pushed a need for Thailand to secure MTP as an economic hub. Regional economic depressions and greater networking within ASEAN moved this need forward. The decision to establish the ESB goes as far back as the 1970s with the discovery of natural gas in the Gulf of Thailand which led to 112.7million USD World Bank loan (LePoer, 1989).

The lawsuit and initial ruling posed a serious risk to the economy. This is especially true with an already fragile national economy that was returning from the global economic downturn in 2007. The lawsuit also followed on the heels of the 2006 government transition which then continued through four different prime ministers by the end of 2008. Insecurity for investors on both the political and economic fronts compounded economic issues. The NEB knowingly allowed industrial development in order to avert economic losses (Hassarungsee, 2010) - the impact of which was estimated at 1.88billion USD on Thailand's GDP (Economic Intelligence Center, 2009).

The Bangkok to Rayong route is an important industrial cluster due to the access to infrastructure and trade access (NESDB 2016). Public investment in the ESB is expected to increase from 93.9billion USD since 1987 to an additional 59.5 billion USD in only a few years (Janssen, 2017). Heavy investment in the region is also being pushed by the Asia Development Bank (ADB) through the creation of economic corridors to connect Vietnam, Cambodia, Thailand, Myanmar, and India through existing and newly created trade routes (ibid). The ESB plan has since been redefined as the Eastern Economic Corridor (EEC) projects across these trade routes (ibid). Additional connections north-south will network Malaysia, Thailand, Laos, and China. These plans reinforce Rayong province as an important economic and resource distribution hub.

Development activity in Map Tha Phut is inevitable and unsurprising. The region has a deep-rooted history as an economic centre first being a part of the ESB and now as a focus for the EEC. The connections to infrastructure and international trade routes make the area ideal for economically driven development despite the environmental or human cost. This suggests government priority is economic and environmental governance change that lacks any serious societal focus.

**Political and social context**

Environmental policies have been a crucial part of the Thai legal system. A number of regulatory bodies are important to industrial estate development. These include the National Economic and Social Development Board (NESDB), Board of Investment (BOI), Industrial Estate Authority of Thailand (I-EA-T), Department of Industrial Works (DIW), and the Office of the Natural Resources and Environmental Policy and Planning (ONEP).

***NESDB***

The National Economic and Social Development Board is arguably one of the most influential environmental governance bodies in Thailand. Established in 1959 the NESDB is described as a national planning agency. They provide recommendations for and a pathway towards economic and social development through steering national level policymakers. Development strategies recommended by the NESDB often reflect the changes in government priority and provide insight into the impact of shifting political leadership throughout Thailand's history. Each administration interprets the NESDB policies differently based on their priorities and the multiple political crises between 2006 and 2014 saw shifts between economic and social focus.

Despite these political changes, two important points of consistency remain within the NESDB plans from its early years. The first constant is an intense focus on securing economic development and growth. The first seven NESDB plans focused heavily on economic growth using industrial estates. The eastern seaboard development strategy, which included Map Tha Phut, was designed from the sixth plan specifically.

A second constant among the plans is a focus on environmental considerations. Environmental laws have been a part of Thailand's legal system for a number of years now. As early as 1967 the Toxic Substance Act came into force which was then replaced in 1992 by the Hazardous Substance Act (Nilprapunt, 1992). Amendments to the act in 2013 expanded responsibility and regulations and gave authority to local agencies to revoke registration permits for violations (Little, 2016). The National Environment Act also came into force in 1999, which specifically required the use of environmental impact assessments (EIA) as a tool for project evaluations. A more evident example of NESDB's influence on environmental governance policy came in 2007 with the inclusion of Article 67 of the 2007 Constitution (§3.12 Section 67; ILO, n.d.). This policy specifically states a need for environmental and health impact assessments stating:

Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organised, and opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity (ibid).[129]

[129] An unofficial translation is provided by the National Assembly of Thailand (ILO 2007).

The NESDB's aim was to encourage economic growth while securing natural resources for future use.

Language plays a role in how NESDB plans are viewed and followed. The first major shifts in the national development strategy occurred in the eighth NESDB plan. This was the first transition from economic growth-oriented development to human-centred development (NESDB, n.d.c). All earlier plans had specific numeric targets such as the 'target to raise GDP […] by an average rate of 8.5 percent,' (NESDB, n.d.a) or the goal to 'designate national forest reserve areas at 25 percent of total area in Thailand" (NESDB, n.d.b). The language in the eighth plan became more general using language such as to "foster", "promote", "improve", and "encourage" rather than using specific numeric targets. This transition in language is significant. The policies developed from this point onward became suggestions and lost significant strength in terms of enforcement.

The ninth plan added a "Sufficiency Economy" philosophy and is described as a middle path to raise up the poor and 'reduce the vulnerability of the nation to shock and excesses that arise from globalization' (NESDB, n.d.d). It also sought to include more public participation in the development process. The tenth plan saw another shift, this one towards sustainability which reinforced the earlier NESDB plans. It sought to protect resources by focusing more on biodiversity and hazardous substances and to 'create good governance for the sake of the quality of life' (NESDB, n.d.e).

The eleventh plan introduced the "Balanced Growth" philosophy which attempted to balance economic needs with environmental and social concerns (NESDB, n.d.f). While similar to the previous 8th, 9th, and 10th plans the 11th plan specifically cited Map Tha Phut as an example of management and policy failures (ibid). The creation of the 11th plan followed on the heels of the Map Tha Phut lawsuits and sought to better align development to avoid future Map Tha Phut situations. Unfortunately, during the implementation of this plan, Thailand experienced another major shift in government and in national priorities.

The NESDB's current 12th plan utilizes existing infrastructure at the expense of those in areas such as Map Tha Phut for the betterment of the country at large. It is a return to the Sufficiency Economy philosophy in response to continued economic challenges. According to the NESDB, this plan incorporates sustainable development and people-centred development with a greater focus on environmentalism and resilience-focused strategies (NESDB, n.d.g). However, this plan takes a national level approach to economic resilience at the cost of communities.

### *A connection with UNGP on Business and Human Rights*

In June 2011 the UN Human Rights Council endorsed the UNGP BHR. Soon afterwards, the study on CSR and human rights in ASEAN, conducted by the ASEAN Intergovernmental Council on Human Rights, referenced the UNGP BHR for guidance in the study. Then by 2012, ASEAN adopted the ASEAN Human Rights Declaration, further emphasizing human rights in the region. The 2012 ASEAN Human Rights Declaration 28 (f) addresses access to adequate standard of living specifically including 'safe, clean, and sustainable environments'; articles 35 and 36 address right to developmental access for sustainable environmental needs of present and future generations (ASEAN (2013). The influence of the UNGP BHR directly on the NESDB plans is not directly known and was not explored during the initial research. However, the influence can be inferred by the NESDB's

push to position Thailand as a critical hub for the ASEAN economic community (AEC) by 2015. The NESDB drew on the need for greater connectivity with the rest of the ASEAN community - which the NESDB 11th plan cites as a major priority for national policy direction (NESDB, n.d.f). Rising international and domestic concerns of labour rights, environmental responsibilities, and businesses impacts on society echoed throughout this plan in reference to the AEC preparation (ibid). ASEAN's timely human rights initiatives in 2011, the shift towards the AEC, and the NESDBs desire to better align with regional and international development standards and obligations has direct impacts on the direction of Thailand's future development and echo the UNGP BHR.

**Other Regulatory Bodies**

The Board of Investment (BOI) provides guidelines for investment through incentive creation. BOI policies include specific social and environmental protection laws. Their guide for investors in a 2017 document includes a section on environmental requirements that have been in the books for years (BOI, 2017). The BOI requires compliance with the Investment Promotion Act 2520 which was then amended in 2534 and 2544 (BOI, 2002). This act requires compliance with the order No. 2 /2557 Policies and Criteria for Investment Promotion in addition to other regulations (BOI, 2014b).

The following policies are of particular importance. They specifically set out regulation on harmful impacts towards the public and environment. The policy § 19. Ch 2 of the Investment Promotion Act (1977) states 'the investment project […] shall be one which incorporates appropriate measures for the prevention and control of harmful effects to the quality of the environment in the interest of the common good of the general living of the public and for the perpetuation of mankind and nature'. Then the Policies and Criteria for Investment Promotion §6.2.1 states 'adequate and efficient guidelines and measures to protect environmental quality and to reduce environmental impact must be installed. The Board will give special consideration to the location and pollution treatment of a project with potential environmental impact (BOI, 2014b)'. Additionally, §6.2.2 states 'projects or activities with type and size that are required to submit environmental impact assessment reports must comply with the related environmental laws and regulations or Cabinet resolutions (ibid) and §6.2.3state "projects located in Rayong must comply with the Office of the Board of Investment Announcement No. Por 1/2554 dated May 2, 2011, on Industrial Promotion Policy in Rayong Area' (ibid). These are significant in that they describe legal responsibility of businesses to comply with environmental and social regulations.

To further assist developers, the BOI publishes a guide to the environmental regulations relevant to investment that include: The National Environmental Quality Act of B.E. 2535 (1992); Soil Quality Standards (2004); Air Quality and Noise Standards (2007); Water Quality Standards (2009); and The Factory Act of B.E. 2535 (1992) (BOI, 2014a).

Industrial Estate Authority of Thailand (I-EA-T) is a state enterprise under the Ministry of Industry. As of 2016, there are 11 industrial estates fully managed by I-EA-T and another 45 estates jointly operated (I-EA-T, 2017). According to the I-EA-T, the establishment of industrial estates is to concentrate industrial development into area-specific locations in order to reduce overall negative impacts of development and to concentrate infrastructure to reduce the need to rebuild it (ibid). Additionally, I-EA-T serves as a

mechanism to decentralize development to the provincial levels throughout Thailand (I-EA-T, n.d.).

The Department of Industrial Works (DIW) was established in 1942 with the task to specifically support government-owned factories. They provide procedures and ensure compliance with the Factory Act B.E. 1992, Machinery Registration Act B.E. 2514, and the Hazardous Substance Act B.E. 2535 (DIW, n.d.a; DIW, n.d.b). DIW does not have full jurisdiction within industrial estates, therefore, regulation of these areas are controlled by the I-EA-T while areas outside of I-EA-T zones are regulated by DIW (DIW, personal communication, August 24, 2017; I-EA-T, personal communication, August 24, 2017). Both DIW and I-EA-T are under the Ministry of Industry, thus the Ministry of Industry should handle any conflicts that may arise internally (ibid).

The Office of the Natural Resources and Environmental Policy and Planning (ONEP) is part of the Ministry of Natural Resources. The ONEP develops environmental and natural resource conservation policies, monitors and assess environmental impact mitigation measures. The policies created by ONEP are applicable to I-EA-T projects.

These regulatory bodies and the legislation developed suggest environmental governance challenges are not in the creation of the policies. The extensiveness and history of creating regulations well before the 2009 court case and the UNGP BHR indicate other factors led to the perceived environmental governance failures.

## Methods

The study participants were placed into three stakeholder groups: government, businesses and NGO/CSO/community leaders. Entities that frequently appeared in the secondary research or who currently and/or formerly worked within the I-EA-T in MTP made up the stakeholders.

The study used standard qualitative data collection methodology with the use of semi-structured interviews. A purposive sampling method, supported by Baxter and Eyles (1997), was used and a snowball sampling strategy was employed when necessary to reduce confirmation bias and broaden stakeholder data.

Interviews were conducted in two stages between July 25th and August 24th, 2017. Stage one took place in Bangkok with local offices and stage two took place in Rayong. Interviews were audio recorded with permission and notes taken by hand. All interviews had both English and Thai speaking researchers with simulations translation for interviews conducted in Thai. Interviews conducted in English often used Thai for point clarification throughout the interviews. Field notes were checked against audio data to ensure original vocabulary and consistency in translation existed across the research before analysis began.

Analysis of the qualitative data used a standard general inductive approach (analytic induction) to identify themes and categories in the interview data with the assistance of the program Hyperresearch (Thomas, 2006). The coding was analyzed for similarities to responses and to draw logical relationships between stakeholder responses as well as secondary data.

Data gathered from businesses were communicated through their CSR department, environmental teams, or a combination of both. The dominant industry in MTP is petrochemical based. The selection was based on secondary research and review of physical structures and land use in MTPIE.

Data gathered from government related entities came from policy creators, legal professionals, or government representatives. Agencies and government organizations that directly impact environmental policy creation or enforcement in MTP were important stakeholders for the interviews.

Data from NGOs/CSOs and community leaders came directly from persons working in the field or from community leaders. NGO/CSO selection was based on an organization's past involvement in the region with working knowledge of environmental or social policy impacts. They were also selected based on their appearance throughout the literature review.

**Discussion**

A number of limitations to the research were identified which included inability to solicit responses from a number of stakeholders, time limits in the research area and the use of mixed languages during the interviews.

TEAM, an environmental consulting firm active in Map Tha Phut did not respond to our request to interview. Environmental Resource Management, another environmental consulting firm that is currently seeking consultants for Map Tha Phut projects, cancelled due to scheduling conflicts. AECOM, which had worked in Map Tha Phut in the past, has in the last 10 years split from the group that worked in the Rayong and thus lost institutional knowledge of the area. AECOM could only speak to the broader experiences in Thailand as a whole. Additionally, our attempts to meet with the Federation of Thai Industries failed to receive a response.

To address these challenges, we sought confirmation through additional secondary research and corroborated responses with other interview data where possible and relevant. Additionally, we spoke with subsidiaries of Bangkok based businesses in Rayong to confirm responses and identify bias in the data.

Another limitation of our research was the decision to restrict individual community member participation in interviews. This decision was made due to large amounts of community targeted research previously conducted over the past twenty years. Additionally, we identified ethical concerns with individual community members not selected as the primary target of the initial research output as the research was originally conducted as a lesson learned for other development projects. To mitigate this challenge we interviewed community leaders as representatives of the larger communities. To reduce confirmation bias, our research sought to compare the data with NGOs and CSOs and data collected was cross-checked with other interviews and secondary data to further reduce bias.

Furthermore, the interviews were conducted in a mix of English and Thai depending on the preference of the interviewee. Simultaneous translation was provided only in a handful of interviews by the interview team. To help ensure interview data was consistent from English to Thai, interviews conducted in Thai were also conducted by the same team members present throughout the interview process. Despite these challenges, we believe the study data was well rounded and with significant depth.

## Identified Themes

A number of major themes stood out in the research: risk and trust, CSR implementation, environmental monitoring practices, information transparency, and the use of Section 44 of the Thai Interim Constitution. This paper only addresses trust, CSR implementation, transparency and Section 44.

### *Trust*

Breaches of trust that occurred in the past were still seen as major points of contention in MTP. Businesses often viewed NGOs and CSOs as disruptors of progress, raising unnecessary or trivial issues to the national psyche. During an interview, I-EA-T described environmental impacts as 'an old story; we use new technology that is clean. It has less environmental impacts'. Businesses also blamed these groups for encouraging complaints regardless of actual connections to the businesses that received the complaints.

PTT LNG stated that complaints were increasing but that 'zero official complaints have been recorded' (PTT LNG, personal communication, 2017). They further justified receiving zero complaints by claiming they were unrelated to operations or were of little significance, such as off-gas events, safety flare events or the occasional unpleasant smells from unidentifiable producers (ibid).

A local human rights lawyer confirmed an increase in complaints stating legal action against businesses in MTP has risen significantly in the wake of the 2009 ruling. They continued by suggesting this has become a strategy to elicit a response from an otherwise silent business. Another activist suggested that protests were the only tool left for local communities and indicated continued health problems and environmental degradation proved a lack of willingness to change business and government.

In fact, local community leaders still reference the 1997 air pollution event as a massive failure on the side of the government and businesses to protect the community. Distrust is then reinforced by continued human health and environmental catastrophes that occurred as recently as 2014. This fuels a belief that businesses are indifferent to public safety and that the government is not adequately protecting their rights.

### *Corporate social responsibility*

One method businesses used to counter the negative perception of their presence and work was corporate social responsibility (CSR) strategies. Many businesses in the I-EA-T, such as PTT and SCG, use CSR as a method for engagement and trust building with the communities. CSR is voluntary and conducted at the businesses expense. However, it is also important to recognize that CSR is also meant to improve the image of a business in the eyes of the local communities they engage with, the public as a whole and with the investors. With this perspective, there is little wonder for why communities would believe CSR is simply a marketing tool. This latter point is an important distinction, especially where CSR was being used post-catastrophe verses as a pre-emptive relationship-building strategy.

A local community leader suggested that the businesses who have engaged with their community in CSR activities are doing so with ulterior motives. The community participated in past research that opened dialogue with the businesses directly to address concerns about

increased cancer levels and death rates associated with the petrochemical industry. In response, the businesses came to the community and offered alternative methods to their current farming practices (comm. leader A, personal communication, 2017). While the methods suggested by the businesses in the CSR project were scientifically sound and environmentally beneficial, the project was not received well by the community leaders. Instead, they saw this as blaming the farmers and their methods as the cause of their health problems. Understandably, the CSR project was received with mixed acceptance from the community as no evidence connected communities' farming practices with rising cancer and death rates while past research suggested evidence of connections between health problems and industry (ibid; comm. leader B, personal communication, 2017).

By engaging after detrimental environmental or human health events, the perceived intentions of CSR activities were seen as malevolent attempts to persuade an impacted community. This, in turn, led to the use of less impactful CSR activities such as inviting communities to visit factories or conducting open houses. The latter activities were reported as key CSR strategies by all the businesses interviewed. This may well be a more cost effect method to engage the community but allows for a very restricted staged viewing of operations.

Another CSR strategy used by businesses was compensation following industrial disasters. Citing ethical and internal policies, businesses do not give compensation directly to individual community members negatively impacted by business activities (PTT, personal communication, 2017). Instead, businesses contributed to a pool of funding that went to community leaders who then disbursed funds or used the funds for the benefit of the community (ibid; comm. leader A, personal communication, 2017). However, this practice displaced responsibility of seeking solutions from those who caused the damage to the community and their leaders. In doing this, communities can only address the symptoms, not the causes, and formal recognition of blame never occurred.

***Transparency***

Complaints of transparency in the decision-making process and the implementation of policy recurred throughout CSO and community leader interviews. One CSO representative and his community was invited to participate in the decision-making process for EEC activities because they were directly impacted by construction. However, major project decisions were already made before their invitation and thus their inputs were only formalities. Additionally, they were told the projects were going ahead regardless of what the community says as the community was seen as 'causing too much delay in the process' (CSO, personal communication, 2017).

Another issue was access to both EIAs and EHIAs. EIAs and EHIAs are a requirement under the BOI guidelines. However, such reports were difficult to obtain. While these assessments were expected to be distributed to the public they were often only in the form of summaries or made available upon approval of the results by the company which risks bias results. Digital access continued to be a challenge. Specific EIAs and EHIAs produced by companies in Map Tha Phut were not available online at the time of writing. Additionally, the EIA page on the I-EA-T website (in both languages) failed to provide

information aside from general knowledge.[130] While this may be a result of searches conducted primarily in English, the World Research Institute expressed similar concerns to transparency and access in 2012 (Excell, 2012). Assessors treated the EIAs and EHIAs as preparatory information that requires permission from the company that sponsored the assessment (ibid).

Businesses discussed combating transparency complaints through open houses, site visits and meeting with communities and their leaders. These practices were in use before the 2009 court cause however, a few issues were still voiced by the community. A number of interviewees commented that these events were held strategically during inopportune times. Often a community member would have to decide between generating income (fishing, farming, etc.) or attend a meeting where the only benefit was to make the business look better.

*Section 44*

Section 44 (S44) of the interim constitution states:

§44 For the sake of the reforms in any field, the promotion of love and harmony amongst the people in the nation, or the prevention, abatement or suppression of any act detrimental to national order or security, royal throne, national economy or public administration, whether the act occurs inside or outside the kingdom. The orders so issued are all deemed lawful, constitutional and final.

This common strategy is used by many governments throughout the world, especially as it relates to land use. In many ways, this is similar to the common practice of eminent domain which is the power to take private property for public use by a state following the payment of just compensation to the owner of that property.

CSOs and community leaders have suggested that the broad definitions in S44 have allowed for the indiscriminate use of the statute to further develop Map Tha Phut and the EEC. Many have voiced concerns that S44 was used to justify lack of compensation, to prevent or avoid required public participation and to bypass environmental requirements found in the EIA or EHIA.

A series of actionable recommendations reflect the themes identified above. Trust building between all stakeholders especially between NGOs, CSOs, and businesses is necessary. Better partnerships between community organizations, individual community members, and businesses need to be forged. These partnerships can be built through the financial support of business CSR programs. Rather than working independently with communities, businesses should seek to partner with local civil society organizations and actively seek their inputs to be more effective. Due to the importance of community involvement, participation times based on community availability is important. As it stands, communities view existing meeting times as non-beneficial as it takes away from their livelihoods commitments.

Conduct CSR as a pre-emptive measure to avoid problems in relationships in the future. CSR projects should actively seek to identify potential future pressure points on community relations and pre-emptively seek to address these issues. A pre-emptive CSR

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[130] Recent updates to the I-EA-T, BOI, DIW, and ONEP websites have begun to include sections on EIAs. However, as of this writing, specific EIA reports are not available.

strategy that shows potential, though was not explored deeply in this paper, was PTT LNGs strategy to participate in fish nurseries and fish/crab stock releases prior to project start. This was done following concerns about their expansion and the impacts it could have on the fisheries and ecosystems. Rather than waiting until after impacts occurred on fishing communities, PTT LNG pre-emptively started a CSR project to address these concerns.

Greater transparency is needed in both EIA and EHIA reports and in the use of section 44. Clearer justification for the use of S44 and other eminent domain type laws are needed. Eminent domain laws are the right of a government. However, greater transparency for why and when they are used is necessary. When such powers are exercised by the State due process, public participation, appropriate compensation and EIA/EHIA requirements must be fulfilled.

**Conclusions**

Since the 2009 case, clearer regulations have been defined. Stronger policies on business requirements are evident throughout the NESDB policy plans since the conception of the 11th plan. UNGP BHR may have influenced the national policy direction via Thailand's desire to be an influential actor in the AEC. However, environmental regulations created by the various governing bodies and highlighted through guidelines for investment show a progression of adaptation by the government that began in the 1960. This also shows a continual improvement in environmental governance in terms of policy creation that is external to the UNGP BHR. Therefore the policies themselves do not appear to be the main problem in Map Tha Phut. Other underlying problems to environmental governance exist. Government priorities are clearly economic focused with social impacts only addressed through the NESDB. Enforcement of existing policies, public participation, and stronger community engagement in all stages of the development processes need to be addressed.

Finally, while this study begins to highlight the linkages between stakeholders and the failures in environmental governance, further research is still needed to better understand the root causes.

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Wiriyapong, Nareerat (2011) ‘Thai plastic to expand investment in Burma’, *Bangkok Post*, at: http://www.pressreader.com/thailand/bangkok-post/20110223/282273841854793.

# The Impact of the Government Transparency on the Success of Myanmar's Dawei Deep Seaport & Industrial Estate Development project

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**Abstract**

Dawei Deep Seaport & Industrial Estate Development Project (Dawei Project) on the west coast of Myanmar is not only a huge project in the country, but also the biggest mega project in ASEAN. This project is foreseen to be a new economic gateway between the western and eastern regions as a new hub of logistics and a largest regional trade route. Moreover, this is the route that facilitates transportation and international trade in the group of Southeast Asia and South China Sea countries through the Andaman Sea passing the Indian Ocean to the Middle East, Europe and Africa. This will significantly save the cost and time in transit and help to develop trade, investment and the economy in the region to prosper in the long term. Nevertheless, the Dawei Project has been delayed on the original timeline of the operation due to the internal factors. These factors interrupt the success of this project. Hence, this study analyzes the lack of Myanmar's government transparency in Dawei Project by using the elements of good governance, international transparency, including the law and regulations of investment in Myanmar's Special Economic Zones by looking through the planning process to demonstrate the possibility of success in Dawei Project. Then, the further implication of this study will be discussed.

**Keywords:** *Dawei Project, Myanmar, Government Transformation, Government Transparency, and Human Rights.*

## CHAPTER 1

## INTRODUCTION

### 1.1 Background of the study

In 1962, Burma (Myanmar) changed the political system from the parliamentary system to a single party system under the leadership of Burma Socialist Program Party (BSPP) which was controlled by the military junta. Since then, Myanmar has been controlled under the military junta for over 50 years. This made Myanmar have a closed economy, no contact with foreign countries. In that period, the military had a significant role in controlling the economy. They intervened the local companies, especially in the energy industries. The rights and freedom of people in the political and economic system were confined. Military junta was a solely party who handled the power in the country, and was not checked for transparency.

However, Myanmar had tried to reform the country to become a democratic regime. Development and political reform from 2008 to 2014 affected the development of the political, economic and society of Myanmar. After the political reforms, the Myanmar government has opened the country and attracted foreign investors by offering the tax incentive. Furthermore, Myanmar has established a special economic zone (SEZ) in three

zones which are Kyaukphyu SEZ, Thilawa SEZ, and Dawei SEZ. Nevertheless, this study will focus on Dawei Deep Seaport & Industrial Estate Development Project (Dawei Project).

In May 2014, Myanmar government applied for membership of the Extractive Industries Transparency Initiative (EITI)[131] to prove the government transparency and build the trust to foreign investors. This is based on the concept that the citizens from their country have to be able to get the advantage of natural assets from their own country. Consequently, citizens are allowed to determine themselves how much their government is receiving income from mining, oil and gas or other extractive industries companies from the revealable payments report. According to U Kyaw Thu, civil organizations representative from Myanmar EITI, said that "if Myanmar becomes a member of EITI, it will bring more investments from foreign countries and the taxation reports on the country's natural resources will become public information."[132] But Myanmar government has not achieved to become a member of EITI yet.

### 1.2 Statement of the problem

Due to lacking an auditing system and undisclosed payments report, Myanmar government is not qualified for the transparency and accountability standards of EITI. This is why the Myanmar government has less transparency and unaccountability. It can affect a mega project in Myanmar like Dawei Project. Lack of good governance with a high rate of corruption of Myanmar government results in the Dawei Project that is less trusted by foreign investors to support the project. Therefore, government transparency is an important factor in the development and success of the Dawei Project in the future.

### 1.3 Objective of the study

1. To study how the Myanmar political transform from the military junta to the current government.
2. To study how the Myanmar government transformation impacts on the Myanmar government's transparency.
3. To analyze the Myanmar government transparency that has affected the success of the Dawei Project.

### 1.4 Research Question

1. How does Myanmar politically transform from the military junta to the civilian government for the first time in 50 years?
2. How does Myanmar's political reformation impact Myanmar government transparency?
3. How does the Myanmar government's transparency affect the success of the Dawei Project in the future?

### 1.5 Significant of the study

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[131] EITI is a global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources.

[132] "2017 EITI Report Aims for Full Membership." Myanmar Business Today. Accessed February 28, 2018. https://www.mmbiztoday.com/articles/2017-eiti-report-aims-full-membership.

The finding of this study will reflect the Myanmar government transparency in the Dawei Project. It will include the possibility of the Dawei Project success and propose another aspect of this project. The study will benefit researchers, related agencies to apply as a guide of planning in the project. Particularly, investors can use this study to make the investment decisions at the Dawei Project.

### 1.6 Scope of the study

The scope of this research covers the Myanmar political transformation and its transparency during the Dawei Project since 2008 until 2018.

## CHAPTER 2

## REVIEW OF LITERATURE

### 2.1 Literature Review

Transparency is the crucial component for the government to strengthen the confidence of their citizens. According to Veronica Cretu and Nicolae Cretu, there are different kinds of transparency. As for data transparency, the government has to provide the information about the project plan of government to the citizens and make it to be openly without the restriction. In addition, the data can be freely shared on social networks. To understand the process transparency, it has to understand consultation as well. Consultation is the system for accomplishing the process of policies' outline by the government listens to criticism, optional decisions, and analysis from the public that include in the process transparency. Government uses strategic transparency as a mechanism to encourage their citizens to be involved with the decision making process. It is a challenging responsibility of the government in the country that their citizens lack the knowledge about their own rights to participate in the governance process. Transformational transparency is the way that the government gives a lot of opportunities to their citizens for allowing them as explorers, they can pinpoint the problem of both national and local levels.[133]

As Myanmar has opened the country, the Myanmar government has established the SEZs to encourage Foreign Direct Investment (FDI). According to Robert Nash, his research reports about the Kyauk Phyu SEZ in Myanmar. Myanmar government transparency in the SEZ does not happen in the area. Due to his study, local people or stakeholders have known limited data about the SEZ plan. Local people do not understand the effects of establishing the SEZ on their lives such as impact on the environment and their way of life. It can illustrate that local people are given the information in one aspect because the Myanmar government mainly emphasizes possible advantages with a little probability of negative effects. Nevertheless, the Asian

[133] Cretu, Veronica, and Nicolae Cretu. "Government 5D Transparency." April 2015. Accessed March 14, 2018. https://www.europeandataportal.eu/sites/default/files/2015_government_5d_transparency.pdf.

Development Bank (ADB) determined that the factors of the success of the SEZ also rely on a legalistic system and standard of transparency.[134]

According to Yukari Sekine, her research is about rural democratization in the aspect of land confiscations and social movement action by using Dawei SEZ as a case study. Since Myanmar reform the political and economy, there has been increased land-grabbing for the large-scale of development projects led to the conflict in the area. Despite, the politics in Myanmar is more liberalized that it can observe from the civil society movement, but the legacy of military junta in terms of corruption still exists in the economic liberalization.[135]

Many people already research the meaning and type of transparency, transparency in the government projects, Myanmar political reform, Dawei Project in the regional context and the problems of Dawei Project. Therefore, this research will focus on the relevant Myanmar political transition and its transparency that impact the Dawei Project.

### 2.2 Theoretical Framework

This research study about the impact of the government transparency on the success of the Dawei Project. Transparency is the one of good governance's principles. Therefore, firstly, this research will explain the theory of good governance. According to United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), UNESCAP is used to define the principles of good governance which has 8 principles as following;

Firstly, participation is a key element of good governance. Citizens or stakeholders have the opportunity to show their opinions and participate in activities that affect people well-being such as election, promoting and recommend some institution. So, the comments are also included in the policy and the decision of the state. Secondly, rule of law; separation of power, protection of rights and freedom, legitimacy of judiciary and administration, legality of law, independence of the judge, is required in good governance because the state has to assure the impartiality in the society. Thirdly, transparency implies that government decision making and their enforcement have to be done under the laws and regulations. Information has to freely be accessed by the public for accuracy on government decisions. It can make the citizens have confidence in government and certify good governance conduct. Fourthly, good governance also requires responsiveness from the government or institutions that involve the issue. Institutional processes should try to perform the capacity of their duties within a proper time scheme to respond to all stakeholders. Fifthly, consensus oriented is introduced in good governance principles. There are different points of views and interests of several sectors in the society.

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[134] Nash, Robert. "Responsible Investment in MYANMAR." January 25, 2017. Accessed March 15, 2018. https://myanmar.oxfam.org/sites/myanmar.oxfam.org/files/file_attachments/dp-responsible-investment-myanmar-sez-250117-en.pdf.

[135] Sekine, Yukari. "Land Confiscations and Collective Action in Myanmar's Dawei Special Economic Zone Area: Implications for Rural Democratization." February 2016. Accessed March 15, 2018. https://www.iss.nl/sites/corporate/files/59-ICAS_CP_Sekine.pdf.

Government has to make a general agreement to seek the best advantage as a sustainable human development toward the community. Sixthly, equity and inclusiveness mean that everyone in the society should have chances to enhance their well-being. Everyone are all embraced as a member of society, no discrimination. Seventhly, effectiveness and efficiency consist in good governance because the government has to provide the best things to the citizens with getting the most out of resources usage and concern about environmental protection. Lastly, accountability is a foundation of good governance theory. Government and officers must be responsible for their action.[136]

Applying good governance principles is able to diminish corruption and abuse of resources. In addition, it can guarantee that the voice of people and the best usefulness of people in the society are compromised. The practice of good governance can authorize the trustworthy to governments and institutions. Good governance is used to guide the leaders make the correct decision with the most productive consequences.[137] Accordingly, this study will emphasize the transparency dimension, including other dimensions which closely govern good governance that influence the Dawei Project.

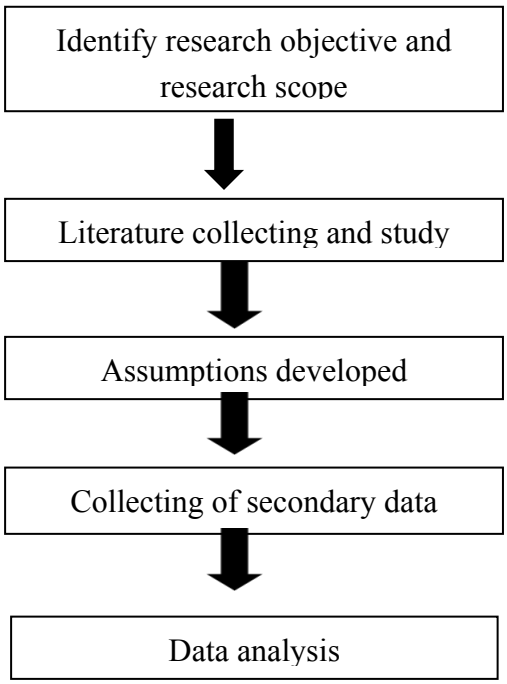
### 2.3 Hypothesis

Even though the new government has shown the willingness to improve the legal framework and judicial system, however, the transparency of the Burmese government has not reached to the standard yet. Therefore, the higher transparency of the Burmese government is, the more success of the Dawei project will be.

## CHAPTER 3

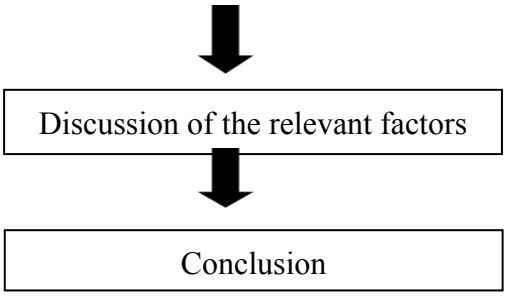
## RESEARCH METHODOLOGY

### 3.1 Methodology




[136] "What Is Good Governance?" Accessed March 02, 2018. https://www.unescap.org/sites/default/files/good-governance.pdf.

[137] "What Is Good Governance?" Accessed March 02, 2018. www.ccf.org.fj.




This research collects the information with the qualitative analysis from secondary data; book, article, news law and regulation.

### 3.2 Limitation of the study

Limitations of this research are the period of time that has only 3 months, budget to go on the site, and the information accessibility of Myanmar government.

## CHAPTER 4

## THE RESULTS OF THE STUDY

### 4.1 Myanmar Political Transition

According to O'Donnell and C.Schmitter, in the moment of transition, the opening of negotiation is a significant factor to seek an agreement of the parties and the core of the contract is a compromise by using a way to offer guarantees rather than threats.[138] However, in the case of Myanmar, there is very different from the thought of O'Donnell and C.Schmitter in the time of General Than Shew because the opponents are so weak, they are not in a position to bargain. The antagonistic politicians were detained and the ethnic groups lost their base and power. So, they cannot no longer be the threat. The government or the military is very solid because the empowered military of leadership in a new army is almost 400,000 armed forces, together with the modern weapons.[139] In addition, the new capital (Naypiydaw) geography is a basis for the effective controlling of the Burmese people and the ethnic groups because Naypiydaw is closer to 3 important states; Shan, Kayah, and Kayin.[140] Therefore, it can be predicted that there is no negotiation among political parties during Myanmar political transformation in the period of General Than Shwe era, but it is a part of the military who impose the rules and regulations and go through all the stages of transition.

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[138] ODonnell, Guillermo A., Philippe C. Schmitter, and Laurence Whitehead. *Transitions from Authoritarian Rule*. Baltimore: Johns Hopkins University Press, 1986.

[139] Parameswaran, Prashanth. "Myanmar Military Modernization in the Spotlight Amid Air Force Anniversary." The Diplomat. December 19, 2017. Accessed May 06, 2018. https://thediplomat.com/2017/12/myanmar-military-modernization-in-the-spotlight-amid-air-force-anniversary/.

[140] "Myanmar Naypyidaw." Myanmar Naypyidaw. Accessed May 06, 2018. http://myanmarnaypyidaw.com/.

This phenomenon can explain the idea of Samuel P. Huntington that the government must be able to tighten up the power to be stronger than the opponents, which is the characteristic of political transition in many countries.[141]

Over the course of two decades, Myanmar closed the country without attention to the outside world. It made Myanmar still an underdeveloped country. Finally, the Senior Lieutenant General Than Shwe declared a referendum to campaign the people for voting on the constitution drafting on May 10, 2008, resulting in major political changes in Myanmar's history. Considered in the political context of Myanmar at that time, it can be said that the referendum process was held due to the pressure (sanction) from the international community. So, the Myanmar government had taken steps to reduce the pressure from the outsiders. Political program was launched with the four goals; (1) stability of state, (2) national strength, (3) stable constitution, (4) modern and developed nation building. In addition, the government emphasized that to lead Myanmar to become a prosperous and developed country, it requires a newly strong constitution. For this reason, the government announced plans or seven steps to proceed democracy which is called "Roadmap towards Democracy". The seven steps consist of "(1) reconvening the National Convention (2) implementation of a process to allow the emergence of a "genuine and disciplined democratic system" (3) draft a new constitution (4) adopt a constitution through a national referendum (5) hold free and fair elections (6) convene elected bodies and (7) create government organs instituted by the legislative body."[142]

Apparently in the constitution 2008, the interesting issue of this constitution is the legislature. This draft constitution requires that there are 20 percent of representatives from the military in the Upper House and 25 percent of representatives from the army in the House of Representatives, three ministers are reserved for deputies of the army as the Ministry of Defense, Ministry of the Interior, Ministry of Border Affairs. Moreover, the president must be experienced in the military administration and the supreme commander has the power to declare a state of emergency.[143]

According to Dunlayaphak Pricharat, the military government has used the constitution 2008 as a tool for political development and it is evident that the State Peace and Development Council was strenuously trying to use the constitution as a political reform to create democracy. In fact, the constitution, since the revolutionary government, State Law and Order Restoration Council (SLORC), and State Peace and Development Council (SPDC), are far away from the nature of democracy. If we look superficially, there is a structure of democracy because there is public participation in the comment process and the constitutional referendum. They are the only thing that the SPDC emphasized. The military thought that democracy must be open for all people to participate. On the other hand, if we

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[141] Huntington,S.,P. (1991). *The third wave: Democratization in the late twenties century*. London: Oklahoma University Press.

[142] Junta Pushes the 'Seven-step Roadmap' Forward Despite Flaws. Accessed May 07, 2018. http://www2.irrawaddy.com/article.php?art_id=9500.

[143] "Myanmar's Constitution of 2008." April 17, 2014. Accessed May 07, 2018. http://extwprlegs1.fao.org/docs/pdf/mya132824.pdf.

are concerned about the terms of the Myanmar constitution 2008, it can be seen that the military government has never expressed an intention to release power from its possession. Thus, it can be noted that the constitution 2008 had the meaning in terms of the old power from military faction's power bases. The civilian government is still under the control of retired generals. The benefits of former military colleagues and soldiers, as well as reputation and status, and various economic benefits will be maintained by the group.

In 2010, Myanmar held its first general election under the constitution 2008. The Union Solidarity and Development Party (USDP) were victorious. Thein Sein is a leader of the party, receiving a consensus from parliament to be the new president of Myanmar. Even though this is the first time that a civilian government has been formed, the USDP was formed by the State Peace and Development Council (SPDC) under the control of Than Shew. He had used USDP as a political tool for him since 1993 because the party administration consists of several former military officers, serving in the SPDC military government. Although the military still had the political influence in Myanmar, the military has more relaxed control over the government. The rapid succession of the new government led to political and economic reform. Then, in the year 2011, the president announced the political reform. So, in the time of Thein Seng was compatible with the O'Donnell and C.Schmitter though due to the decreasing military's role in the government and becoming of negotiation with other parties.

The historic election of Myanmar on November 8, 2015 was an important test of Myanmar's democratic reform that was closely watched by the international community. The political situation that the army has ruled for almost half a century was sent to the semi-civilian government under the leadership of President Thein Sein from the USDP. But it is clear now that the power was changed to the National League for Democracy (NLD) of Aung San Suu Kyi. However, the victory of Aung San Suu Kyi could not determine that Myanmar became a true democracy because of the constitution 2008. According to Phil Robertson, deputy director of Human Rights Watch, noted that the great victory of NLD is only the first step in the upcoming negotiation between the new power that was elected and the old power that was constitutionally certified.[144] Even though she has people backing, she still faces many problems because the army controls the major political decisions. The NLD and other political parties must cooperate with the military. Aung San Suu Kyi will cooperate with the military better if she uses the principle of reconciliation in the nation. So, the military is an important group in the parliament that cannot be ignored.

Even if the NLD won the election, the leader of the party cannot be qualified as the president according to the constitutional restrictions imposed by the military.[145] Suu Kyi said before the election that if the NLD wins, she will run the government and above the

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[144] "STATUS OF HUMAN RIGHTS & SANCTIONS IN MYANMAR JUNE & JULY ..." Accessed May 10, 2018. http://www.bing.com/cr?IG=F29F2BA5A9904D7BB8F88991430CB9B1&CID=3998A3D12309635F373FA83A22A662D0&rd=1&h=nXeGq9AFpNnpocO9o7mS7fCVOLzf_QM9q4InKlhWFFo&v=1&r=http://hrn.or.jp/eng/wp-content/uploads/2015/09/mujunjul2015report.pdf&p=DevEx.LB.1,5069.1.

[145] Act 59. Qualifications of the President and Vice-Presidents; (f) shall he himself, one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country. They shall not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country.

president.[146] On March 15, 2016, the Myanmar Congress held a meeting of members of the House of Representatives and the Upper House to elect the President. U Htin Kyaw was elected by more than half of representatives to be the new president of Myanmar.[147] He is the first civilian president in over 50 years of the country. Nevertheless, he was a leader of Myanmar de jure, while Aung San Suu Kyi, the State Counsellor and Minister of Foreign Affairs, has been as the country's leader de facto. On March 21, 2018, he resigned. Afterwards, U Win Myint has become the 10th President of Myanmar.

### 4.2 Myanmar's political reformation toward government transparency

Political reformation in Myanmar has progressed on the government's plan since the President Thein Sein established the civilian government, then moved to Aung San Suu Kyi in the present. According to corruption perception index (CPI) of Transparency International, "the Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be on a scale of 0 (highly corrupt) to 100 (very clean)." The result shows that Myanmar had 14 scores in 2008-2010, 15 scores in 2011-2012, 21 scores in 2013-2014, 22 scores in 2015, 28 scores in 2016, and 30 scores in 2017 respectively.[148] It can be seen that Myanmar's corruption perception index has improved but it cannot prove that Myanmar reaches the standard of good governance, as transparency is included, observably from the problems in Myanmar government's mega projects. Political corruption is highly rooted in Myanmar. Thus, the political reform could not be as effective as expectable.

Myanmar has an abundance of lobby groups. They are operated in different kinds of organizations or individuals, such as law firms, legislatures, political parties, politicians, and other interest groups. However, Myanmar's lobbyists issue is not only the variety of types and rising in nowadays, but also the inferiority of suited laws and regulations. Lobbyists use the way of bribe and compromise to obtain support as a usual practice. It shows that the Myanmar government does not have transparency and accountability. Political corruption also exists at the high rank in the public sector as government, especially in the hugely infrastructural works or mega projects. They are negotiated or implemented. This is particularly mentioned that in the situation when authorizations of acceptance are attempted, politicians and the high-ranking officials must often be corrupted to obtain the projects. In addition, the companies have a willingness to pay these rents in order to keep away from the problem and lateness, including, to set up the illegal connections as patronage. It can be significantly used in the future business transactions. This ill-usage of decision making power by bureaucrats and politicians in this regard is hard to solve because the people who are involved with this corruption are powerful people in the legislation sector.

### 4.3 Government transparency and the success of Dawei Project

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[146] Mizzima. "Suu Kyi Says She Will Run Government If NLD Wins Election." Mizzima. November 05, 2015. Accessed May 10, 2018. http://www.mizzima.com/news-election-2015-election-news/suu-kyi's-says-she-will-run-government-if-nld-elected.

[147] "Myanmar Elects Htin Kyaw as First Civilian President in Decades." BBC News. March 15, 2016. Accessed May 12, 2018. http://www.bbc.com/news/world-asia-35808921.

[148] E.V., Transparency International. "Thank You for Donating ToTransparency International!" Transparency International - The Global Anti-Corruption Coalition. Accessed May 13, 2018. https://www.transparency.org/.

### 4.3.1 Myanmar's Legal Structure for Special Economic Zones

In January 2014, the Union Parliament legislated the Special Economic Zones law and set up the legal framework for supporting Myanmar's SEZs, and in 2015, the central Ministry added the implementing regulations in the SEZ law. The SEZ law includes the particular governance bodies; namely Central Body, Central Working Body, and Management Committee, and One Stop Service Centre (OSSC), which facilitate the investors all service in one place.[149] For the case of selection the Management Committee members, the SEZ law state that "this body may include representatives of relevant government departments and government organizations as well as investors, developers, other suitable persons and persons from organizations."[150] But, there is no standard of electing members. It can imply that the transparency in those positions still be questioned.

This legal framework also connected with national laws, such as environmental law, land law, and labor law. However, the SEZ laws are not clarify about human rights and environmental impacts responsibilities. The SEZ laws do not mention human rights protections. For example, land accession and people replacement in SEZs area, there are three parties; namely the Ministry of Home Affairs, Companies, and the Management Committee, engaging with those issues. The Ministry of Home Affairs is accountable for the land transfer and accession in the SEZs. Companies or organizations are imposed to compensate and ensure that the people's living standards are not destroyed due to the resettlement. Nevertheless, the role of the Management Committee, which is a representative from the Central Working Body, is limited to critical for the residents' disputes in the SEZ laws. As a representative of the central government, they should have the right to coordinate with all of stakeholders to deal with the situation. Thus, there is no accountability in terms of principle and scheme. The legal processes are not developed.

### 4.3.2 Dawei Project and its human rights

Dawei Special Economic Zone (Dawei Project) has been developed in the same way as Map Ta Phut Industrial Estate. The petrochemical industry, oil refineries, gas separation plants, coal power plants, etc. are also established. The Dawei Project is often mentioned in terms of the importance of economic benefits by the governmental sector, business sector, and some media. The dimensions of environmental resources and the way of life of people in the area are rarely mentioned and not well known. So, the role of Non-Government Organizations (NGOs) and International Non-Governmental Organizations (INGOs) in the Dawei Project are significant to protect human rights and the environment.

In late 2010, villagers in the project area and surrounding areas were affected by the development for more than 7 years since Italian-Thai Development Public Company has developed the project. According to a report by the Dawei Development Association, a civil society organization in the area, the impact can be described into four areas. The following information will be reported on the impact that has occurred;

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[149] 2014 SEZ Rules, Art. 20.

[150] 2014 SEZ Law, Art. 11(q).

Firstly, deep sea port area and industrial estates (within the Special Economic Zone), after Italian-Thai Development Plc. started the construction of the coastal area in the Dawei Special Economic Zone in 2010 without the notification to the villagers in the area. In 2011, the government announced a formal number of villages that 19 villages will be removed from the area to build the Special Economic Zone. Informally, there are also 3 other villages, totally 22 villages. According to the survey of the Dawei Development Association, villagers in such areas have lost land, many houses were destroyed. Because the road cut through the field, the water in the stream cannot flow normally and the field cannot be cultivated. This impacts on the livelihood and food security of the community. In some areas where a mountain explosion has occurred, the soil is deposited on the villagers' paddies and waterways. The waste water from the project flows down streams where the villagers spend their consumption and the water is smelly and cannot be consumed as usual.

Secondly, Nearby Special Economic Zone, the area is mostly suitable for agriculture. The villagers as farmers, salt makers, and fishermen are affected by the floods. According to the Dawei Development Association found that the villagers in the area are suffering by the construction of the project in terms of the loss of land, habitat, and natural resources. The construction resulted that the water cannot flow into the farmland, the farm was seized, and forbidden to build houses or engage in any occupational activity. In some areas, it is also impacted from dust in the quarries.

Thirdly, road-link projects area, the area will consist of roads, railways, pipelines of gas and oil. Most of the villages were confiscated for road construction. In the highlands, most villagers are Karen ethnic that has a long history of settlement for centuries. Gardening is the main way to generate income and wealth for the family.

Fourthly, dam reservoir area, the reservoir area is located on a hill in the northeast of the site. The reservoir takes up space more than 7-12 square kilometers to use as a primary source of water for the SEZs. The village consists of 182 households, with about 1,000 residents, including the village of Kalone has been further affected by the road connection.[151]

According to the good governance principle by UNESCAPE, it can be seen that the Dawei Project lacks elements of the principle, such as accountability, responsibility, transparency. There are physical impacts in different areas in terms of corporate governance, investment or development, human rights, lack of environmental and social impact assessments prior to the project operation. There is no clarification and disclosure of information related to the project. In the case of land expropriation, the villagers received insufficient information on the part of the project and the impact that will have on their communities and their way of life if they are displaced. The information provided by the government and the company did not reach the majority of affected people. No consultation and community involvement in decision making without the consent of most villagers and only a very small number have received printed materials. Most of the information received from the local media.

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[151] "Dawei Project: Its Development and Impacts and People's Struggles." Themekongbutterfly.com. December 15, 2017. Accessed May 15, 2018. https://themekongbutterfly.com/2017/12/15/dawei-project-its-development-and-impacts-and-peoples-struggles/.

In addition, compensation does not have a clear standard. In the report of the Dawei Development Association, 63% of respondents said that government officials and companies had never disclosed information about compensation, in terms of pricing and compensation process.[152] Even though there are some who have been compensated, it was also found that it is defective because there is a delay, do not pay the full amount agreed, and some are still waiting for compensation. Just only some of the official receipts with figures, calculations, and compensation payments are provided for the people receiving compensation. Moreover, the management of migration, although the company will build 480 homes for migrants from the Bavarian village, there is only one family that stays. This is because most villagers lacking confidence in the quality and durability of the house due to the storm caused the roof to collapse.

In conclusion, transparency and other elements of good governance cannot be found in the Dawei Project. There are many challenges involved in the project, such as human rights, environmental issues. Especially, the process of government management shows the lack of transparency to deal with those problems. Therefore, it can be estimated that the Dawei Project will not be successful if the Myanmar government cannot solve the issues within the project.

# CHAPTER 5

# DISCUSSION, CONCLUSION, AND RECOMMENDATION

## 5.1 Discussion

In Myanmar's SEZs, especially in the Dawei Project, the development and operation faces human rights abuses. Laws, Policies, and practices related to the project have to concentrate on good governance practices. Hence, there are some recommendations to the sectors that have the important role for making the Dawei Project successful.

Recommendation for the legislation is that the legislator have to guarantee that people will have the protection of ownership if they are immigrated and bring the law of land acquisition to the international standards. Moreover, the administration has to provide for the compensations and remedies effectively.

Recommendation for the SEZ Central Body is that the SEZ Central Body have to constantly investigate the working of Dawei SEZ Management Committee to behave lawfully, especially the compensation, human rights and environmental issues. In addition, the SEZ Central Body has to determine the qualification of the representatives in the SEZ law.

Recommendation for Dawei SEZ Management Committee is that the Dawei SEZ Management Committee has to set up the productive mechanism for opening of stakeholders' participation to make the decision-making in every issue that involves the rights of them.

Recommendation for civil society is that the civil society should observe and evidence the SEZ developments and view to ensure that the governance bodies practice in the

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[152] "Dawei Project: Its Development and Impacts and People's Struggles." Themekongbutterfly.com. December 15, 2017. Accessed May 15, 2018. https://themekongbutterfly.com/2017/12/15/dawei-project-its-development-and-impacts-and-peoples-struggles/.

way of international standards and laws, support INGOs and NGOs to reinforce the effective work on Dawei SEZ.

### 5.2 Conclusion

The constitution 2008 had the meaning in terms of the old power from military faction's power bases. Political corruption is highly rooted in Myanmar. Myanmar has an abundance of lobby groups to corrupt in the mega project. It shows that the Myanmar government does not have transparency and accountability. Political reform could not be as effective as expectable. Dawei Project was established during the transition of Myanmar politics and it delays from the original timeline. One of the problems is Myanmar government transparency that interrupts the success of Dawei Project. Moreover, the human rights and environmental issues in the area of project construction are the significant challenges that Myanmar government has to solve for gaining the confidence of international investors and reducing the problem with the local people. Thus, the Myanmar government has to cooperate with stakeholders to make the decisions together.

### 5.3 Recommendation

This research has shown the problem within Dawei Project and Myanmar's Special Economic Zone laws, but was not specific in the domestic laws due to the limitation of time. It made the analysis focus on overall issues more than specific issues. The further research could be more investigated in the domestic laws to find the other issues and more updated.

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# Towards an Empirical Understanding of Ethical Consumption in Southeast Asia

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## Abstract

Throughout 2014 and 2015 the *Guardian* ran a series of articles and videos under the headlines 'Supermarket Slave Trail' and 'Slavery in Thai fishing industry', sparking consumer boycotts and demonstrations principally in Europe and North America. Consumer networks rallied governments and companies to demand an overhaul of the Thai Seafood Sector compelling commitments to reform, the effectiveness of which remains unclear. Viewing ethical consumption – or values-driven purchasing - through these series of events raises a range of pertinent questions about ethical consumption in general. Why did consumers decide to target this issue at that moment over any number of other injustices? How did consumers decide where to channel their discontent? Do these kinds of consumer backlashes tackle the root cause of the problem and lead to sustainable improvements for target beneficiaries? These meta-questions certainly deserve attention. But the Thai Seafood case lends itself to even more fundamental questions about ethical consumption in Southeast Asia. These are questions of crucial importance in terms of business and human rights in Southeast Asia as both states and business entities are staked to the economy (and ultimately the consumer). While many people connect ethical consumerism to Western countries, the existence of Halal, Kosher, and Vegetarian food offerings represent a long-held consumer behavior tied to ethical consideration across many cultures. Consumers in such instances are going beyond price, quality, and material concerns making purchasing decisions based on values – social, environmental, and moral concerns. This paper is a search for apt questions and methodologies. Based on a series of semi-structured interviews with eight key informants around the region it became clear that there is no consensus and a limited empirical basis for understanding the potential role of consumers in the region. The study here concludes that we need more than theory – there is a great need for an empirical understanding of ethical consumption in Southeast Asia. Further, our contention is that we need to understand how consumers fit into the business ecosystem. Focusing on any one level, stakeholder, or dynamic leaves far too many variables and viewpoints unaccounted for. Alternatively, an ecological approach attempts to account for the collective interactions between personality, culture, capabilities, community, institutions, legislation, legitimacy, markets, the media, civil society, regional bodies, and international bodies.

## Introduction: Ethical Consumerism as a Catalyst for Human Rights in Business

Throughout 2014 and 2015 the *Guardian* ran a series of articles and videos under the headlines 'Supermarket Slave Trade' and 'Slavery in Thai fishing industry', sparking consumer boycotts and demonstrations principally in Europe and North America. Consumer networks rallied governments and companies to demand an overhaul of the Thai Seafood Sector. The threat of sanctions, yellow and red-cards, and the withdrawal of contracts compelled commitments to reform, the effectiveness of which remains unclear. Viewing

ethical consumption – or values-driven purchasing - through these series of events raises a range of pertinent questions about ethical consumption in general. Why did consumers decide to target this issue at that moment over any number of other injustices? How did consumers decide where to channel their discontent? Do these kinds of consumer backlashes actually tackle the root cause of the problem and lead to sustainable improvements for target beneficiaries? These meta-questions certainly deserve attention. But the Thai Seafood case lends itself to even more fundamental questions about ethical consumption in Southeast Asia.

Media outlets effectively captured a scene of consumers in Europe and North America who were outraged and unwilling to tolerate or contribute to the injustices underway in the Thai Seafood Sector. Did they overlook the response of consumers in Thailand and Southeast Asia more broadly? Was the regional movement somehow less familiar or recognizable? Is ethical consumerism even 'a thing' in Southeast Asia? If so, what is unique about ethical consumption in Southeast Asia? Or were consumers in Southeast Asia less willing or able to mount a movement against these kinds of injustices in the region? Perhaps there is limited awareness or means that prevent consumers from mounting a response. Perhaps ethical consumption has yet to gain momentum in Southeast Asia. Or is there something more fundamental at play around the intersection of authoritarianism, capitalism and cultural violence?

**Methodology**

As this article is meant to serve as a starting point for a collaborative series of precise, empirical research aimed to influence strategy and action, the study was designed as a qualitative study using a simplified version of Bengtsson's (2016) work as a starting point. The study team took an informal approach and conducted online interviews with experts in the region. Eight people were contacted via email with a standard series of questions regarding ethical consumerism in Southeast Asia. The key informants provided responses representing Indonesia, Singapore, Thailand, Vietnam, and in the case of Véronique Salze-Lozac'h a wider angle on Southeast Asia. For a complete list of those who contributed to this process, please see the acknowledgements

These are questions of crucial importance to business and human rights in Southeast Asia as both states and business entities are staked to the economy (and ultimately the consumer), to one degree or another. Consumers have power in regard to sales. While many people connect ethical consumerism to Western countries, the existence of Halal, Kosher, and Vegetarian food offerings represent a long-held consumer behavior tied to ethical consideration across many cultures.[153] Why are companies in Australia producing Halal products? Because a lot of people buy them and a lot of people *won't* buy non-Halal. Consumers in this instance are going beyond price, quality, and material concerns making purchasing decisions based on values – social, environmental, and moral concerns.

This paper is a search for apt questions and methodologies. Based on a series of semi-structured interviews with eight key informants around the region, as well as a literature review, it is clear that there is no consensus and a limited empirical basis[154] for understanding the potential role of consumers in the region. Is ethical consumption a silver bullet? Is it a myth? The study here concludes that we need more than theory – there is a great need for an

[153] Described by Respondent 6 (R.6)

[154] By empirical, we mean *verifiable* observations or experiences using the scientific method, rather than solely on theory. How do consumers *actually* behave when confronted with these ethical dilemmas (cost vs. rights).

empirical understanding of ethical consumption in Southeast Asian. Further, *our contention is that we need to understand how consumers fit into the business ecosystem.* Focusing on any one level, stakeholder, or dynamic leaves far too many variables and viewpoints unaccounted for. For instance, one could point to the Protect, Respect, Remedy framework and position the state as the key unit to catalyze ethical consumption, but this assumes a certain legitimacy and authority in markets and consumption that may be illusionary in Southeast Asia. Alternatively, an ecological approach attempts to account for the collective interactions between personality, culture, capabilities, community, institutions, legislation, legitimacy, markets, the media, civil society, regional bodies, and international bodies.

The following sections summarize our approach and initial findings based on these interviews and literature review. We then present a proposed research agenda to fill the empirical gaps in knowledge, based on ecological systems theory, needed to build a strategy that incorporates ethical consumerism into the reality of state and business practices and responsibilities, hence identifying key questions for future research. This paper is meant to be a catalyst for collaborative conversation and research to understand if and how ethical consumerism has a role in the business-state ecosystem realities in ASEAN.

**Ethical Consumerism: An ecological view**

Respondent 4 (R.4) provides a useful working frame of ethical consumerism:

> *Depending on the 'ethic' of the buyer, ethical consumption is the act of buying a product or service that is environmentally friendly, that is free of animal cruelty, respectful of human rights (no child labor, good labor conditions in the production and distribution line, etc.) and with a fair retribution of all actors in the value chain.*

Ethical consumerism may manifest at the level of the individual consumer, but one can see in R.4's quote an entire ecosystem in motion. Bronfenbrenner's social ecological model offers perhaps the most practicable view to illustrate this (see Figure 1). One can begin by looking at the individual. Pending that they have the awareness and means, which is a premise to investigate rather than presume, each individual has the power to choose what they consume and can thus directly impact sales if there is diversity in the marketplace and an adequate level of information. In a sense, there are ethics involved in every transaction. Even when consumers do not intend to 'be ethical' they have an impact on peoples' lives and the environment. One of the core questions at the individual level is who or what determines the legitimacy of a certain ethic. Is 'ethical' consumption in the eye of the beholder? At a purely individual level, this may be the case. But other forces in the ecosystem provide varying measures of what constitutes an ethical act.

Moving out from the individual, the focus moves to the microsystem. These are the people and institutions that most directly influence a person. At this level, one can begin to explore how household dynamics and belief systems may impact ethical consumption. The mesosystem focuses more on community influences than the individual or immediate influences. At the mesosystem, one can see ethical consumption as something that is at least partially the product of local customs, cultures, identities, and signaling.

In the microsystem and mesosystem, the individual is an active agent with direct influence over that particular ecological level. When moving to the ecosystem, the individual is in more of a passive position. For ethical consumption, one could interpret the exosystem as the market. How available are ethically made goods and resources? After all, as a key informant captures below, save for a blanket boycott scenario like vegetarianism, ethical consumption requires ethical production. In this sense, ethical consumption can be seen as a phenomenon that occurs through rather than to markets. Put another way, ethical consumerism can be seen as inextricably linked to ethical business practices.

The market could also be seen as part macrosystem, which refers to the institutional and power architecture that overlays an ecosystem. Markets may respond to consumers, but states legislate what is ethical and acceptable in societies as a whole. Whether this reflects reality or not is another question. Indeed, one hypothesis could be that ethical consumption rarely has a human rights orientation in Southeast Asia because governments in the region do not offer an enabling environment. Nonetheless, viewing ethical consumption as part of macrosystems, the focus goes to laws, regulations, narratives of history and collective identity, and systemic structural and cultural violence. Here, ethical consumption could be seen as something that taps into a defined or relatively defined system of ethics. Finally, the chronosystem refers to patterns or events that may shift the entire environment. A new set of global norms or a new trend may transform the way in which individuals and collectives understand and practice ethical consumption. Thinking in terms of chronosystem, it is possible to see ethical consumption as fluid, something that is constantly redefined as circumstances change.

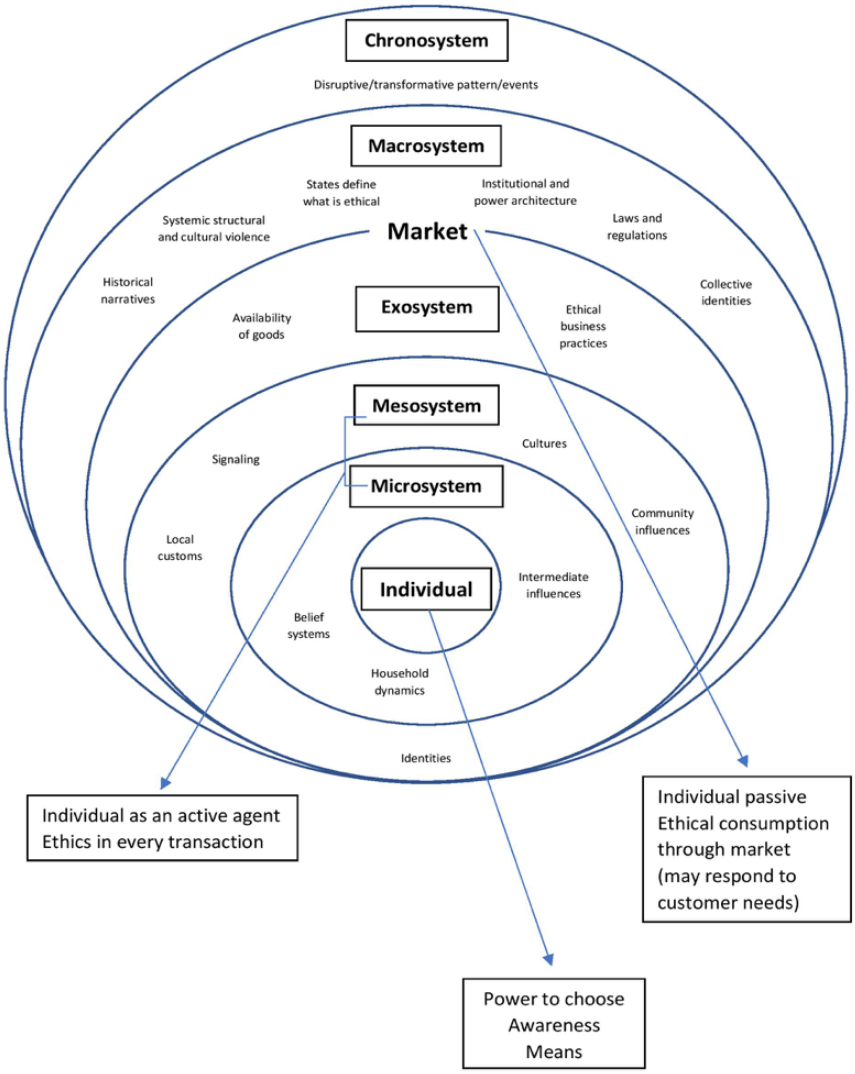


**Figure 1.** Applying Bronfenbrenner's ecological systems theory to ethical consumption in Southeast

An ecological view of ethical consumerism provides a useful way of mapping the phenomenon that is ethical consumption. However, there remains ambiguity as to whether it is possible to demarcate what makes consumption ethical. One could argue that ethical consumption is endlessly individual and subjective. However, if we consider an ecological framework, we can see many regulatory and normative structures that inform or qualify consumption as ethical or otherwise. A good example of this is the UN Guiding Principles on Business and Human Rights, which provide one definitive framework against which to measure.

## The Literature on Ethical Consumption

The UN's Sustainable Development Goals (SDGs) are a universal call to action to guide the fast-paced change of the world onto a more prosperous and sustainable path. Along this path, international frameworks mostly focus their attention on the duties and responsibilities of states and businesses, as we describe above. However, SDG 12 on responsible consumption and protection touches upon ethical consumerism, broadening the focus to include the

individual and acknowledging the agenda-setting potential of consumers through ethical consumption. The SDGs demarcate ethical consumption as a worthy pursuit with mainstream potential.

Searching for a historical understanding of ethical consumption, one sees an act or practice that has contributed in one way or another to notable shifts. Consumers took a stand against slavery through the purchase anti-slavery sugar and other products. The 'White Label' movement took shape in protest to sweatshops. Gandhi led a boycott under the tag of 'buy Indian' to confront British imperialism and colonialism more broadly. More recently, consumers have taken stands against predatory multi-nationals, free-trade agreements, blood-diamonds, environmental harm, human trafficking and exploitation in a general sense. For instance, in 2003 Thai consumers boycotted Nestlé for making genetically modified products (Racela, 2012). Whether taking a stand for 'fair-trade,' 'responsible business,' or another imperative or against harmful, predatory production, ethical consumption "…is a convenient catch-all for a range of tendencies within contemporary consumer culture today" (Lewis and Potter, 2013: 4). While ethical consumption is generally a discourse that evokes altruism, it is not without cynics and critical questions.

In a chapter entitled, *What's wrong with ethical consumption?*' Jo Littler (2011) offers a useful summation of popular cynical views of ethical consumption:

> …ethical consumption is ultimately ineffective because it is merely used by a minority as a panacea for middle-class guilt; that it is an individualistic form of politics, a means through which neoliberal governments encourage consumers to become 'responsibilised' amidst the atrophying of wider social safety nets; that it is produced primarily through the whitewashing and profit-seeking actions of corporations, and as such can have little radical purchase; and that it is, in itself, a fractured field of often dissociated and contradictory practices, or simply too large a category to be meaningful.

Such critiques are formidable and deserve reflection. The scope of this article does not allow for engagement with the range of rebuttals to ethical consumption. Suffice it to say that a study of ethical consumption in Southeast Asia should account for both support and cynicism towards ethical consumption.

Moving away from history and politics and considering consumer attitudes and purchasing behavior: Does ethical consumption work? Academics agree that there is a link between a company's ethics and consumer behavior with ample evidence showing how either favorable or unfavorable impressions of a company impact people's attitudes around the company's products (Brunk, 2017). According to Brunk, there is mixed evidence regarding whether these perceptions translate into consumer purchasing behaviors with some studies showing a connection and others not. In particular, research suggests differences between consumers' intentions to consume ethically, and their actual purchasing behavior – an "attitude-behavior gap" (Bray, Johns, Kilburn 2010; Irwin 2015; Eckhard, Belk, Devinney 2010). In addition, while survey results propose that a large group of people are interested in ethical consumption, the marketplace for ethical consumerism is limited to a niche group (Eckhard, Belk, Devinney 2010). As these studies suggest, it is critical to pursue empirical data-points

to better understand when and why rhetoric translates to practice and what effect that action may have.

**Ethical Consumption in Southeast Asia: Knowns and Unknowns**

In the Southeast Asian context, literature paints a patchy, somewhat contradictory picture of the state of ethical consumerism in the region. On one hand, several surveys suggest a healthy amount of ethical consumerism in the region. In a Nielsen survey of 30,000 consumers in 60 countries, Southeast Asian consumers were the most willing to pay more for sustainable products compared to all other regions. Within the Southeast Asian region, 80% of consumers said they "preferred to buy from companies who are committed towards creating a positive social and environmental impact," compared to Asia Pacific (76%), Middle East/Africa (75%) and Latin America (71%), Europe (51%), and North America (44%) (Nielsen, 2015).

On the other hand, state-level research describes a more moderate interest in the space. For instance, R.3 mentions a study by the NTUC Fairprice Co-operative in Singapore having conducted a customer survey that found that while they were in favour of organic and ethically produced products, customers were not prepared to pay more for them. Reflecting further on our discussion above regarding the varying opinion of what is "ethical," one survey looking across countries found that in Indonesia, creating jobs and supporting the economy was the most important thing a company can do to be seen as socially responsible (Guibeleguiet, 2014).

Another reality touched on by Panya and Sirisai (2003) is the diversity in consumer attitude and behavior both regionally and socio-economically within states. The authors suggest that the general public in Thailand "lack a sense of personal efficacy and responsibility feeling that environmental action is outside the individuals' responsibility and that it belongs to the urban-based elite and environmentalist experts." Arttachariya (2012) seems to build on this sentiment exploring in-depth the positive relationship between "green attitudes" and green consumer behavior among Bangkok graduate students.

Several authors examined ethical consumerism within cultural and religious contexts including an exploratory study of moral philosophy, materialism and consumer ethics in Indonesia (Lu and Lu, 2010) and an ethnographic study of the impact of Buddhism on consumer attitudes (Srisaracam, 2015). Additionally, Abdulrazak and Quoquab (2018) explored consumers' motivations for sustainable consumption finding that within the Southeast Asian region, sustainable consumption has particular strong links to communal practices.

"The Unknowns" are vast, and one can argue that "we don't know what we don't know." Thus, a narrow window of the unknowns includes a limited understanding around ethical consumption in regard to non-environmental issues – such as labor. Interviewees described an ethical consumption as involving labor practices, human rights, health and safety, fair price, animal welfare, as well as environmental sustainability. Overall, most literature examines the topic in the light of green consumption and blurs the notion of "buying organic" with

environmental sustainability.[155] This leaves researchers and practitioners with many questions about what issues gain prominence from ethical consumers and why.

**Initial Findings: Contrasting Views on Ethical Consumption in the Region**

An analysis of the key informant interviews shed light on the contrasting views on ethical consumption in the region. These insights are highly valuable insofar as they provide a starting point to fill the gaps in our understanding. Importantly, throughout the interviews, aspects of various ecological systems emerged as touchpoints for a deeper understanding of the landscape of business and human rights. Themes that emerged center around the presence of ethical consumption in Southeast Asia, a possible regional uniqueness of the concept, the identification of key drivers and possible factors serving as catalysts to advancing the concept, and overall perceived (real?) challenges around ethical consumption. Through these themes two common issues became apparent. First, the key informants occasionally held very contrasting views on ethical consumption. Second, there was limited use of empirical data points regarding the themes. These two findings inform our contention that a research agenda for ethical consumption in the region should utilize an ecological systems framework and pursue a deeper empirical basis. This section will also build on the initial findings and identify key questions for further research.

**1. Is Ethical Consumption a Thing in the Region?**

A fundamental question for the overall research agenda is whether ethical consumption is 'a thing' in Southeast Asia. Key informants provided differing vantage points spanning from the perception that ethical consumption has not yet arrived in the region to the idea that more traditional forms of ethical consumption are practiced by particular societal groups.

R.3 asserts that the awareness around ethical consumption would not be very high and that "the main reason why this has not taken root in [Southeast Asia] is because of 'growth and profits at all cost' mentality… a mentality that would be supported by governments that also follow the mindset of 'GDP growth at all cost.'" Similarly, R.2 notes that "ethical consumption is a thing in SEA [Southeast Asia]." He nevertheless acknowledges that "certain people in the middle class […] have awareness of human rights and [the] environment." The importance of the middle class for ethical consumption is also pointed out by R.4 who finds that "in Southeast Asia, ethical consumption may be expanding among the new generations, with a growing purchasing power, however, it remains marginal." While, regardless of their different conceptions of ethical consumption, most key informants seemed to mutually agree

[155] Much of the rationale described around "organic" is around eating healthy, which is tangential to the social and environmental value-driven nature of "ethical consumption." That said, if "organic" goods actually are produced in an environmentally sustainable way (which is not always true), then the blurred line may be beneficial.

that ethical consumption remains a marginal phenomenon;[156] R.6 adds an interesting angle on regional forms of ethical consumption:

> [The] concept [ethical consumption] is not too alien for Southeast Asian people. At least for Muslims. Halal labelling has been going on for ages. This being the case, the idea that people may want to know what it is they are consuming (on ethical as well as physical grounds) is quite common.

Such notion is supported by R.2 who suggests that indigenous groups "might be more incline[d] to ethical consumption as part of their way of life, however they may not call them ethical consumption." All of this lends to the take-away that to understand ethical consumption in the region one has to look at the traditions, attitudes, beliefs, and institutions that shape it.

**2. Who or what are the key drivers?**

Taking the ecological approach, as well as the discussion of ethical consumption in Southeast Asia and its regional particularities into account, it has become clear that we cannot focus on a singular actor in our analysis of the phenomenon. Whereas a focus on, for example, the state as the unit of analysis could provide valuable insights into the current interest of states[157], such singular focus would fall short in terms of a holistic analysis of the overall ecological system regarding ethical consumption as it relates to business and human rights and the interplay of its key drivers. As this paper seeks to initiate conversation around a research agenda that deals with the phenomenon holistically, key informants were asked to discuss these key drivers. There are again no clear empirical data points presented and while there seemed to be a consensus for the role of the young middle class, key informants were divided over which stakeholder is to be considered as key driver.

R.8 finds the key driver of ethical consumption within the ecosystem. S/he looks on ethical business practices with a focus on labor rights: "Good labor practices of the producer are the most important agenda [item] that businesses MUST have." For R.8, the key driver of the business and human rights agenda, including ethical consumption, should be the businesses. As has already been mentioned, one can perceive ethical consumption to be happening through the market rather than to the market and as businesses are an essential part of the market, they are in the driver seat for providing the conditions to advance human rights through facilitating ethical consumption.

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[156] R.7: "Ethical consumption is rarely found in most countries in ASEAN."
R.1: "Ethical consumption is not yet a thing. Major Consumers are yet to be concerned about ethical consumption […]."
R.8: "I think most Thais are not really concerned with ethical consumption."

[157] Such as Thailand and Vietnam in the model of Social Enterprises or Thailand's move towards a national action plan on business and human rights.

Informed consumers in turn are also key drivers that influence how businesses behave. R.3 points out that some international standards[158] "were driven by consumer demand for ethical production." R.1 also identifies the consumer as an important actor: "It is true that ethical consumption should come from consumers first to demand for change at the production side."

R.3, R.4, and R.7 offered interesting perspectives on different tools as key drivers that might contribute to an increase in ethical consumption – regional stock exchanges and social media. R.3 holds that "stock exchanges are influencing listed companies to have non-financial disclosures." Such non-financial disclosures of corporate social responsibility, sustainability and business and human rights efforts, which are mandatory under some national stock exchanges, are becoming increasingly common among Southeast Asian listed companies. Although such practices are bridging the exo- and macrosystems by providing institutional, as well as ethical business frameworks, those practices alone will not suffice to mainstream ethical consumption in the region due to an apparent attitude-behavior gap. At the same time R.4 points out that "social media is a very powerful means of communication on products […]." It is hard to single out one key driver of ethical consumption; rather, one must look at the interplay of different systems in order to facilitate a holistic analysis of the phenomenon.

**3. Is there something unique about ethical consumption in SEA?**

The key informant interviews did not only bring forward a wide array of perceptions on the presence of ethical consumption, but also shed light on some supposedly unique features of ethical consumption in the region. Again, it seems that there are limited empirical data points and different informants defined uniqueness in such singularities that it is hard to say whether ethical consumption in Southeast Asia must be conceptualized differently from other world regions.

What seems a unique perspective on ethical consumption, not in a way that it doesn't happen in for example Europe or the United States as well, is the idea of consuming organically produced food. This notion has been brought forward by key informant R.3, who recalled the above-mentioned study by NTUC Fairprice Co-operative and pointed out that consumers "were in favour of organic and ethically produced products." This was also supported by R.1, who notes that:

> change in organic agriculture, in reducing plastic use, in recycling habit etc. [and in] some other movements [such as] fair trade (agriculture), fair wear (in garment and textile) [has] been raised into action because [it] is more obvious for consumers to know how these products are produced in SEA and they can put pressure on MNCs [multinational corporations] or TNCs [transnational corporations] over their supply chain.

Again, what we find here are various ecological systems at play. On the exo-level we find goods that are produced on the global market by ethical (organic or good labor practices)

[158] Such as the ISO 20400 Standard for Sustainable Procurement and other sectoral standards

made available for purchase to the individual, which is being influenced not only by intermediate contacts such as family and friends through the microsystem, but also subject to local customs and wider community influences that are conveyed by the mesosystem. But possibly more prevalent in Southeast Asia than to other regions is the so-called "attitude-behavior gap" that has been briefly mentioned before. For instance, R.3 stressed the conclusion of the NTUC Fairprice Co-operative survey that customers "were not prepared to pay more for them [organically produced goods]" and adds that "the mood is still for cheap products regardless of how they are produced." It is a possibility that although Southeast Asian customers principally are in favor of ethical consumption, as found in the Neilson survey described above, behavior does not appear to match such ethical concerns (although we are lacking empirical purchasing data needed to fully make this claim).

Another interesting feature of ethical consumption in Southeast Asia described by the key informants is the lack of governments, businesses, and individuals alike to push for an increase in ethical production/consumption. Many of the informants contest a regional focus on economic capital and development through economic growth.[159] However, R.7 finds, at least for the cases of Thailand and Vietnam, the business model of Social Enterprises as being related to ethical consumption and actively promoted by the state. "In terms of [ethical] business practices, Social Enterprises (SE) which hold two missions: 1) Social; and 2) Economic, are proposed." He argues that "laws that will facilitate the growth of SE have been drafted in many countries in ASEAN, for example, Thailand and Vietnam." Hence one might find some form of uniqueness in such a model, which, if R.7's assumption would prove to be true, it would underscore our ecological argument that ethical consumption happens through rather than to the market. The individual's awareness on issues related to ethical consumption and its means (read for example: purchasing power) depend heavily on the micro- and mesosystems (e.g. family, community, culture) and, as has been pointed out above, the apparent attitude-behavior gap among individual customers does not set a favorable frame for the overall success of Social Enterprise to spark a change that could ultimately affect the chronosystem and create disruptive change of business practices, government behavior and individual consumption patterns.

**4. What conditions are necessary to catalyze ethical consumption in Southeast Asia?**

The ecological systems approach provides us with different levels to approach such questions and the key informants were speaking to it offering differing perspectives and many possibilities. R.2 argues in favor of a both a stronger state and the promotion of traditional lifestyles of Southeast Asian peoples. Although "the role of state should be as a regulator for the business and consumers' ', S/he does not have high hope that the state could be an agent of change. Complementing this sentiment, he suggests shifting attention away from the

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[159] R.7: "Following western countries as an example, most ASEAN countries are largely dominated by Economic capital. I call it economic capital because the growth of the country is measured by GDP."
R.1: "Market is still driving consumption behavior, which is more on convenience, price than ethical sense."
R.2: "The lack awareness from the government on the ethical consumption, because most of the government in SEA more concern on the development and poverty reduction, jobs etc."

macrosystem and its institutional and power architecture, towards traditional lifestyles, local customs and institutions of the meso- and microsystems. Such shift from a sphere in which the individual is passive (the state level) towards a realm in which the individual acts as an active agent (local communities, daily life, the workplace), is remarkable in so far, as it mirrors the current move towards stakeholder engagement in human rights due diligence processes.

This shift seems to be grounded in the disconnect between the market and the wider society. R.7 deciphers this disconnect and provides an ecological-focused explanation of the phenomenon described by their colleague.

> Though societies are market driven, however, in reality, societies are not existing by materials alone but are also socially driven […] a consumerist model that is ethical and sustainable is possible. To develop this model, you have to think about social and economic (SO+EC) [sides of things].

For R.8, this first step of bringing the social and economic together, and thus bearing the possibility of crafting a new macro- or even chronosystem, is making sure that workers' rights are protected: "Once the workers have good working conditions, they could produce good products and then the company could take care of things outside the company."

R.3 suggests that "education, awareness building is needed to drive ethical consumption." An increased level of information on business practices of big business on parts of both the consumer and the state seems to be mandatory, as R.1 finds that:

> Big companies have more space and market monopoly even over the governments. It's difficult to monitor what these big companies produce and how they operate. Therefore, consumers [have] hardly access to or demand ethical business from these big players.

The point made here has serious implications for the ecological system of ethical consumption. The market as part of the meso- and exosystem does not only have an impact on the individual, but also on the macrosystem level of the state. It is exactly this train of thought that leads us to argue that ethical consumption does not happen to but through the market. In order to drive ethical consumption, education and awareness building must focus on different ecological systems of ethical consumption. R.8 uses the example of labor rights to stress the negative consequence of the cultural view that "we" are not included as "laborers," and thus we don't connect with the issue of human rights.

> I could say that here in Thailand people do not know their basic rights, the examples, of trade union rights here in Thailand […], office workers, engineers, teachers, nurses, or other professionals, they don't recognize themselves as laborers (labor in their views are people who use their energy to work; construction workers, drivers, etc.). That's because their educational background [has] shaped their attitude to be like that.

Given the variety of necessary conditions to catalyze ethical consumption offered by the key informants, we find these to be another strong case in favor of the ecological systems approach to ethical consumption as a tool for protecting human rights in the realm of business.

## 5. Challenges abound

Having already identified certain key drivers, we will shift our focus towards some challenges in ethical consumption. The key informants pointed out four main themes – the state as a regulator, the relationship of basic needs and purchasing power, a lack of information, and diversities in worldviews around ethical behavior.

Since Thomas Hobbes' *Leviathan,* it goes without question that the state has a responsibility to its citizens. In terms of ethical consumption, however, there is no clear set of rules as to what a state must guarantee. In this context, R.3 argues that:

> Ethical production for ethical consumption works for the benefit of citizens. [The] state has an important role to play in creating the operating environment for businesses with good laws that are well enforced. Also, a culture of integrity under the rule of law will make a big difference.

Although the state has an important role to play in terms of the rule of law, R.3's colleagues do not find states in Southeast Asia to be in the driver's seat of ethical consumption.[160] This is highly problematic, as the state, being part of the macrosystem, provides the institutional framework and power architecture in which all the other systems operate. When states fail to pick up signals sent to them by other systems and actors, be it the market, CSOs, or individuals, it can lead to missed opportunities for growth and can create a warped direction of progress.

Another challenge presented by several of the key informants are the different levels of purchasing power and a perceived prioritization of cheap products among Southeast Asians. According to R.2, "ethical consumption has not taken shape in SEA because most people, especially urban society, [have] more concern for their basic needs." R.3 takes this one step further: "The mood is still for cheap products regardless of how they are produced. This mindset has to change and will only change if it is shown to affect the consumer as an employee." This challenge, too, touches upon various of the ecological systems. On the individual level the economic means to opt for ethically produced goods need to be matched with an awareness on the issue.

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[160] R.5: It [ethical consumption] is a really new concept and the Thai government […] is not doing anything to promote it. In fact, the government might not even know anything about it.
R.1: [The] state has little role [to play] in business control with regards to human rights. Some stronger concerns are on the environment but not very explicit on human rights.

Coming back to the need for awareness around ethical consumption on the individual level, a third challenge is access to information. R.4 impressively highlights the many dimensions of this crucial aspect:

> The challenges are the level of information of consumers, the transparency of the value chain, the capacity of consumers to access and understand true, verifiable and verified, reliable information. Another challenge is when the product is not clearly identified (by its label or brand) and where there is no "traceability" to ensure that the product is ethical. Control is another challenge, that varies from one sector to another, from one country to another. Clear, transparent, reliable information and accountability and control on the other side are key to ethical consumption.

R.1 goes on to note that:

> *The challenges are: (i) …not all consumers are at the same awareness on their consumption behavior for sustainability of production so they prefer to pay less or buy cheap products; (ii) the consumers [have a] lack of monitoring information on the field… (iii) big players often …rely on CSR, not on consumers' ethical wish.*

Possibly of highest importance is the aspect of diversities in worldviews around ethical behavior and consumption, as R.4 continues to argue,

> *[The] boundaries [of ethical consumption] are the boundaries of the buyer and what he/she considers as ethical. It can also be the boundaries of what is considered as socially acceptable that may differ from one society to another and within various group of a society, depending on their beliefs, convictions, commitments.*

R.4's argument confronts us with important questions – can ethical consumption be used against what we, as a field, consider human rights? We can find a huge diversity of worldviews on the individual level, which is, through household dynamics, belief systems and local customs, at an interplay with the micro- and mesosystems. On the levels of the exo- and macrosystems, worldviews in forms of legislation and international frameworks are at play that in turn influence the levels in which the individual acts as an active agent. To drive ethical consumption forward It is necessary to approach these challenges at all levels. Given the limited empirical data points on ethical consumption in Southeast Asia, research that spans the different systems is necessary. In the following we will therefore suggest a preliminary research agenda.

**Conclusion: Where Should Researchers Focus?**

> *"Bringing ethics into consumerism; i.e. the identification of issues behind the product is something which can take hold. It's just how it is put forward and 'sold'." – R.6*

Considering the above preliminary findings, it is clear that there is a need for further empirical evidence to understand how consumers fit within the business ecosystem as a mechanism for advancing human rights in Southeast Asia. It is not necessary for ethical

consumerism as a strategy in the region to follow the path of the West. Rather, through a mix of empirical research that tests locally-relevant hypotheses and strategies within the reality of the ecosystems of the regions, a unique approach may arise to facilitate and support ethical consumption, ultimately advancing human rights. Based on our initial findings via the literature review and key informant interviews, several important questions come to the surface.

Microsystem

- What "ethics" do people care about? What are the "big problems" people are concerned about? How does this impact behavior? (i.e. will they pay more for an item? Will they buy more of an item? Will they shop more often or longer? Will they buy more types of products from the same company? Will they recommend friends and family? What other actions?)
- How does key groups' definition of "ethics" and "big problems" differ? i.e. middle class, millennials, government.
- Which of the above behaviors are influential to business decision-makers in light of human rights practices? (i.e. if consumers are not willing to pay more, but are willing to shop more often, buy other products, and recommend the company to friends, is that persuasive in order to revise business practices in regards to labor rights?

Mesosystem

- What aspects of culture and values are beneficial in developing ethical consumerism in the region? (i.e. religion, connection to family and community)
- How can social media play a role in ethical consumerism in the region?
- What are the mechanisms for ethical consumerism to interact with civil society activism?
- How do people learn about whether a business has ethical practices?
- How can we secure a standard on information about production? Do we have it with the UNGPs and related reporting frameworks? If so, how can we mainstream knowledge around the UNGPs among consumers in order to make them push for implementation?

Exosystem and Macrosystem

- What is the governments' awareness of ethical consumerism as a mechanism for advancing human rights in the business ecosystem?
- Where, within the realities of each government's framework and functioning, can ethical consumerism benefit the overall goal for growth and development? What are the leverage points?
- What role can governments play to increase incentives to consume ethically, especially in the middle class?
- Is there something like an information gap on business behavior in terms of ethical production between businesses and consumers? If so, how do we close this gap?
- Given the focus on information and trackability, what are innovative means of mainstreaming ethical consumerism through automation/digitization/IoT/new technology, such as the Blue Number Initiative?

- How can consumers leverage their purchasing preferences with the government to create a human rights agenda that is responsive to local priorities?

"You cannot have ethical consumerism without ethical production", as R.3 puts it. S/he further states: "the palm oil and paper products companies went out to show that they are responsible. There was also pressure on banks as they financed these companies and their activities. The government stepped in with standards for 'responsible lending' and for banks to release ESG [Environmental and Social Governance] reports. Pressure works." What motivates ethical consumption in Southeast Asia? What are the impacts and limitations of ethical consumerism in the region? These questions are too big to look at one dimension and too important to guess at.

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# Tourism and Human Rights: A Study towards Indonesia Tourism Regulation

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## Abstract

Tourism is one of the most rapidly growing sectors in Indonesia. As an activity and human relation, tourism has two sides to it. On one side, tourism is related to the basic human right to leisure time and the ability to travel freely, and on the other side tourism has potential to create infringement of human rights. Using a legal document analysis approach, this study tries to expose to what extent human rights principles and protection are regulated by Indonesian tourism regulation. The starting point of this study is the first pillar of the United Nations Guiding Principles on Human Rights and Business (UNGPs), especially the operational principle: general state regulatory and policy function, and the operational principle: ensuring policy coherence. The object of analysis is directed to Law No.10/2009 regarding tourism, followed by an analysis of the Minister of Tourism Regulation No.53/2013 about Hotel Business Standards. By doing this, there will be a basic understanding about how the state protects human rights with its regulations and policies in Indonesia's tourism sector. In the end, this study concluded that the human rights provision in Indonesia tourism sector is minimal despite human rights is already mentioned as one of the tourism guiding principles and articulated in terms of rights and duty of several tourism key stakeholders. Hence, further action is necessary to urge the human rights awareness among tourism stakeholders by taking efforts such as: introducing tourism and human rights guidelines and include the human rights impact assessment as one of the requirements for major tourism business.

Keywords: UNGPs, Indonesia, Tourism, Regulation, Hotel

## Introduction

Nowadays tourism has grown into one of the most important sectors in the world. The World Tourism Organization (UNWTO) recorded that as of 2013 tourism was ranked 4th in export earning worldwide. UNWTO also noted that in 2014 international tourist arrivals had increased by over 1.1 billion and this number is still expected to grow by 3-4 per cent in the future, especially in Asia and the Pacific region (UNWTO, 2014). This trend also occurred in Indonesia with an 8.7 per cent rise in international tourism in 2014, which is expected to reach 20 million tourists by 2019.[161]

Few scholars argue that this so called tourism development is caused by several factors, such as: economic growth (Stabler & Sinclair, 2002), globalization (Higgins-Desbiolles, 2006, Reid, 2003) and the rise of modern transportation and technology (Goeldner & Ritchie, 2009) Besides those factors, one thing that we cannot ignore is the fact that tourism itself is grounded on the fulfillment of two human rights: the right to move freely (mobility) and the

[161]See, Siaran Pers VITO Country Managers Meeting 2014 Peran Penting VITO dalam Meningkatkan Kunjungan Wisman, http://www.parekraf.go.id/asp/detil.asp?c=16&id=2813

right to leisure (free time) (Higgins-Desbiolles, 2006, A.J Veal, 2003). In other words, there is a possibility when these rights are fully guaranteed; there will be a rise in tourism.
However, tourism can endanger human rights, especially when it only supports the rights of the tourist, as the 'customer is king' motto goes. This concern was raised by George & Varghese (2007: 44) who stated: 'The rights of tourists are overstressed and the rights of other significant stakeholders, especially the local community members are under-stressed'. Furthermore, the human rights issue in tourism has been highlighted by Tourism Concern, an NGO based in the UK. In 2009 they launched a groundbreaking report, titled: Putting Tourism to Rights: which challenged human rights abuses in the tourism industry (Eriksson, et al, 2009). While previously in 2004 they had released a report titled: Labor standards, social responsibility and tourism (Beddoe, 2004).
In Indonesian context, apprehension toward human right issues in tourism industry already indicates in Tourism Concern (2009) report regarding land rights violations of land owned by local communities in Lombok, and there are other cases that can be found in several research report such as violation of hotels workers' rights in Bali (Beers, 2013) and issues related with human rights to water rights in Bali and Yogyakarta (Cole, 2014, Watchdoc, 2014). More recently, there are two cases highlighted in national media in relation to violation of land right and tourism development, in this case: the construction of Kulonprogo airport in Yogyakarta and the development of Marosi beach in West Sumba.[162] In the end, all of these concerns warn us about how the government can be less than effective when dealing with the tourism business sector regarding their responsibility towards human rights.
The issues related to business and human rights have already been set forth by the United Nations, directly or indirectly, starting with the Universal Declaration of Human Rights and including the latest standard, the United Nations Guiding Principles on Business and Human Rights (UNGPs).[163] The UNGPs (also known as Ruggie Principles) consist of three pillars, which are: State Duty to Protect (principle 1-10), Business Responsibility to Respect (principle 11-24), and Access to Remedy (principle 25-31).[164]
Although at this stage the UNGPs work as a non-binding instrument (*soft law*), the presence of UNGPs starts a whole range of further discussions and follow ups from various conversations.[165] In the context of the tourism industry there are a few organizations and businesses that have already made efforts and taken initiative based on the UNGPs, such as: Roundtable Human Rights in Tourism (RHRT, 2013), International Tourism Partnership (ITP,

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[162] See for details, http://elsam.or.id/2018/04/tinjau-ulang-pembangunan-kawasan-industri-pariwisata-di-sumba-barat-kapolri-harus-usut-tuntas-peristiwa-penembakan-di-pantai-marosi-sumba-barat/

[163]http://www.ohchr.org/EN/Issues/Business/Pages/InternationalStandards.aspx

[164] United Nation Office of the High Commissioner for Human Right, 2011, Guiding Principles On Human Right and Business. HR/PUB/11/04.

[165] One of the current ongoing proccess is the Global Movement For A Binding Treaty to enhance the international legal framework to protect human rights from corporate abuse. See, http://www.treatymovement.com/statement

2014) and KUONI (2012, 2014, 2015).[166] However, from a state perspective the question that arises is: do tourism regulations and policies in certain state covered human rights principles correspond to the UNGPs?

This study attempts to answer that question in the specific context of the Indonesian tourism sector. It tries to expose to what extent human rights principles are protected by Indonesian tourism regulations and policies in accordance with the UNGPs. The object of analysis in this study refers to Law No.10/2009 about Tourism, and the Minister of Tourism Regulation No. 53/2013 about Hotel Business Standards. As a growing industry and the backbone of the tourism industry hotel business standards have been selected to give examples of how tourism business regulations protect human rights in this particular industry.[167]

In terms of method, this study follows a similar path as a previous study conducted by Mohamad Hussein titled: Human Rights and Business Regulation in the Plantation Sector.[168] Although Hussein did not explicitly state the method of his research, this kind of study could be categorized as a 'black-letter' research because it wants to evaluate legal rules and suggest recommendations for further development of the law (McConville & Chui, 2007, p.4). In other terminology, this study can also be identified using document analysis as a qualitative method by skimming, reading, interpreting, and evaluating certain key documents (Bowen, 2009). In this case the key documents are Law No.10/2009 about Tourism, and the Minister of Tourism Regulation No.53/2013 about Hotel Business Standards. In the end, through this study, there will be a basic understanding about how the state protects human rights with its regulations and policies in Indonesia's tourism sector.

**Figure 1.**
**Study Flow**

**The First Pillar of the UNGPs[169]**

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[166] See, Andreas, Zotz (ed), 2013, *Human Rights in Tourism: An Implementation Guideline for Tour Operators,* Available online at: http://www.menschenrechte-im-tourismus.net/fileadmin/user_upload/Menschenrechte/RT_Human_Right_in_Tourism_ENG_02.pdf; see also, International Tourism Partner, 2014, *Know How Guide: Human Rights & the Hotel Industry,* Available online at: http://www.greenhotelier.org/wp-content/uploads/2015/01/Know-How-Guide-Human-Rights.pdf; see also, KUONI, 2014, *Assessing Human Rights Impacts: India project report*, Available online at: http://www.kuoni.com/download-center/corporate-responsibility/labour-rights/assessing-human-rights-impacts-in-india-2013

[167] The central statistical Bureau of Indonesia recorded that until 2014 there are (total) 17.484 hotel operate all over Indonesia, see, http://www.bps.go.id/Subjek/view/id/16#subjekViewTab3

[168]M.Zaki Hussein, 2014, Human Right and Business Regulation in the Plantation Sector, ELSAM, Jakarta.

**[169]** For detail see, United Nation Office of the High Commissioner for Human Right, 2011, *Guiding Principles On Human Right and Business*, HR/PUB/11/04, Available online at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, p 3-12.

The first pillar of the UNGPs is grounded in the recognition of states' existing obligation to respect, protect and fulfill human rights and fundamental freedoms that apply to all states. There are two foundational principles under this pillar. The first is:
*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.*

While the second foundational principle is:
*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.*

Moreover, under this first pillar there are four operational principles: (1). General state regulatory and policy functions, (2). The State-Business nexus, (3). Supporting business respect for human rights in conflict-affected areas, and (4). Ensuring policy coherence. Because of research limitations, this study only focuses on operational principles (1) and (4).
In the UNGPs article 3 regarding operational principle (1), it states that 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 constrain but enable business respect for human rights;*
*(c). Provide effective guidance to business enterprises on how to respect human rights throughout their operations;*
*(d). Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.*

While regarding operational principle (4), the UNGPs article 8 states that:

*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.*

**Findings and Discussion**

**1. Tourism Law No.10/2009**

In 2009, the Indonesian government published Law No.10/2009 about Tourism. This law intended to change the previous Law about Tourism (Law No.9/1990). Law No.10/2009 regulates several important things such as: rights and duties of communities, tourists, businesses and the government (central and regional). This law also covers comprehensive and sustainable tourism, cross-sector coordination, national tourism destinations and strategic regions, empowerment of small-medium tourism businesses, tourism promotion, tourism

associations, tourism business standardization, and human resource training as well as competency.

Furthermore, in terms of tourism development, Law No.10/2009 focuses on regulating: the tourism industry, tourism destinations, marketing, and tourism organizations, and it also gives a mandate to central, provincial and local governments to form a master plan. In regulating the tourism industry, the law provides for the protection and development of small and medium local businesses. This task is specifically given to the government (Central and Regional) to facilitate certain policies and partnerships.

**Table 1.**
**Table of Content**
**Law No.10/2009 about Tourism**

| Chapter | Content | Article |
|---|---|---|
| Preamble | Considerans and Enactment | - |
| I | General Definition | 1 |
| II | Foundation, Function and Purpose | 2-4 |
| III | Principle of Tourism Operation | 5 |
| IV | Tourism Development | 6-11 |
| V | Strategic Region | 12-13 |
| VI | Tourism Business | 14-17 |
| VII | Rights, Duty and Prohibition | 18-27 |
| VIII | Government Authority | 28-32 |
| IX | Coordination | 33-35 |
| X | Indonesia Tourism Promotion Agency | 36-49 |
| XI | Indonesia Tourism Industry Union | 50-51 |
| XII | Human Resource Training, Standardization, Certification, and Labor | 52-56 |
| XIII | Funding | 57-61 |
| XIV | Administrative Sanctions | 62-63 |
| XV | Penal Provision | 64 |
| XVI | Transitional Provision | 65-66 |
| XVII | Closing Provision | 67-70 |

As the paramount tourism regulation in Indonesia, this law has already positioned human rights protection as a commanding principle to exercise in tourism. In this law, there is an explicit acknowledgement of the freedom to travel freely and the right to leisure activities in the form of tourism, both of which are considered human rights.[170] Among the many principles of tourism, this law also notes one specific principle that ensures all tourism activities must be performed with respect for human rights, cultural diversity and local wisdom.[171] For the goal of tourism itself, this law clearly states that tourism must fulfill the needs of tourists (physically, spiritually, and intellectually) while enhancing state income and recognizing public welfare.[172]

This feature is in fact also aligned with what has already been set as the global tourism norm, the Global Code of Ethics for Tourism.[173] This global code was adopted in 1999 by the General Assembly of the World Tourism Organization. It was acknowledged by the United Nations, and it expressly encouraged UNWTO to promote the effective follow-up of its provisions within two years' time. Similar to the UNGPs, this code is not legally binding; however the Code features a voluntary implementation mechanism through its recognition. This code is directed to governments, the travel industry, communities and tourists alike, while it aims to help maximize the sector's benefits and minimize its potentially negative impact on the environments, cultural heritages and societies across the globe.[174]

Moreover, regarding the rights acknowledgment, this law categorizes rights into four main types, which are; everyone rights, local people rights, tourist rights, and tourism business rights. Meanwhile on the duty side, the law covers State/Government duty, everyone duty, tourist duty, and tourism business duty (see table 2 and 3).

**Table 2.**
**Rights Related Content in**
**Law No.10/2009 about Tourism**

| Rights | Chapter/ Article |
|---|---|
| Freedom to travel and leisure in form of tourism activities | Preamble |
| Human rights as tourism performance principle | III/5 |

[170] Law.No.10/2009, Considerans

[171] *Ibid*, article 5b

[172] *Ibid,* article 3

[173] Global Code of Ethics fo Tourism consist of 10 principles: Article 1: Tourism's contribution to mutual understanding and respect between peoples and societies, Article 2: Tourism as a vehicle for individual and collective fulfilment, Article 3: Tourism, a factor of sustainable development, Article 4: Tourism, a user of the cultural heritage of mankind and contributor to its enhancement, Article 5: Tourism, a beneficial activity for host countries and communities, Article 6: Obligations of stakeholders in tourism development, Article 7: Right to tourism, Article 8: Liberty of tourist movements, Article 9: Rights of the workers and entrepreneurs in the tourism industry, Article 10: Implementation of the principles of the Global Code of Ethics for Tourism.

[174] See, http://ethics.unwto.org/en/content/global-code-ethics-tourism

| | |
|---|---|
| Everyone Rights:<br>Rights to tourism; rights to do tourism business; rights to working the tourism industry and involve in tourism development process | VII/19a |
| Local people rights: privilege to work; to do consignment; and to manage. | VII/19b |
| Tourist Rights: rights to get accurate information; rights to get standardize tourism services; rights to get legal protection and security, rights of health services; privacy rights; rights to get insurance regarding high risk tourism activities, rights to get special services for disable tourist. | VII/20,21 |
| Tourism business rights: equal rights and chances to perform tourism business; rights to form and to become members of tourism association; rights to get legal protection; rights to get facilities according to law. | VII/21 |

**Table 3.**
**Duty Related Content in**
**Law No.10/2009 about Tourism**

| Duty | Chapter/Article |
|---|---|
| State/Government duty: provide tourism information, legal protection and security to tourist; duty to create conducive environment to perform tourism business, as in; equal opportunity, facilitating, and rule of law; maintain, develop, and preserving national tourism assets; supervise and control tourism activities in order to prevent and overcome negative impact from tourism. | VII/23 |
| Duty of everyone: maintain and preserve tourism attraction; support the creation of a conducive environment for tourism. | VII/24 |
| Tourist Duty: maintain and respect local belief, custom, culture and values; preserve the environment; participate in maintaining peace and order; prevent and not committing law violation. | VII/25 |

| | |
|---|---|
| Tourism business duty: maintain and respect local belief, custom, culture and values; give accurate and responsible information, non-discriminative service; to give protection, hospitality, security and safety for tourist; to give insurance on high risk tourism activities; develop partnership with small-medium business and local union; prioritize utilization of local product and working opportunity of local people; enhance worker competency through training and education; actively involved in infrastructure and community development program; prevent and not committing law violation; preserving healthy environment; preserving nature and cultural heritage; protect Indonesian image by doing responsible tourism; and apply regulated business standard and competencies. | VII/26 |

We can see that the Indonesian government has already taken measures to prevent human rights abuses in the tourism sector by enacting Indonesia's tourism law with the clear expectation that the tourism business must respect human rights (see table 3, tourism business duty). This milestone in Indonesian tourism cannot be separated from what has already been accomplished by the Indonesian government in human rights regulation in a broader sense. The state duty to protect human rights was already provided for as stipulated in the national constitution and later in Human Rights Law No.39/1999 as well in Law No.40/2008 regarding the elimination of racial and ethnic discrimination.[175] Thus, Indonesian tourism law, while working as *Lex specialist* for the tourism sector, still has to refer to other *Lex specialist* about human rights.

Meanwhile, in the matter of the state duty to protect, this law emphasizes that it is the duty of governments to supervise and control tourism activities in order to prevent and overcome any negative impact from tourism. This role is laid out separately in more detail in the President's Regulation No. 63/2014 regarding Supervision and Tourism Control.

## 2. Minister of Tourism Regulation No.53/2013 about Hotel Business Standards

The Minister of Tourism Regulation No.53/2013 about Hotel Business Standards is a regulation that aims to guarantee the quality of the products, the services and the management for satisfying tourists; also to give protection for tourists, hotel businessmen, employees and society, specifically with respect to safety, health, comfort, and nature preservation. Overall this regulation is divided into 5 parts: a. hotel business, b. products, services and management aspects, c. hotel standard review, d. supervision and e. administrative (see table 5).

**Table 5.**
**Table of Content**

[175] See, Constitution of the Republic of Indonesia, chapter X.

**Minister of Tourism Regulation No.53/2013**
**About Hotel Business Standards**

| Chapter | Content | Article |
|---|---|---|
| Preamble | Considerans and Enactment | - |
| I | General Definition | 1-3 |
| II | Hotel Business (Classification) | 4 |
| III | Product, Services and Management | 5 |
| IV | Standard Hotel Business Assessment (Ratings) | 6-14 |
| V | Guiding and Supervision | 15-17 |
| VI | Penal Provision | 18 |
| VII | Transitional Provision | 19-20 |
| VIII | Closing Provision | 21-22 |
| Attachment I | Absolute and non-Absolute Criteria for Hotel Business Standard | |
| Attachment II | Standard Hotel Business Ratings Manual | |

In this regulation, there are more guidelines for the standardization of products and hotel services, meaning that there is more of a guarantee that tourists will receive more standardized services. Every hotel in each category has to meet certain absolute and non-absolute standards. Related to human rights protection, in standard management, rules about employees' rights fulfillment, hotel business social responsibilities and the duty to make relations with micro, small and medium businesses can be found (see Table 6).

**Table 6**
**Absolute and Non-Absolute Criteria for Hotel Business Standards**

| **Absolute Criteria for Classified hotel.** | **Product Element** | **Services Element** | **Management Element** |
|---|---|---|---|
| All classified hotel | 15 sub-element | 5 sub-element | 5 sub-element |
| Rights and Duty Relation | Tourist Rights: to deliver certain products.<br><br>Hotel Business Duty: to deliver certain product | Tourist Rights: to get certain services.<br><br>Hotel Business Duty: to deliver certain services | **Workers Right:** Medical checkup program;<br>Collective working agreement as regulated in applicable law;<br><br>Certification program<br><br>**Hotel business duty:**<br>To give certain facilities and condition for employees;<br>Duty to maintain sanitation and hygiene,<br>duty to preserve the environment. |
| **Non-Absolute Criteria for Classified Hotel** | **Product Element** | **Services Element** | **Management Element** |
| One Star Hotel | Extra 31 sub-element | Extra 4 sub-element | Extra 1 sub-element |
| Two Star Hotel | Extra 36 sub-element | Extra sub-element | Extra 3 sub-element<br><br>**Workers Right:** Participate in K3 Program (Working Safety and Healthy)<br><br>**Hotel business duty:**<br>Having Working Safety and Health program. |

| | | | |
|---|---|---|---|
| Three Star Hotel | Extra 96 sub-element | Extra 18 sub-element | Extra 12 sub-element<br><br>**Workers Right:** Participate in Human Resource Development Program.<br><br>**Community Right**:<br>To Get CSR Program<br><br>**Hotel business duty**:<br>Human Resource Development Program.<br><br>Clear organizational policy<br><br>Having CSR Program |
| Four Star Hotel | Extra 111 sub-element | Extra 24 sub-element | Extra 16 sub-element<br><br>**Hotel business duty**:<br>Partnership with SMEs |
| Five Star Hotel | Extra 132 sub-element | Extra 35 sub-element | Extra 16 sub-element |
| **Absolute Criteria for Non-Classified hotels.** | **Product Element** | **Services Element** | **Management Element** |
| All Non-Classified Hotel | 7 sub-element | 5 sub-element | 4 sub-element |

| | | | |
|---|---|---|---|
| Rights and Duty Relation | Tourist Rights: to deliver certain products.<br><br>Hotel Business Duty: to deliver certain product | Tourist Rights: to get certain services.<br><br>Hotel Business Duty: to deliver certain services | Workers Right: Medical checkup program;<br><br>Collective working agreement as regulated in applicable law;<br><br>Certification program<br><br>Hotel business duty:<br>To give certain facilities and condition for employees;<br><br>Duty to maintain sanitation and hygiene, duty to preserve the environment. |

At this point we can see that the hotel business standard regulation No.53/2013 already conveys several human rights protections. The rights and duties outlined in this regulation use gradual logic, meaning that the higher the classification of a hotel, the more rights and duties that follow (see table 6). However this regulation tends to focus on ensuring the quality of products and services delivered to the tourist (or any other type of client). In other words, it still works to support the rights of the tourists, as the 'customer is king' saying goes. Thus, ratings and certifications that are given to hotels based on this regulation do not reflect a comprehensive human rights assessment (due diligence).

Below, in table 7, we can see that while this regulation already covers most key human rights issues in hotels, there are still several areas which are not regulated by the hotel business standard. Based on this finding, the hotel business standard is not a standalone regulation to address key issues in human rights and hotels. This means that with regard to hotels and human rights protections in Indonesia, we still have to refer to other related laws and regulations.

**Table 7**
**Key Human Rights Issues in Hotels**

| Issues | Hotels Regulation 53/2013 | Tourism Act 10/2009 | Other relevant Laws |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Right to Work: are you providing jobs for local communities and contributing to the local economy? | Not provided | Provided | Corporation Law 40/2007<br>Labour Law 13/2003<br>Human Rights Law 39/1999 |
| Labour Condition: are your staff well-treated? | Provided | Provided | Labour Law 13/2003 |
| Land Rights and Forced Displacement: has your hotel sitting denied local people access to their land? | Not provided | Provided | Human Rights Law 39/1999 |
| Forced Labour: how well are your agency workers treated? Can you be sure they are not being exploited? | Provided | Provided | Labour Law 13/2003<br>Human Rights Act 39/1999 |
| The Right To Water and Sanitation: are you enhancing the drinking water availability for the local area? Or is your hotel's consumption of water at the expense of others? | Provided | Provided | Protection and management of the environment Law 32/2009 |
| The Right to Life and Health: how do you ensure staff wellbeing? | Provided | Provided | Labour Law 13/2003<br>Work Safety Law 1/1970 |
| The Right to Dignity and Privacy: how do you protect the privacy of your guests? | Provided | Provided | Elimination of racial and ethnic discrimination Law 40/2008 |
| Economic Impacts: How are you giving back to the local communities through employment and supply chains? Are you paying suppliers and workforce fairly? | Provided | Provided | Corporation Law 40/2007 |

| | | | |
|---|---|---|---|
| Cultural Impact: Are you providing a centre for community involvement that enables positive and shared cultural experiences? Or do you provide excursions that exploit local communities? | Provided | Provided | Human Rights Law 39/1999<br>Elimination of racial and ethnic discrimination Law 40/2008 |
| Child Labour: are any of the goods or services you use the product of child labour? | Not provided | Not provided | Human Rights Law 39/1999 |
| Sexual Exploitation: are your premises used to sexually abuse adults or children? | Not provided | Not provided | Human Rights Law 39/1999 |
| The Right to Participate: do your workers have a voice? | Provided | Provided | Labour Law 13/2003<br>Labour Union Law 21/2000 |

Furthermore, in this regulation the obligation to assess comes from two sides. The first is done independently by the hotel itself while the other is a hotel business certification process which is performed by a business certification agency in Indonesia.[176] This assessment is done by following the basic requirements as well as ordinances and guidelines found in this regulation (Attachment II). For guidance and supervision this law gives specific mandates to the government to guide such efforts (state duty).[177]

**Conclusion and Closing Remarks**

This study concludes that Tourism Law No.10/2009 is a regulation that promotes human rights as one of its key features. With respect to human rights and tourism, this law not only regulates travel and destination management in tourism, but it also sends a strong message about how tourism must be understood and approached. This law also frames tourism development in an effort to achieve a quality of tourism which respects human dignity and sustains human rights fulfillment at the same time. In summary, this law already aligns with the first and second foundational principles of the first pillar of the UNGPs. This paramount regulation in Indonesian tourism has already set as clearly as it can that all tourism activities must respect human rights.

[176] Minister of Tourism Regulation No.53/2013, article 13-14

[177] *Ibid,* article 15-17

With relation to the Minister of Tourism Regulation No.53/2013 about Hotel Business Standards, this study concludes that several human rights protections have already been regulated by it, although there are still several gaps in other key issues that cannot be addressed based on this regulation alone. To summarize, this regulation does provide minimal guidance for hotels to respect human rights. In order to achieve that, it is crucial to understand this regulation not only from a products and services delivery perspective, but also to understand it from a human rights protection perspective. And it is also important to note here that under operational principle (1) in the first pillar of the UNGPs, this kind of regulation is needed to assess and address any gaps, while at the same time ensure enforcement.

Based on the conclusion above, there are several follow ups that could be performed. The first is to conduct an advanced study to analyze the implementation of Tourism Law No.10/2009 and the Minister of Tourism Regulation No.53/2013 about Hotel Business Standards in certain tourism destination settings. This kind of study is needed in order to have a better understanding of how human rights protection operates in the practical realm of hotel business, and also to find the gap between *das sollen* and *das sein* in order to improve *das sollen* and the human rights practice itself.

The second is to conduct a study or survey in order to find out to what extent hotel businesses understand and implement human rights protection. In this kind of study, even where there are no clear policies on human rights, goodwill on the part of the hotel business should be sufficient. Afterwards more research could also be developed by conducting an impact assessment or full due diligence process according to the context, scale and reach of every hotel business. Active involvement from researchers, academia, and tourism consultants could also be helpful to initiate the study. Since they have the tools needed to conduct such a study, they could also approach hotels to begin launching the assessment. The third is to create a comprehensive mapping of human rights and business regulations in Indonesia, followed by establishing a national action plan which would implement sub-sector classifications along with the identification of human rights infringement potential. Finally, it is time to think more on introducing tourism and human rights guidelines and include the human rights impact assessment as one of the requirements for major tourism business.

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# A rock and a soft place? International resource corporations, a State's right to development of natural resources and Indigenous Peoples right to Free, Prior and Informed Consent under the Laws of the Republic of the Philippines and Western Australia

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## Abstract

Principles 11 and 13 of the UN Guiding Principles on Business and Human Rights (the *Guiding Principles*) set out the two key responsibilities of businesses. These are: to avoid causing or contributing to adverse human rights impacts through their own activities; and, to prevent or mitigate human rights impacts that are directly linked to their operations. This paper examines the operation of these principles in the context of the extractive (mining) industry and its interactions with Indigenous Peoples. This interaction provides an often stark example of the dilemma faced by mining corporations faced with potentially competing rights-based obligations. On the one hand mining corporations, particularly those operating in developing nations must accept the sovereignty of the host state. The right of the host state to develop its natural resources is an important aspect of this sovereignty. The mining corporation is particularly sensitively placed in regard to this obligation as the development of a state's mineral resources by private corporations can be legitimately characterised as joint venture or public private partnership.However, mining operations will frequently involve the interaction of some of the world's largest corporations with Indigenous peoples. Twenty first century human rights law has developed to the point of recognising particular rights that accrue to the world's Indigenous Peoples. These rights include Indigenous Peoples' right to Free Prior and Informed Consent (FPIC) in respect to the development of natural resources within their traditional lands. With reference to relevant regional examples the paper will explore the competing obligations of mining corporations to assist a state with the development of its natural resources on the one hand while respecting Indigenous Peoples' right to demand consent to such development. This exploration will take place particularly through a consideration of the content of the International Council on Mining and Metals (ICMM) May 2013 Position Statement on *Indigenous Peoples and Mining* and the mining regimes in place in the Republic of the Philippines and the Australian state of Western Australia. The paper notes the ultimately merely aspirational regard had to FPIC within the ICMM Position Statement when confronted with potentially contradictory state regulatory requirements. The paper continues by suggesting that the ICMM approach to the dilemma demonstrates a practical, if not wholly satisfying, illustration of the resolution of potentially conflicting obligations in the *UN Guiding Principles* to avoid causing negative human rights impacts on one hand and yet to "mitigate" the adverse impacts that are caused on the other.

The paper concludes by suggesting that the described dilemma faced by mining corporations arises only when the state actor in question has not fully accepted its own human rights obligations.

## 1. Introduction

The aim of this contribution is to examine three principles of international law, and the municipal law manifestations of those principles that international resources companies (IRCs) are today required to navigate in order to operate legitimately. The principles that will be considered are: Permanent Sovereignty over Natural Resources (PSNR), commonly seen as being articulated in United Nations (UN) General Assembly Resolution 1803 on *Permanent Sovereignty over Natural Resources*;[178] Indigenous Peoples' rights of Free Prior and Informed Consent (FPIC) to the developments affecting their lands as enunciated in the UN Declaration of the Rights of Indigenous Peoples[179] (UNDRIP); and, a corporation's responsibilities under the *UN Guiding Principles on Business and Human Rights*[180] (the GP) and the contextualisation of these responsibilities in the International Council on Mining and Metals (ICMM) May 2013 Position Statement on *Indigenous Peoples and Mining*[181] (the Position Statement).

The purpose of this examination is to explore the proposition that when faced with the potentially competing obligations to respect a nation's right to permanent sovereignty over its natural resources imposed under municipal legislation and to respect Indigenous Peoples' right to FPIC with respect to natural resource development on their lands imposed under the GP and the Position Statement, IRCs are caught in a potential dilemma. The paper concludes by suggesting that this conflict can best be resolved through incorporation of a more contemporary interpretation of PSNR being included in municipal resource legislation and the practice regarding its implementation. However, the paper also notes that, absent such legislative reform, the existing legislation in the two jurisdictions considered do allow for IRCs to give effect to the FPIC principle.

In reaching this conclusion the paper proceeds in three sections subsequent to this introduction. The first of these sections is in turn divided into four parts. The first part considers the origins and development of the principle of PSNR. The second part looks at the development of UNDRIP and places it in the context of developments in international law regarding PSNR. The third part considers the development of the notion of corporate responsibility with regard to human rights that led to the endorsement of the GP and the subsequent development of industry codes of practice such as the Position Statement. The following section examines the application of these international law principles in municipal legislation. The *Philippine Mining Act of 1995* and the Western Australian *Mining Act 1978* and the associated (Australian) Commonwealth *Native Title Act 1993* are utilized for this purpose. The concluding section considers how the competing obligations under the instruments considered can be reconciled in the practical operating environment of an IRC. As noted earlier, the conclusion reached is that this reconciliation can best be achieved through modification of municipal legislation, but that it is open to IRCs to address this situation within the existing legislative structure.

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[178] G.A Res 1803 (XVII) UN Doc A/5217 (Dec 14 1962). (the RPSNR)

[179] A/res/61/295 Ann. 1 (Sept 13, 2007).

[180] A/HRC/8/5.

[181] International Council on Mining and Metals, May 2013. Available at https://www.icmm.com/website/publications/pdfs/commitments/2013_icmm-ps_indigenous-people.pdf.

## 2. International Legal Principles and Expectations

### 2.1 Permanent Sovereignty over Natural Resources

#### 2.1.1 Origins

Effective control over territory, and therefore the natural resources within that territory, is an integral aspect of sovereignty and therefore international legal personality.[182] At first blush then the 1952 UN General Assembly Resolution 626 *The Right to Exploit Freely Natural Wealth and Resources*[183] and the subsequent 1962 RPSNR would seem otiose. To understand the purpose of these instruments it is necessary to appreciate the context in which they were developed.

Writing in 1956, Hyde[184] notes that the United States opposed the 1952 Resolution because of the inclusion in its text of the phrase: "the right of people to use their natural wealth and resources is inherent in their sovereignty"[185] without recognition of the obligation of states to "…recognize the right of private investors under international law".[186] He goes on to note that at the time of the passage of the 1952 Resolution and subsequently the process of development of the International Covenant on Civil and Political Rights[187] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[188] (ICESCR) was underway and at that time there was debate around the inclusion of the appropriateness of the inclusion of reference to a right to self determination "in covenants dealing with the rights of individuals".[189] There was further debate about the inclusion in the definition of the right of self-determination of the principle of PSNR – economic self-determination.

Of course, common Art 1.2 of both the ICCPR and ICESCR ultimately provided:

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[182] "Westphalian Sovereignty" from the Peace of Westphalia of 1648. See also for example Art 1 *Montevideo Convention on Rights and Duties of States 1933* 165 LNTS 19; USTS 881.

[183] GA Res 523 (VI) UN Doc A/2119 (Jan 12, 1952) (The 1952 Resolution).

[184] James N Hyde, 'Permanent Sovereignty over Natural Resources", (1956) 50 *American Journal of International Law* 854.

[185] 1952 Resolution, Art 1.

[186] Hyde, above n 7, 854.

[187] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171.

[188] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, vol. 993, p. 3.

[189] Hyde, above, n. 7 at 855.

> 1.2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

As Hyde goes on to note:

> Once the principle [of PSNR] became part of a draft article on self-determination, it was directly involved in the issue of colonialism and took secondary position in heated discussions of what the principle of self determination is and how it should affect the relations of colonial and non-colonial peoples.[190]

It is against this background that the PSNR Declaration was adopted. The PSNR Declaration provides in part:

> 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
>
> 2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
> …
> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law….

From this brief review of the history of the PSNR Declaration three matters become apparent. First, there has, virtually from its outset, been some tension over the inclusion of PSNR in (individual) human rights instruments. Second, the origins of the debate around PSNR lie in issues associated with the obligations of a post-colonial state towards (generally) IRCs who secured rights in relation to resources located in the (former) colonial territory during the period of colonial rule. Thus, the issue of PSNR, from its outset has involved the relationship between a state and (international) private corporations. Third, the use of the term “peoples" in each of the Covenants and the PSNR Declaration, is informed in part by an understanding of the fact that the instruments were developed in the context of the management of the decolonization process. Prior to independence, the occupants of a colonial territory are a “people”. It is only subsequent to the act of self-determination leading to independence that a state is formed. However, as discussed below, the potential distinction between peoples and a state has influenced much of the subsequent development of international jurisprudence

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[190] Hyde, *ibid.*

around PSNR. These three themes will be explored further in the later parts of this section of the discussion.

2.1.2 Subsequent Development of PSNR

The issue of whether PSNR vests in peoples or a state is considered by Duruigbo[191] who suggests: "[t]he right to PSNR has been viewed alternatively as a right vested exclusively in peoples, solely in states (nations), or jointly in peoples and states."[192] In support of the proposition that PSNR vests solely in states she notes that several significant recent UN instruments refer solely to PSNR vesting in states.[193] The theoretical argument is support of this proposition is articulated by Pereira and Gough as follows:

> …it could be argued that once the peoples in a state gained independence, it would no longer be necessary to focus on the rights of peoples in any discussion of permanent sovereignty.[194]

By contrast Duruigbo cites a number of prominent publicists to support the contention that PSNR vests exclusively in *peoples*.[195] The joint view is said to be supported by still other publicists.[196]

The diversity of credible opinion on this point is perhaps further obscured by a divergence of opinion regarding the meaning of the term peoples. Duruigbo again identifies the different interpretations:

> "Peoples" can refer to: (1) those under colonial occupation, (2) a portion of the population, especially indigenous peoples, (3) the whole of the population, or (4) a synonym for the state.[197]

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[191] Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', (2006) 38 *George Washington International Law Review*, 33.

[192] Duruigbo, *ibid,* 43.

[193] Amongst those referenced on this point are the *UN Convention on Biological Diversity* (5 June 1992) 31 ILM 818, the *UN Convention on the Law of the Sea* (Nov 16 1994) 1833 UNTS 397 and the *UN Framework Convention on Climate Change* (Mar 21 1994) 1771 UNTS 107.

[194] Ricardo Pereira and Orla Gough 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resources Governance and the Right to Self-Determination of Indigenous Peoples under International Law' [2013] *Melbourne Journal of International Law* 1, 10.

[195] Theo van Boven, 'Human Rights and Rights of Peoples' (1995) 6 *European Journal of International Law* 461, 470 and Robert Dufense, 'The Opacity of Oil: Oil Corporations, Internal Violence and International Law' (2004) 36 *NYU Journal of International Law & Politics* 331, 354 are two of the publicists cited in this regard.

[196] Lorne S Clark, 'International Law and Natural Resources, (1977) 4 *Syracuse Journal of International Law & Commerce* 377, 380 and Nico Schrijver, *Sovereignty over Natural Resources* (Cambridge University Press, 1997) 379-80.

[197] Duruigbo, above n 14*,* 52.

The same author continues to suggest that while the predominant view is that "peoples" in the RPSNR referred to "people" who had not yet been able to exercise a right to self-determination[198] After independence the people remained vested in the PSNR as against the post-colonial state.[199]

Despite the ongoing uncertainty as to the definitions involved in the RPSNR its key theme of sovereignty over natural resources as an essential element of the notion of economic self-determination of peoples have featured in successive international documents. Schrijver[200] suggests that the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1982 United Nations Convention on the Law of the Sea, the 1986 United Nations Declaration on the Right to Development (UNDRTD), the 1992 Rio Declaration on Environment and Development and the 2002 Johannesburg Declaration on Sustainable Development[201] can all be viewed as aspects of this continuum.

Certainly, the terms of UNDRTD Arts 1.2 and 2.3 resonate with the themes (and uncertainties) contained in the RPSNR:

> 1.2 The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions of both International Covenants on Human Rights the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.
> …
> 2.3 States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

In these two articles can be seen all of the principles discussed thus far: the basic notion of PSNR; the self-determination of *peoples*; the foundation in the International Covenants; as well as the ongoing ambiguity between the rights of states and the rights of peoples to control natural resources. On this basis it is easy to understand Schrivjer's suggestion of an ongoing ideological tradition between these instruments. This inter-relation becomes more apparent if the relevant jurisprudence is considered. A survey of some of the relevant cases is undertaken in the following part.

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[198] Schrijver, above n 19 9 is cited in support of this view.

[199] Duruigbo, above n 14, 53.

[200] Nico Schrijver, 'Self-Determination of Peoples and Sovereignty over Natural Resources and Wealth' in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, United Nations 2013, 101.

[201] UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994; UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3; 21 ILM 1261 (1982); UN General Assembly *United Nations Declaration on the Right to Development* (4 December 1986) A/RES/41/128; 1992 *Rio Declaration on Environment and Development* UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) A/RES/41/128.

### 2.1.3 Jurisprudence relevant to PSNR

A first aspect of the PSNR jurisprudence to note goes to the acceptance of the principles underlying PSNR into international law. Duruigbo[202] as well as Pereira and Gough[203] refer to the *East Timor Case*[204] on this point. These authors note that, while the majority of the Court held there was no jurisdiction to determine the matter before them, the dissenting judgments of Judges Weeramantry and Skubiszewski readily accept the principle of PSNR as a part of customary international law.[205] Pereira and Gough[206] continue to suggest that in the subsequent *Armed Activities in the Congo* case[207] the ICJ expressly recognised the RPSNR as accurately stating contemporary international law.[208] The conclusion as to the effect of this case is endorsed also by Schrivjer.[209]

Aside from considering the legitimacy of PSNR within international law, there have also been a number of cases that have explored some of the themes identified earlier such as the nature of peoples and the role of the state *viz a viz* its perfect peoples. Three cases considered by the African Commission established under the African Charter on Human and Peoples Rights[210] are important in this regard. Both these cases involve consideration by the Commission of Article 22 which provides:

> 22.1 All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> 22.2 All States have the duty individually and collectively to ensure the exercise of the right to development.

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[202] Duruigbo, above, n 14 at 39-40.

[203] Pereira and Gough above n 17 at 12.

[204] *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

[205] *Ibid* at 204 (Weeramantry J) and 264 (Skubiszewski J).

[206] Pereira and Gough above n 17 at 13.

[207] *Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment)* [2005] ICJ Rep 168.

[208] *Ibid* at 251-2 [244].

[209] Schrivjer, above n 23, 95.

[210] The African Charter on Human and Peoples' Rights adopted Nairobi on 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217. Available at: http://www.achpr.org/instruments/achpr/#a22.

In *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*[211] Arts and Tamo[212] report the African Commission as determining:

> [t]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources has also occasioned another violation – their right to economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development guaranteed under article 22 of the African Charter.[213]

Article 22 of the African Charter was also considered by the African Commission in the highly relevant *Endorois* case.[214] Arts and Tamo summarise the case as involving: "the forced removal in the 1970s of the Endorois (a pastoralist group) from their ancestral land…to set up a national game reserve and tourist facilities.[215] In response to this scenario the African Commission suggests there are five men in criteria to act said to be fulfilling the obligations under a right to development. They must be: "equitable, non-discriminatory, participatory, accountable and transparent". The African Commission in its decision referred to the report of a UN Independent Expert:

> …who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live….the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available. Freedom of choice must be present as a part of the right to development.[216]

Pereira and Gough note that the African Commission in this case called for compensation to the victims for "loss of property, development and natural resource rights, the freedom to practice their religion and culture and also requir[ed] restitution of their land with legal title".[217] The same authors also note that the African Commission in the *Ogoni* case[218]

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[211] *Democratic Republic of the Congo v Burundi, Rwanda and Uganda,* Communication 227/99 29 May 2003.

[212] Karin Arts and Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?', (2016) 62 *Netherlands International Law Review* 221.

[213] *Ibid* at 245, citing *Congo* above n 32, [95].

[214] *Case Centre for Minority Rights Development (Kenya) and Minority Rights Group Group International obo the Endorois Welfare Council v the Republic of Kenya*, Communication No 276/2003 (*Endorois*).

[215] Arts and Tamo, above, n 35, 245.

[216] *Endorois*, above n 37, [277]-[288].

[217] Pereira and Gough, above n 17, 44.

[218] *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria,* Communication 155/96.

made similar orders; requiring compensation and a clean-up of lands and waters damaged by oil operators.[219]

Further useful jurisprudence has come through Inter-American Commission on Human Rights and the Inter-American Court of Human Rights established under the Organisation of American States and with jurisdiction to consider human rights abuses pursuant to the *American Declaration on the Rights and Duties of Man* (1948) and the *American Convention on Human Rights* and other sources of regional law.

Barrera-Hernandez[220] reviews some of this jurisprudence. Several of these matters are relevant for current purposes. The *Yanomani (v Brazil*) case[221] involved Brazilian government programs to encourage agricultural and mineral development on the traditional lands of the Yanomani. The Yanomani had no formal "title" to their traditional lands – i.e. they were not demarcated. Barrera-Hernandez reports[222] the Commission determined:

> That in failing to demarcate indigenous lands and to prevent encroachment and invasion, the Government was in violation of the right to life, liberty and personal security; the right to residence and movement; and the right to preservation of health and to well-being.

A similar but also significant matter is the *Maya (v Belize)* case[223]. In this case, faced with the granting of logging and oil concessions over the traditional lands of the Maya who held no formal title to those lands, the Inter-American Commission determined:

> The organs of the Inter-American human rights system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning at international law.[224]

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[219]Pereira and Gough, above n 17, 43

[220] Lila Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation', (2006) 12 *Annual Survey of International and Comparative Law* 43.

[221] Inter-American Commission on Human Rights, Res 12/85, Case 7615, March 5 1985. Reported in Barrera-Hernandez *ibid,* 51.

[222] *Id.*

[223] Inter-American Commission on Human Rights, Report 40/04, Case 12.053 *Maya Indigenous Communities of the Toledo District v Belize*, Oct 12, 2004.

[224] *Ibid* at [150] reported in Reported in Barrera-Hernandez above, n 43*,* 51.

Similar issues were raised in *Dann v United States.*[225] Here, with reference to UNDRIP as an accurate reflection of the state of current international law, the Commission rejected the validity of an Indigenous land claims process that had determined the petitioners indigenous land rights had been extinguished.[226] In a similar vein the Inter-American Court in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*[227] determined that the grant of certain logging concessions was a violation of the plaintiff Indigenous community's property rights. In so doing the Court rejected Nicaragua's argument that all lands to which there was not a formal registered title could be considered state lands, of which the natural resources therein could be disposed of by the State at its discretion. Finally, in *Yakye Axa v Paraguay*[228] an Indigenous community disposed of their lands by government grant to overseas pastoralists in the nineteenth century the Court found the communities right to property had been violated. In that case Paraguay acknowledged the traditional association of the Indigenous community but maintained the pastoral grants that led to the land being put to a more rational and productive use. The Court was not, however, persuaded.

2.1.4 Conclusions as to the contemporary interpretation of PSNR.

The jurisprudential development of PSNR since the first adoption of the RPSNR has served to refine the PSNR principle. Certainly, PSNR still supports the right of states as representatives of their peoples to control (and if need be expropriate) the natural resources within their territory. However, the further development of international legal instruments relevant to PSNR and the development of (particularly regional) human rights jurisprudence around the exercise of state's "sovereign" rights in the allocation of natural resources has served to qualify this sovereignty. There is a clear trend in the jurisprudence to suggest that PSNR is vested in the state as a trustee or fiduciary[229] and the state can be held to account as such. However, the jurisprudence also suggests that "the people" who are the beneficiaries of the PSNR are not necessarily the undifferentiated residents of the post-colonial state. Rather, the rights of communities within the broader population can be asserted as a foil to the state's exercise of PSNR. What should be noticed from the survey of the regional jurisprudence above, however, is that it is not suggested that the plaintiff communities have a competing sovereignty in natural resources but rather that the state's exercise of the sovereign rights vested in it is constrained by the necessity to have regard to the interest of the affected communities.

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[225] OAS Report No 75/02, Case 11.140 *Mary & Carrie Dann v United States, Dec 27, 2002 (The Western Shoshone Case.*

[226] Barrera-Hernandez above, n 43*,* 52.

[227] Inter-American Court *Mayagna (Sumo) Awas Tingni Community v Nicaragua August 31, 2001.* Reported in Barrera-Hernandez above, n 43*,* 54.

[228] Corte Inter-Americana de Derechos Humanos, *Caso Comunid Indigena Yakye Axa v Paraguay*. Sentencia de 17 junio de 2005. Reported in Barrera-Hernandez above, n 43*,* 55.

[229] Duruigbo, above, n 14, 67-68.

With this conclusion in mind it is apposite to consider the second key instrument upon which this discussion is centred; the *United Nations Declaration of the Rights of Indigenous Peoples*.

## 2.2 UN Declaration of the Rights of Indigenous Peoples[230] (UNDRIP)

### 2.2.1 Overview

The UNDRIP was passed by the UN General Assembly on September 13, 2007. One hundred and forty four member States voted in favour of the resolution adopting UNDRIP, eleven abstained, and four (Australia, Canada, New Zealand, and the United States) voted against it. Since 2007, all four of the countries who voted against the resolution, have reversed their positions and now officially endorse it.

The 46 articles of the UNDRIP cover a range of matters and serve to recognise and protect indigenous peoples' rights to cultural integrity, education, health, and political participation. Of particular relevance to this discussion are UNDRIP's provisions that deal with self-determination and rights in respect of natural resources. To deal with self determination matters first. Article 3 of the UNDRIP, in familiar terms, provides:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 is however qualified by the terms of Article 46.1 which relevantly provides:

> Nothing in this Declaration may be interpreted…as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Article 4 provides some elaboration of this limited right of self-determination:

> Indigenous peoples, in exercising their right to self-determination, have a right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions.

The issue of natural resources is dealt with extensively in Articles 26-28. Article 26 provides:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

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**230** A/res/61/295 Ann. 1 (Sept 13, 2007).

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 provides for a requirement to establish a process to "adjudicate the rights of indigenous peoples pertaining to their lands territories and resources. Such a process is expressed to require the involvement of Indigenous peoples and the recognition of indigenous law and land tenure systems in the process of adjudication. Article 28 establishes a requirement for redress for land, territories and resources previously taken without indigenous peoples free, prior and informed consent.

Finally, Article 32 deals with the management of lands and natural resources:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

With these relevant provisions in mind it is useful to consider the history of the development of UNDRIP as a prelude to analysing its contents.

### 2.2.2 History

The adoption of UNDRIP in 2007 was not the first occasion that international law turned its attention to Indigenous Peoples. As Macklem notes the International Labour Organisation (ILO) adopted seven Conventions between 1930-1955 that established "relatively weak labour standards for the protection of workers in colonies and dependent territories."[231] In 1957 the ILO expanded its attention on Indigenous Peoples with the adoption of the *Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (No. 107)* on Indigenous Peoples and

[231] Patrick Macklem, *The Sovereignty of Human Rights*, Oxford University Press, 2015, 143.

Tribal Populations.[232] As its title suggests a central concern of Convention 107 was "their progressive *integration* into the life of their respective countries."[233] Despite this obnoxious objective, as Macklem[234] notes Convention 107 is notable for a number of positive reasons:

- It broadened international concern in respect of Indigenous Peoples to matters beyond simply labour standards;
- It identified Indigenous peoples as sections of the population of Independent countries and not merely colonies or dependent territories;
- It identified a right of Indigenous ownership of traditional territories[235] and recognition of indigenous legal and cultural traditions,[236] although each of these matters were significantly qualified in the text.[237]

Essentially Convention 107 was based in the principle of non-discrimination rather than distinct Indigenous rights.[238]

In 1989 the ILO adopted the Indigenous and Tribal Peoples Convention (No. 169).[239] Convention 169 overcame many of the shortcomings and qualifications of Convention 107 and eliminated notions of "integration". It also characterised the rights of Indigenous Peoples as vesting in "peoples" and not individual members of a community.[240] Amongst its other provisions, Convention 169 identified the rights of Indigenous peoples "to decide their own priorities for the process of development".[241]

The terms of Convention 169 regarding the use of natural resources are worthy of particular attention. Article 14.1 provides in part: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." Article 15 continues this theme:

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[232] ILO Convention 107, 40th sess., 328 UNTS 247 (June 26, 1957),(entered into force June 2 1959) ("Convention 107").

[233] *Ibid*, Art. 2(1).

[234] Macklem, above n 54, 144-147.

[235] Convention 107, above n 55, Art. 11.

[236] *Ibid,* Art. 7.

[237] Macklem, above n 54, 147.

[238] *Id.*

[239] *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* (No. 169), 72 ILO Official Bulletin 59, concluded 27 June 1989 (entered into force September 5 1991). ("Convention 169").

[240] Macklem, above n 54, 149.

[241] Convention 169, above n 62, Art 7(1).

> 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
> 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16 deals with situations where a development proposal contemplates the necessity of relocating Indigenous peoples. It provides in part:

> 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
> 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

Thus, while Convention 169 recognised Indigenous peoples' rights to their traditional lands, it fell short of establishing an absolute requirement for those peoples to consent to any (relevantly mineral) development on their land.

It was against this background that the development of UNDRIP itself took place. Macklem describes[242] how this process commenced in 1971 when the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned a study on "discrimination against indigenous populations". The study took 12 years to complete but one of its eventual recommendations was the adoption of a UN Declaration on indigenous rights. In response to this recommendation in 1982 the Sub-Commission established a Working Group on Indigenous Populations (WGIP).[243] Davis[244] describes that the WGIP concluded a draft of the declaration in 1993 which then transmitted it to the Commission on Human

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[242] Macklem, above n 54, 152. The report is known as the Martinez Cobo Report after its author. On the development of UNDRIP in the UN see also Erica-Irene A Daes, 'The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples" in Clare Charters and Rodolfo Stavenhagen (Eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWIGA, 2009.

[243] ESC res 1982/34, UN ESCOR, Supp (No 1) at 26, UN Doc E/1982/82 (1982).

[244] Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On', (2012) 19 *Australian International Law Journal* 17, 21.

Rights (CHR) which in turn transmitted the draft to a Working Group (CHRWG) for further consideration. Davis describes the processes of the CHRWG as follows:

> The CHRWG had a difficult history…The seemingly insuperable challenges included: Indigenous participants' 'no change' approach to drafting, collective rights, disputation over the application of the right to self-determination of Indigenous peoples, implications of self-determination for state sovereignty and territorial integrity and the extent of the rights pertaining to lands territories and resources.[245]

The difficulties were overcome through the preparation of a "Chair's text" of the draft Declaration which was subsequently adopted by the (then) Human Rights Council.[246] Davis goes on to note that subsequent concerns by the African Group regarding the content of the right to self-determination were resolved through the preparation of an advisory opinion by the African Commission on Human and Peoples' Rights. Davis extracts the following portion of this opinion:

> [t]he notion of self-determination has evolved with the development of the international visibility of the claims made by Indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.[247]

With the comfort provided by the Advisory Opinion and the inclusion in the Preamble of the Draft Declaration of a recognition of regional and national differences in the situation of Indigenous peoples the UN General assembly adopted the UNDRIP on 13 September 2007.[248]

### 2.2.3 Analysis of the UNDRIP

Macklem[249] investigate the basis for the international legal recognition of Indigenous peoples contained in the UNDRIP. While acknowledging that some of the rights described in the UNDRIP spring from a traditional non-discriminatory human rights analysis[250] Macklem sees the foundation of international legal recognition of Indigenous peoples as lying in their historic position. "The criteria by which indigenous peoples can be said to exist in

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[245] *ibid,* 21-22 (footnotes omitted).

[246] *Id.*

[247] African Commission on Human and Peoples' Rights, *Advisory Opinion of the* African Commission on Human and Peoples' Rights on the United Nations declaration on the Rights of Indigenous Peoples (adopted at the 41st ord sess 16-30 May 2007) [22], cited in Davis, above n 67, 23.

[248] Davis, above n 67, 23.

[249] Macklem, above n 54.

[250] *Ibid,* 155.

international law relate to their historic exclusion from the distribution of sovereignty."[251] By way of explaining this conclusion he earlier commented:

> …international indigenous rights mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the exiting distribution of sovereign power…their purpose is to mitigate injustices produced by the way the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities it recognizes as States. Indigenous peoples in international law are collectivities for which states must adopt appropriate domestic measures to vest contemporary claims of sovereign authority with a modicum of normative legitimacy.[252]

Other commentators however dispute the centrality of notions of distribution of sovereignty as the foundation of UNDRIP. Erueti[253] describes the development of UNDRIP as influenced by those Indigenous representatives from "the North" (primarily Canada, Australia, New Zealand and the United States – CANZUS) and those from "the South" Africa, Asia and Latin America. The North pursued rights based in sovereignty as described by Macklem, the South had a greater focus on non-discriminatory human rights approaches. He states:

> The political narrative of the declarations indicates there are two forms of argument underlying the indigenous rights in the declaration, one based on human rights and the other on decolonization.[254]

To Erueti the rights contained in Articles 26 and 32 to control the natural resources located in their lands and for these not to be developed without the Free, Prior and Informed Consent of the relevant Indigenous peoples lie in the decolonization model and informed not by the human rights model but rather "…is primarily directed at the negotiation between two nations of their terms of coexistence."[255] To Erueti this approach allows for a "stronger reading" of rights such as those contained in Articles 26 and 32.

With these doctrinal foundations of the UNDRIP in mind, it is appropriate to focus attention on that aspect of the Declaration that gives effect to an Indigenous people's right to control natural resources within their lands. It will be recalled that this is contained in Article 32.2:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent* prior to the approval of any project affecting their lands or

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[251] *Ibid,* 162.

[252] *Ibid,* 162.

[253] Andrew Erueti, 'The Politics of International Indigenous Rights', (2017) 67 (4) *University of Toronto Law Journal* 569.

[254] *Ibid,* 571.

[255] *Ibid,* 571.

territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (Emphasis added)

Article 26.2 is one of a number in the declaration that uses the "free, prior and informed consent" formulation (see also for example Arts 10, 11 19, 28, 29). The principle of Free, Prior and Informed Consent (FPIC) is explained in general terms by the following text developed by the United Nations Permanent Forum on Indigenous Issues and contained in the 2005 *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*.[256]

- ***Free*** should imply no coercion, intimidation or manipulation.
- ***Prior*** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
- ***Informed*** should imply that information is provided that covers (at least) the following aspects:
    - the nature, size, pace, reversibility and scope of any proposed project or activity
    - the reason(s) for or purpose(s) of the project and / or activity
    - the duration of the above
    - the locality of areas that will be affected
    - a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle
    - personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
    - procedures that the project may entail.
- ***Consent*** Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

  Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

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[256] Extract from United Nations Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005), UN Doc E/C.19/2005/3 (2005), [46]. At https://undocs.org/E/C.19/2005/3 .

The Report goes on to suggest:

> Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In free, prior and informed consent processes, indigenous peoples, United Nations organizations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.[257]

Anaya and Puig[258] explore the notion in greater detail. They suggest there are four approaches to interpreting FPIC: the human rights pluralist approach; the consent or veto approach; the instrumentalist approach; and, the minimalist approach. The latter of these approaches:

> …regards consultation processes as a sizable bureaucratic obstacle that hinders productive activity. Accordingly, consultations are reduced to obtaining input to validate the measure with ultimate state decision making power remaining substantially unaltered.
> …
> According to this approach, instead of adding burdensome processes like consultation, states should minimize the risks and red tape to encourage long-term commitment of financial resources in indigenous communities.[259]

Of the instrumentalist approach these authors suggest:

> This discursive methodology essentially treats the duty to consult as a body of rules with a fixed determinate meaning…the state acts as an imperfect optimizer of competing demands to be assessed, evaluated and examined. Formal institutions within the state make the decisions over policy and its consequences as well as over the long-term and aggregate needs of different communities.[260]

As between the first two approaches the significance divergence in analysis between Macklem and Eruiti outlined above can be seen. Anaya and Puig comment on the consent or veto approach that it asserts:

> A freestanding 'right to consent' as part of the consultative norm. Accordingly, protecting a choice of giving or withholding consent – not specifically safeguarding human rights.
> …

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[257] *Ibid,* [48].

[258] S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', (2017) 67 (4) *University of Toronto Law Journal* 435. Note that from 2008 to 2104 Anaya was appointed to the position of UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples.

[259] *Ibid,* 450-451 (footnotes omitted).

[260] *Ibid,* 448.

> This position affirms a slice of sovereignty for indigenous peoples at the expense of the state and implies an absolute right to block a proposed measure that may otherwise be backed by ordinary majoritarian democratic decision making.
> …
> Notwithstanding its deep concern for the advancement of the rights of indigenous people, the consent or veto approach tends to reduce the key outcomes of the process to obtaining or withholding consent, instead of safeguarding human rights.
> …
> …it eliminates the governments' policy space to make important decisions without indigenous peoples' consent – something that is difficult to reconcile with the basic idea of state sovereign decision making and prevailing understandings of pluralistic democracy. [261]

The human rights pluralist approach favoured by Anaya and Puig is described in the following passage:

> In keeping with the safeguard role of the duty to consult, consent by indigenous peoples is required whenever their substantive rights of land and resources…or other internationally recognised rights will be materially and substantially affected by a measure promoted by the state. It follows that if the measure is ultimately designed or revised to avoid any substantial effect on indigenous peoples' rights, consent or agreement is not required. By the same token, consent or agreement can only be required for those aspects of a project that materially affect indigenous peoples' rights and not necessarily for the entire project.
> …
> In all cases in which the state determines that consent is not required, the state has the burden of demonstrating either that no rights are being limited or affected or if they are that the limitation is permissible under international law.[262]

Anaya and Puig's rejection of FPIC as constituting an absolute right to veto proposals that affect their lands and resources on the basis of substantive satisfaction of human rights and recognition of the pre-eminent sovereign rights of the state is illustrative of Erueti's contention that a human rights-based approach to the interpretation of FPIC inevitably leads to a weakening of the right. It is also difficult to contemplate circumstances in which a proposal that affected the lands and resources of an Indigenous people that was not supported by those people would not constitute a *material* contravention of Articles 26 and 32 of the UNDRIP. If this is the case the utility of the approach suggested by Anaya and Puig is difficult to comprehend.

Thus, it can be considered that on either approach the right to FPIC in the UNDRIP comprehends a right to consent, or not, to a mineral development on their traditional lands. This conclusion is consistent with the earlier Convention 169 although is a strengthening of

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[261] *Ibid,* 449-450.

[262] *Ibid,* 461.

Indigenous peoples' rights in this respect.[263] The distinction between the two instruments is important as the ILO Convention 169 is binding on those States that have acceded to it. However, UNDRIP as a UN General Assembly resolution is considered soft law and not binding on States parties except to the extent that its provisions are considered to articulate contemporary customary international law.

The jurisprudence around the RPSNR discussed earlier suggests its terms have now been accepted as constituting contemporary customary international law. In this regard the regional jurisprudence also discussed above that suggest that developments that occur on the lands of Indigenous peoples without their consent constitute a violation of their property rights[264] are significant in determining the extent to which the UNDRIP provisions are a manifestation of contemporary customary international law.

Having thus considered the nature, scope and inter-connectedness between a State's PSNR and an Indigenous peoples' right to FPIC under UNDRIP it remains to consider the origins and nature of an IRC (as opposed to the host state) to respect these potentially competing obligations.

### 2.3 International Resources Companies' Obligations

#### 2.3.1 The Context of Human Rights Responsibilities of Corporations

Ruggie[265] describes the common narrative on the development of the concept that multinational corporations (obviously including IRCs) are subject to human rights obligations:

> UN efforts to regulate multinational corporations go back to the ill-fated Code of Conduct negotiations that started in the mid-1970s and were abandoned a decade later. At the turn of the century, the UN Sub-Commission on the Promotion and Protection of Human Rights, comprising independent experts, began drafting a treaty-like document called "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."[266]

However, in the context of PSNR the position of IRCs has always been central. Hyde[267] describes the debate around the adoption of the 1952 Resolution on *The Right to Exploit Freely Natural Wealth and Resources*[268] as one between "capital importing" and "capital

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[263] Notably though the 'human rights pluralist' model advanced by Anaya and Puig would seem to accord more with Convention 169 in this regard.

[264] For example: *Endorois*, above, n 37; *Yanomani,* above, n 44; *Maya,* above, n 46; and *Dann*, above, n 48.

[265] John G Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights', (2014) 20 *Global Governance* 5, 6.

[266] "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights." UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[267] Hyde, above, n 7

[268] ILO, above, n 6.

exporting" nations.[269] In this debate capital exporting nations were acting as advocates for the corporations housed within their jurisdictions who were concerned that PSNR was in reality a licence to expropriate private property without just compensation. He refers to the nationalisation of Iranian oil as an example of this.[270]

In his subsequent discussion Hyde makes two points pertinent to the position of corporations at international law. First, he comments:

> The recognition of an international status of such [resource extraction] agreements between private individuals and governments is not new. This has been seen in various arbitrations between private companies and governments in which the question has arisen as to the choice of law to be applied in interpreting such agreements.[271]

He continues that in interpreting such agreements:

> …the company has removed itself, with reference to the contract and possible arbitration, from the area of law and has subjected itself to a jurisdiction intermediate between public international law and private international law.[272]

The second relevant point made by Hyde suggests the foundation for the further development of the debate around the dichotomy between PSNR as a right of *States* and a right of *Peoples*. He notes that during the debate around the 1952 resolution, representatives of capital importing nations saw PSNR as "intended to prevent…a weak and penniless government should seriously compromise a country's future by granting concessions in the economic sphere."[273]

Lest it be thought that these debates lie solely in the realm of the (de) colonial past; Al Faruque, writing in 2014, notes:

> Many human rights and environmental treaties put limitations on a State's sovereign right to exploit its mineral resources. These treaties indicate that the sovereign right to exploit one's mineral resources is subject to various qualifications.[274]

The focus of Al Faruque's analysis is the implications for human rights implications of aspects of long term natural resources development agreements – "Investment Contracts". In

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[269] See for example Hyde, above n 7, 855.

[270] Specifically, to the decision of the Civil Tribunal of Rome: *Anglo-Iranian Oil Co Ltd v Societa S.U.P.O.R.* No. 3906/53, Italy, Civil Tribunal of Rome, Sec, I July 14, 1954 Cited in Hyde, above, n 7, 854.

[271] Hyde, above n 7, 862.

[272] *ibid*, 863 (footnotes omitted).

[273] *ibid*, 858 (footnotes omitted).

[274] Abdullah Al Faruque 'Relationship Between Investment Contracts and Human Rights: A Developing Countries' Perspective' in S Bhuyian, P Sands and N Schrivjer (eds) *International Law and Developing Countries: Essays in Honour of Kamal Hussain*, Brill 2014, 220, 223.

particular, Al Faruque examines the jurisprudence around "stabilisation clauses" in these agreements. A stabilisation clause, in this context describes a clause in an Investment Contract where the host State undertakes not to amend its laws in any way that will adversely impact the returns on the investment during the life of the contract.[275] In a human rights context Al Faruque describes the potential implications of stabilisation clauses:

> The negative effects of stabilization clauses are exacerbated in poorer developing countries, where the national legal framework regulating environmental protection and human rights at the inception of the investment project may be underdeveloped. In this context, operation of stabilization clauses may be obstacles to the development and application of new laws.[276]

Al Faruque continues to discuss several arbitral matters where human rights matters have been agitated to either justify a State's variation of local laws[277] or to challenge the validity of an investment contract.[278] The application of international law to the interpretation of such clauses is made clear in the following passage from the award in *Duke Energy International Investments No 1 Ltd v Republic of Peru*:

> Even if the law of Peru were held to apply to the interpretation of the Stability law, this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law.[279]

What is apparent from the foregoing is that, at least in the context of natural resources, IRCs have always been an *actor* in international law and relations. The point of the activities since the 1970s as described by Ruggie earlier[280] has been to develop a mechanism to regulate international actors that, similarly to the position of Indigenous Peoples some years ago, had no legal personality in an international legal system focused upon the centrality of the nation state.

### 2.3.2 Basis of International Legal Regulation of Corporations

That corporations can be considered to have rights at international law should be apparent from the earlier discussion regarding the debate on PSNR. The RPSNR was seen as a potential threat to the property rights of international corporations. That there was (is) an increasing *need* to involve corporations in the human rights framework is broadly acknowledged. This increasing need is commonly seen as being based on the increasing

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[275] *Ibid*, 228.

[276] *Ibid*, 235.

[277] *South Pacific Properties (Middle East) Ltd v Egypt* ICSID Case No ARB/84/3 Award 20 May 1992, 32 ILM 933 (1993) [154] cited in Al Faruque *ibid*, 249.

[278] Al Faruque *ibid*, 249.

[279] ICSID Case No ARB/03/28. Decision on Jurisdiction (1 February 2006) [162] cited in Al Faruque *ibid*, 233.

[280] Ruggie, above n 88.

influence of global corporations and financial institutions and the corresponding (relative) decrease in the influence of States.[281]

The struggle for international legal jurists has been to formulate a basis for implanting and imposing *responsibilities*, particularly with respect to international human rights norms, on such rights-bearing corporations.[282] Overwhelmingly, this struggle has been seen to be founded in the state-centric nature of international law itself.[283] From this struggle, two approaches to imposing responsibilities on corporations have arisen.

The first, more traditional approach is to impose responsibilities by way of treaty like instruments. Arnold[284] suggests the International Labour Organisation's Tripartite Declaration of Principles Concerning Multinational Enterprises[285] as one example of this approach. The better-known example is though the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.*[286] The *Norms* "attributed companies to companies…essentially the same range of duties that states have accepted for themselves under international treaties that they have ratified."[287] The *norms* were however rejected by the Commission on Human Rights.[288]

Subsequent to this, the Commission on Human Rights successfully sought the establishment of the position of Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. (SRSG). The function of the SRSG was to clarify aspects of the UN Global Compact. [289] The Global Compact was a policy initiative of the UN Secretary-General launched in 2000. It sought "companies to embrace support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption."[290]

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[281] Ruggie, above n 88, 8; Florian Wettstein, 'CSR and the Debate on Human Rights: Bridging the Great Divide', (2012) 22(4) *Business Ethics Quarterly*739,74; Cynthia Kwakyewah and Uwaafiokun Idemudia, 'Canada-Ghana Engagements in the Mining Sector: Protecting Human Rights or Business as Usual', (2017) 4 *Transnational Human Rights Review* 146.

[282] Wettstein, above n 104, 744.

[283] Maxwell Miyawa, 'The International Dimension of the Right to Development: Where is the Gapping Crack of Accountability for Non-State Actors', (2006) 3 *The Transnational Human Rights Review* 39, 52; Wettstein, above n 104, 743.

[284] Denis Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20(3) *Business Ethics Quarterly* 371, 373-4.

[285] Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

[286] UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). (The *Norms*)

[287] Ruggie, above n 88, 7.

[288] *Id.*

[289] UN Commission on Human Rights, *Human Rights Resolution 2005/69*.

[290] Arnold, above n 107, 372.

In this respect the Global Compact represents the second approach to having corporations accept human rights responsibilities. This approach focuses upon the "voluntary" acceptance of these responsibilities by corporations. As is discussed below, voluntary in this context should be taken to mean; not under compulsion of law. Publicists suggest a number of, potentially related, bases for corporate voluntary acceptance of responsibility for human rights.

Arnold for example argues that there is a moral basis for acceptance of responsibility.[291] However, to Arnold the moral responsibility extends only to basic rights:

> Basic rights are those rights necessary for the attainment of other rights and without which it is not possible to live a decent human life. For example, a basic right to subsistence is necessary before one can take advantage of a non-basic right to education.
> …
> Basic rights take the form of side-constraints that bind the moral space in which duty bearers may pursue ends without unjustified interference by other agents or institutions.[292]

To Arnold basic rights are distinguished from aspirational rights "such as unlimited access to high quality education and healthcare, that may foster a flourishing and fully realized human existence but are difficult, or impossible, to guarantee universally"[293] It would appear that a number of internationally recognised human (and Indigenous) rights would not satisfy Arnold's definition of a *basic* right.

While not exploring the detail of the scope of the more limited basic rights, Wettstein[294] explores the role of morality in an acceptance of Corporate Social Responsibility (CSR). O'Faircheallaigh[295] suggests there have been three approaches identified to the foundation of CSR. The first sees CSR essentially as a ruse, a public relations exercise designed to reduce unwelcome regulatory incursions and negative public scrutiny. The second sees "CSR as a holistic and long-term view of what is required to allow a company to survive and to continue to generate wealth into the future."[296] The third sees CSR as a duty or ethical obligation owed to society even in the absence of any short or long-term benefit to the corporation. Wettstein's analysis pursues this third approach. She states: if positive obligations ought to matter to business, they must be attached to and indeed become a part of their vision and mission, that

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[291] *Ibid,* 372.

[292] *Ibid,* 386, (footnotes omitted).

[293] *Id.*

[294] Wettstein, above n 104.

[295] O'Faircheallaigh, C in O'Faircheallaigh, C and Ali, S, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility*, Greenleaf Publishing, 2008, 2.

[296] *id.*

is of the very reason they are in business"[297] To Wettstein it is through this recasting of business purpose that responsibilities are beyond merely voluntary.[298]

Whether the basis for voluntary acceptance of corporate responsibility for human rights lies in morality or the more pedestrian rationales also suggested by O'Faircheallaigh the result of the work of the SGSR was the 2011 United Nations Guiding Principles on Business and Human Rights.[299] (GP). Before moving to consider the content of the GP it is worth noting, as Kwakyewah and Idemudia[300] proponents of the more treaty approach see the GP as "a parallel development and…not a substitute for moving towards a treaty". As these authors also note: "it is clear that 'soft norms' [such as the GP] are presently being privileged."[301]

2.3.3 Content of the Guiding Principles

The GP are expressed to be "grounded in the recognition of"[302] three foundations: the State's duty to protect human rights; a corporation's responsibility to respect human rights; and, the necessity for the availability of a remedy for victims of any transgression of their rights. The corporation's responsibility to respect human rights is expressed to extend to all corporations irrespective of their size or scope of operations.[303] Some commentators note that the notion of a corporation's duty to respect human rights is vague in content so as to have questionable effect.[304] However, it appears the duty to respect is, in essence, simply the obligation expected of all members of a society not to transgress, or collude in the transgression of the laws of the state. The novelty in the GP is that the laws in question are internationally recognised human rights. Principle 12[305] states that the rights in question are "as a minimum", those contained in the International Bill of Human Rights and the ILOs *Declaration on Fundamental Principles and Rights at Work*.[306] However, the commentary to this principle also notes that in particular contexts "business enterprises may need to consider

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[297] Wettstein, above n 104, 760.

[298] *Ibid,* 749.

[299] *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, HRC, UNGOAR, 17th Sess, UN Doc A/HRC/17/31 (2011) at 6.

[300] Kwakyewah and Idemudia, above n 104.

[301] *Ibid,* 154, (footnotes omitted).

[302] GP, above n 122, 1.

[303] *Ibid,* 15 (Principle 14).

[304] Miyawa, above n 105, 34.

[305] GP above n 122, 13.

[306] International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988.

additional standards."[307] United Nations instruments concerning Indigenous Peoples are identified in this regard.

It is unnecessary for current purposes to review the entirety of the GP. However, several aspects are of particular relevance.

Principle 11 program provides:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address the adverse impacts with which they are involved.

Principle 22 in turn provides

> Where business enterprises identify that they have caused or contributed to adverse impacts they should provide for or cooperate in their remediation through legitimate processes.

Finally, Principle 23 provides in part:

> In all contexts business enterprises should:
>
> …
>
> b) seek ways to honour the principles of internationally recognized human rights when faced with competing requirements

The commentary to Principle 23 notes:

> Where the domestic context renders it impossible [to fully respect human rights] business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances…[308]

In summary and in the context of IRCs and Indigenous Peoples then it would appear that the GP creates an expectation on IRCs to respect the provisions of UNDRIP particularly with regard to FPIC but recognises that this may not be possible in certain "domestic contexts". However, if FPIC cannot be respected then an IRC is to participate in remediation of this human rights violation.

Although in some regards predating the GP, the publication of the GP prompted corporations in a number of sectors to develop Industry Standards.[309] This process is contemplated within the GP itself. The responsibilities contained in the GP are explicitly referred to in the International Council on Mining and Metals (ICMM) May 2013 Position Statement on

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[307] GP above n 122, 14.

[308] *Ibid*, 25.

[309] Mercedes Ruiz-Lozano and Pilar Tirado-Valencia, 'Do industrial companies respond to the guiding principles of the Integrated Reporting framework? A preliminary study on the first companies joined the initiative', (2016) 19(2) *Spanish Accounting Review*, 252–260.

*Indigenous Peoples and Mining*. As such the Position Statement can be seen as a manifestation of this process in the particular context of IRCs and Indigenous Peoples.

2.3.4.1 The ICMM Position Statement - Background

The ICMM is an international industry association comprising 27 mining and metals companies and 33 national and regional mining associations and global commodity associations.[310] The ICMM was established to address core sustainable development challenges. It is headquartered in London. ICMM corporate members include: Anglo-American, BHP-Billiton, Freeport, Mitsubishi Materials, Newmont, and Rio Tinto. The Minerals Council of Australia (MCA) is one of the "member national associations". To be eligible for membership corporations must implement a Sustainable Development Framework that incorporates ten key principles and six positions statements. The ICMM conducts an annual third party verified assessment of member corporations' progress against the commitments contained in the Framework. The results of the annual assessment are published (and publicly available).

The ten principles contained in the Framework can be summarised as follows:

1. Implement and maintain ethical business practices and sound systems of corporate governance.
2. Integrate sustainable development considerations within the corporate decision-making process.
3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
4. Implement risk management strategies based on valid data and sound science.
5. Seek continual improvement of our health and safety performance.
6. Seek continual improvement of our environmental performance.
7. Contribute to conservation of biodiversity and integrated approaches to land use planning.
8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
9. Contribute to the social, economic and institutional development of the communities in which we operate.
10. Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

The Position Statements are intended to provide greater clarity to matters contained in the Principles. They go to matters such as: Climate Change, Water, Mercury Risk Management, Protected Areas and Indigenous Peoples. The Indigenous Peoples and Mining Position statement is said to clarify Principles 3, 6 and 9.

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[310] The information contained in the following section is primarily taken from the ICMM's own website: http://www.icmm.com/about-us/about-us and linked pages. Accessed on 4 June 2018.

2.3.4.2 The ICMM Position Statement – Content and Analysis[311]

The Position Statement is described setting out ICMM members' "approach to engaging with Indigenous Peoples and to free, prior and informed consent".[312] The Position Statement describes FPIC as "a process and an outcome". The *process* is summarised as ensuring decisions are: made freely without coercion or manipulation; involve sufficient time; and, are on the basis of full information. "The *outcome* is that Indigenous Peoples can give or withhold their consent to a project…"[313] The requirements of the Position Statement should have been implemented by May 2015 but do not apply to projects that have started the approvals process at the time of adoption of the Position Statement (May 2013).[314] Aside from these preliminary comments the Position Statement contains six "Recognition Statements" and six "Commitments". This discussion will focus only on those aspects dealing with the consent requirement. Essentially these are found in Recognitions Statements 4 and 5 and also Commitments 4 and 5. Reproducing (at least portions of) the text of these provisions is necessary in order to analyse them.

*Recognition Statements 4 and 5*[315]

> 4. Successful mining and metals projects require the support of a range of interested and affected parties. This includes both the formal legal and regulatory approvals granted by governments and the broad support of a company's host communities … *States have the right to make decisions on the development of resources according to applicable national laws*, including those laws implementing host country obligations under international law. Some countries have made an explicit consent provision under national or subnational laws. In most countries however, "neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them", *so FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation*". (Emphasis added)[316]
>
> 5. States also have an important role to play in the process of engaging with Indigenous Peoples. *They may be involved in determining which communities should be considered indigenous, in shaping the process for achieving FPIC and in determining how this relates to regulated processes for ensuring community participation in decision making.* Given their role in balancing the rights and interests

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311 The material contained in this subsection is a revised and updated portion of an article first published Matthew Storey, 'FPIC, ICMM and CSR, Alphabet Soup or a Sea Change*'* (2014) 1(3) *Energy and Resources Law Bulletin* 55.

312 Position Statement, 1.

313 *id*.

314 Position Statement, fn 4.

*315* Position Statement, 3.

316 The remarks in quotations are referenced to the UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples Issues* (2008). (*Resource Kit*).

> of Indigenous Peoples with the wider population, states may also play an important role in supporting the resolution of disagreements that may arise between Indigenous Peoples and companies in the pursuit of FPIC. (Emphasis added)[317]

*Commitments 4 and 5*[318]

> 4. *Work to obtain the consent of indigenous communities* for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples...These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.
>
> 5. Collaborate with the responsible authorities to achieve outcomes consistent with the commitments in this position statement, in situations where the government is responsible for managing Indigenous Peoples' interests in a way that limits company involvement. *Where a host government requires members to follow processes that have been designed to achieve the outcomes sought through this position statement, ICMM members will not be expected to establish parallel processes.*

There are two (inter-related) issues arising from these provisions. The first is that, in the preambulatory text it is accepted that the "outcome" of FPIC consent is absolute: that is it can be given or withheld. However, in Recognition Statement 4 and Commitment 4 while the giving of consent may be absolute, the consequence of the withholding of consent is not. This is because FPIC has become a principle to be respected "to the greatest degree possible" the Commitment is "to work towards it" as opposed to "not proceeding without it".

The second issue is the role of the State. The first point to note here is that the Position Statement accepts that the State has the right to develop resources in accordance with its (FPIC embracing or not) national laws. Further, even in the observance of FPIC (to the extent it is not trumped by the State right to develop resources), the State may have a role in identifying relevant parties and in shaping and regulating processes. If these processes are "designed to achieve" FPIC, the ICMM member is absolved of independent accountability in the event the design fails. These issues warrant consideration in some greater detail.

To commence with the "aspirational FPIC" point: it should at the outset be noted that the preamble to the UNDRIP itself "proclaims" the declaration to be: "a standard of achievement to be pursued in a spirit of partnership and mutual respect". However, the authority cited in the Position Statement in this regard is the UNDESA, *Resource Kit on Indigenous Peoples Issues* (2008) ("Resource Kit"). The Resource Kit is "designed to provide United Nations Country Teams with guidance as to how to engage with indigenous peoples and include their

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317 The remarks in quotations are also referenced to the UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples Issues* (2008).

318 Position Statement, 4.

perspectives in development processes".[319] The relevant section of the Resource Kit (pp 13 - 18) identifies the text of UNDRIP Art 19 and 26 as establishing a right of Indigenous Peoples to the resources of their lands and the ability for those peoples to give or withhold consent to the development of those resources. It also notes the view of the UNDG that:

> In the case of state owned subsurface resources on indigenous peoples' lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources and have the right to any benefit-sharing arrangements.[320]

It continues by discussing increasing adoption of the principles by States and the views of the UNPFII which are clearly that an FPIC consent is absolute. The Resource Kit does note that international development (e.g. World Bank, Asian Development Bank) agencies acknowledge the specialties of Indigenous Peoples to their land but suggest that the World Bank Group (WBG) only requires "special considerations" of this matter. Reference is made to WBG Operating Procedure 4.10 (OP 4.10) in this regard. OP4.10 requires investments in development programs financed by the WBG only proceed if affected indigenous peoples have engaged in a process of "free prior and informed *consultation*" with the borrower. This is described as "FPICon."

The adoption by the WBG of the FPICon standard as opposed to FPIC was condemned by many Indigenous Peoples' organisations.[321] Critics suggest it represents a watering down of FPIC.[322] This may be true. Although at this point the views of Anaya and Puig discussed earlier[323] suggesting that the consent requirement in FPIC was not absolute should be remembered.

Certainly, a recommendation contained in the review that led to OP 4.10 that FPIC was the appropriate standard[324] was not adopted in favour of the FPICon approach. However, the WBG still requires that borrowers engage in FPICon "resulting in broad community support."[325] The term "broad community support" is not defined.[326] Interestingly, the WBG International Finance Corporation (IFC) addresses the issue as part of its 2012 *Performance*

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[319] *Resource Kit*, p 1.

[320] UNDG, *Guidelines on Indigenous Peoples' Issues 2008,* 18. Available at: https://undg.org/document/the-united-nations-development-groups-guidelines-on-indigenous-peoples-issues/

[321] MacKay F, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?', (2005) 25(1) *Arizona Journal of International and Comparative Law*, 86.

[322] *Ibid*. p 89.

[323] Anaya and Puig, above n 81.

[324] *The Final Report of the Extractive Industries Review: Striking a Better Balance*, (2004), 21, 50 and 60. Available at http://documents.worldbank.org/curated/en/961241468781797388/Striking-a-better-balance-the-World-Bank-Group-and-extractive-industries-the-final-report-of-the-extractive-industries-review

[325] *Ibid.* at 7, 9. And OP 4.10 at paragraphs 1, 6(c), 10 and 11. (See also Mackay F, supra n 144, 81).

[326] Mackay F, supra n 144, 84.

*Standards on Environmental and Social Sustainability*.[327] Performance Standard 7 relates to Indigenous Peoples. There is a guidance note in relation to this Standard. Performance Standard 7 (at paragraph 12) requires "evidence of agreement" between the (IFC) client and affected [Indigenous] communities. The Guidance Note at GN 33 specifically incorporates FPIC (not FPICon) and identifies that FPIC does not require unanimity and that there may be differing views on aspects of a proposal but concludes: "[t]hus an FPIC agreement captures the Affected Communities' broad agreement on the legitimacy of the engagement process *and the decisions made*" (emphasis added).

Thus, while the WBG's FPICon may be a less stringent standard than the UNDRIP FPIC, it still requires the broad "agreement" or "support" of affected Indigenous communities.

It is then in light of this discourse that the full paragraph in the *Resource Kit* to which the Position Statement refers should be appreciated. That paragraph reads:

> It should be noted that the FPIC process may include the option of withholding consent. It should also be noted that, in most countries, neither indigenous nor any other population group actually have the right to veto development projects that affect them. The concept of free prior and informed consent is therefore a goal to be pursued and a principle to be respected to the greatest degree possible in development planning and implementation.[328]

With the greatest of respect, taken in context, this paragraph out of a guide for UN Country Teams on how to involve indigenous peoples in development processes does ***not*** provide the ICMM with a legitimate basis to reduce FPIC to an "aspiration". This conclusion is emphasised by the earlier discussion around the increasing acceptance of FPIC as a feature of international law and a limitation on State sovereignty with respect to natural resources.

What then of the second issue coming out of the Position Statement: the role of the State? In many respects one may be inclined to feel some sympathy for the position of the ICMM in this regard. It could be seen as merely acknowledging the state of the law in the jurisdictions within which its members operate, and those laws are based on the concept of PSNR.

The same issue was debated in the WBG in relation to OP 4.10. There it was argued that to require FPIC would infringe state sovereignty.[329] It is unclear how requiring an FPICon requirement on a nation state that does not embody this concept in its internal law differs in principle from requiring an FPIC proper process in order to access WBG assistance. The question of state sovereignty in the inter-relation between domestic law and international law is well travelled. The fundamental principle is that domestic law (including sub-national law)

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[327] International Finance Corporation *IFC Performance Standards on Environmental and Social Sustainability,* May 20012. Available at: https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES

[328] *Resource Kit*, 18.

[329] Mackay, above n 144, at p 79.

cannot be invoked as a justification for failure to perform a treaty (or other international legal) obligation.[330]

As the earlier discussion on the GP suggested a high profile transnational corporation is unlikely to justify (for example) employment (directly) of child labour, causing massive environmental degradation, or the manufacture of internationally prohibited weaponry on the basis that the laws of the place of operation permit these activities. These are the very basis of the "respect" foundation of the GP. It will be recalled that the commentary on Principle 11 in Part II ("The Corporate Responsibility to Protect Human Rights") put the matter quite succinctly:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[331]

Thus, it can be appreciated that, at least as an ethical proposition, there should be no distinction drawn in application of FPIC *even absent national laws giving effect to the principle.* Indeed if reliance on the text of national laws provided sufficient guidance for ICMM members on ethical behaviour there would be no need for the Position Statement or even ICMM.

From this perspective the reliance in the Position Statement on the idea of "just following the local law" would appear unsupportable and contradictory.

A final, but significant, point to note in relation to the Position Statement is that it makes no reference to the notions contained in Principles 22 and 23 of the GP. It will be recalled that these principles created an expectation in corporations "when faced with competing requirements" to "honour the principles of internationally recognized human rights. "[332] Principle 22 created the expectation to "provide for or cooperate in [the] remediation through legitimate processes" of any "adverse impacts" the corporation had "caused or contributed to".[333] Thus, the GP creates an expectation that even when IRCs are obliged by national laws to not fully respect FPIC they will take steps to remediate this adverse impact. This concept is absent from the commitments contained in the Position Statement.

### 2.4 Conclusions as to International Legal Principles and Expectations

The following conclusions can be drawn from the foregoing discussion:

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[330] *Pacta sunt servada*: Vienna Convention on the law of Treaties 1969 1155 NTSS 331, art 26 and 27. The matter is discussed in Mackay, above n 144, 80.

[331] Guiding Principles, 13.

[332] GP, Principle 23.

[333] GP, Principle 22.

- A State's indisputable sovereignty over the natural resources within its territory is qualified by international legal expectation that the assertion of its sovereignty will be used for the benefits of the peoples that constitute that State. In the same manner a State's general legislative sovereignty is qualified by international legal expectations that it will uphold a range of internationally recognised human rights norms.
- The rights of Indigenous Peoples to control development of the natural resources within their traditional lands and territories is increasingly accepted under international law, particularly in those states that have endorsed the principle of FPIC contained in the UNDRIP.
- Corporations, particularly IRCs are subject to an *expectation* that they will also respect these internationally recognised human rights norms, including FPIC.
- The ICMM Position Statement contemplates as acceptable an IRC not fully respecting the FPIC principle where this absence of respect is a feature of the relevant municipal natural resources regime.
- The authority of the ICMM Position Statement in this respect is questionable and does not address the expectation in the GP that, even when faced with the dilemma of a conflict between municipal legislation and internationally recognised human rights standards a corporation should take steps to remediate any adverse impacts of the IRCs operations.

With these conclusions in mind, the third part of this paper examines the mining regimes actually in place in both the Philippines and the Australian state of Western Australia.

## 3. The Municipal Regimes

(Fortunately) it is not necessary for the purposes of the current discussion to provide a comprehensive exposition of the mining regimes in the Republic of the Philippines and the Australian state of Western Australia. Rather it is sufficient for current purposes only two examine three aspects of each regime. These are: the ownership of mineral resources, the process of gaining authorisation to explorer and extract mineral resources and the requirement for engagement of Indigenous Peoples as an aspect of that authorisation. Each jurisdiction will be considered separately under these headings.

### 3.1 The Republic of the Philippines

3.1.1 Background and Legislative Framework

The Republic of the Philippines is a nation of a high mineral prospectivity. Recent estimates suggest there are $US 840 billion in mineral reserves.[334] These reserves are primarily in non-ferrous metals such as copper, gold, lead nickel, silver and zinc.[335] Indigenous Peoples

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[334] Roberto Raymundo, *The Philippine Mining Act of 1995: Is the law sufficient in achieving the goals of output growth, attracting foreign investment, environmental protection and preserving sovereignty?* De la Salle University Research Presentation, March 2014, 1. Available at http://www.dlsu.edu.ph/conferences/dlsu_research_congress/2014/_pdf/proceedings/SEE-III-026-FT.pdf

[335] William Holden, 'Indigenous Peoples and non-ferrous metals mining in the Philippines', (2005) 18 (3) *The Pacific Review,* 417, 418.

constitute between 15%-20% of the total population.[336] The main centres of Indigenous population are on Mindanao where the Lumad people, who constitute approximately two thirds of the total Indigenous population live and in the Cordillera of the island of Luzon where the Igorot people live.[337] As Holden notes: "[i]t is estimated that half of all areas identified in mining applications in the Philippines are in areas subject to Indigenous land claims".[338]

There are three main pieces of legislation relevant to the current discussion: the *1987 Constitution of The Republic of the Philippines* (the Constitution); the *Mining Act* of 1995[339] (the PMA); and, the *Indigenous Peoples Rights Act* of 1987 (IPRA).[340]

The relevant provisions of the Constitution are:

Section 2 of Article XII which provides in part:

> …The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The state may directly undertake such activities, or it may enter into co-production, joint venture, or production sharing agreements with Filipino citizens or corporations or associations at least sixty percent U.N. of whose capital is owned by such citizens.
> …
> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development and utilization of minerals petroleum and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country.

Section 5 of Article XII, however, provides as follows:

> The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of the indigenous cultural communities and their ancestral lands to ensure their economic, social and cultural well-being.

Pursuant to the power under section 2 of Article XII the Philippine legislature enacted the PMA. This Act and the regulations (Administrative Orders)[341] promulgated under it by the Department of Environment and Natural Resources (DENR) created two relevant forms of "tenure": the Mineral Production and Sharing Agreement (MPSA) and the Financial

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[336] William Holden and Allan Ingelson, 'Disconnect between the Philippine Mining Investment Policy and Indigenous Peoples Rights', *(2007)* 25 (4) *Journal of Energy and Natural Resources Law* 375, 376.

[337] *Ibid,* 377.

[338] Holden, above n 158, 422.

[339] Republic Act No 7942.

[340] Republic Act No 8371.

[341] DENR AO97-24..

Technical Assistance Agreement (FTAA). Both of these forms of title allow for a 25-year tenure for exploration and production purposes. The MPSA is limited to a maximum area of 16,200 hectares for exploration purposes whereas the FTAA provides for 81,000 hectares for exploration and 5,000 hectares for production purposes. The MPSA is limited to 40% foreign ownership but the FTAA allows for 100% foreign ownership but requires a minimum investment commitment of US$50 million. It can only bear approved by the President of the Philippines.[342] O'Callaghan also notes that both forms of title have four core elements. Two of these go to taxation arrangements and environmental matters. Relevantly the other two go to the operational arrangements and social issues. He describes these latter two elements as follows[343]:

> An "operating contract" which stipulates the terms under which a company can explore and develop a mine, and which sets out the terms for the exploration, utilization and development of a resource, the sizer of the concession, the number of years a concession may be held and, most importantly their level of foreign ownership.

The second relevant element is:

> A "social and cultural contract" which includes appropriate treatment of indigenous peoples and communities, workforce skill development and labor laws.

The issue of treatment of Indigenous Peoples is also impacted upon by the second piece of relevant legislation; the IPRA.

Holland and Ingelson summarise the IRPA as follows:

> IPRA is a powerful statute that provides for a wide range of indigenous Peoples trig hits such as the right to ancestral domain, the right to self governance and the right to cultural integrity….IPRA created the National Commission on Indigenous People (NCIP), which is the 'primary government agency responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of [Indigenous Cultural Communities – (ICC) and Indigenous Peoples].[344]

The constitutional validity of both the PMA and the IPRA were challenged in separate proceedings before the Supreme Court of the Philippines. Both were found to be valid.[345]

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[342] Terry O'Callaghan,'Regulation and Governance in the Philippines Mining Sector', (2009) 31 (1) *Asia Pacific Journal of Public Administration*, 91, 98-99.

[343] *Ibid,* 97.

[344] Holden and Ingelson, above n 159, 379. Footnotes omitted but the references are to IPRA ss 4-20 and ss 29-37.

[345] IPRA: *Isagani Cruz & Cesar Europa v Secretary of Environment and Natural Resources et al* (G.R. 135385); PMA *In La Bugal-B'laan Tribal Association Inc et al v Ramos et al* (G.R. 127882). The Supreme Court initially found the PMA to be invalid but subsequently (11 months later) overturned this decision on a government petition for reconsideration on the basis that the original decision failed to adequately take into account the second limb of the Constitution section 2 Article XII as reproduced above.

Pursuant to the IPRA the NCIP promulgated NCIP Administrative Order 98-1 Part III section 7 of which:

> …require[s] that the free prior and informed consent of an indigenous cultural community be obtained as a precondition for the exploration, for the exploration development, exploitation and utilization of natural resources that are the ancestral domain of an indigenous community.[346]

The following from O'Callaghan describing the processes required under the IPRA to achieve FPIC is perhaps lengthy but comprehensive.

> The difficulty for investors is that the process is extremely bureaucratic. It includes endorsement by the Minerals and Geosciences Bureau (a separate bureaucratic process itself), negotiations with landowners, field based investigation conferences and reports, a range of mandatory activities for achieving consent (including development of a community consultative community), and the negotiation and signing of a memorandum of understanding (MOU). The MOU includes such commitments as the payment of royalty fees, employment, education, medical and health services, free light and water supply, security, social projects, infrastructure development, communications facilities and a conflict resolution mechanism. Finally, the [NCIP] may decide to either approve a project or reject it. If it rejects it the applicant must begin the entire process again or abandon it.[347]

While clearly to O'Callaghan the process is "overly bureaucratic", read in the context of the earlier discussion of the FPIC provision of UNDRIP it would appear as an exemplar of an appropriate regime. The one possible qualification to this may be the role of the NCIP. The NCIP is composed of seven Commissioners appointed by the President on the nominations from the Indigenous communities of seven defined regions.[348] A question may possibly arise as to whether a national body of this constitution would satisfy the Indigenous governance provisions of UNDRIP Art 18.[349] Leaving this matter aside, clearly the relevant structures under the IPRA and Administrative Orders are based on recognition and application of FPIC.

The following section of the discussion however, reviews literature regarding the application of these legislative provisions.

#### 3.1.2. Application of the IPRA and PMA

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[346]Holden and Ingelson, above, n 159, 380.

[347] O'Callaghan, above, n. 165, 102.

[348] IPRA, Chapter VII, s 40.

[349]UNDRIP Art 18: "…. the right to participate in decision-making in matters…, through representatives chosen by themselves in accordance with their own procedures…"

In contrast to the legislative provisions of the IPRA and its implementing Administrative Orders a preliminary review of the literature[350] regarding the application of this regime suggests a darker picture. Holden and Ingelson describe dislocated Indigenous communities "living under a bridge."[351] The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People reported in 2003 that there were reports of:

> Arbitrary detentions persecutions and even killings of community representatives, of mass evacuations, hostage taking, destruction of property, summary executions, forced disappearances, coercion and also rape by armed forces and so-called paramilitaries.[352]

Writing in 2016, Simbulan reiterates the allegations of the killings of Indigenous leaders as a consequence of mining developments and asks: "[w]hy are mining companies and their operations in the Philippines often accompanied by militarization and violence in the ancestral lands of indigenous peoples."[353]

However, the relationship between IRCs and Indigenous Peoples in the Philippines is not reported as universally bleak. In 2005 Holden noted that in 1997:

> At its Tampkan property on the island of Mindanao, the Australian mining company Western Mining Corporation engaged in substantial efforts to gain the consent of the *Bla'an* communities. First, the mining project proponent made efforts to engage the communities as early as possible when it began the process of mine development; then, the mining company hired ethnographers and archaeologists to document the traditions of the indigenous community and the extent of its territory; finally Western Mining Corporation also engaged in efforts to improve the conditions of the *Bla'an* Peoples by providing them with education and medical facilities.[354]

Despite this positive note the question remains: how does the positive legislative regime in the Philippines translate into such (largely) reported negative outcomes?

O'Callaghan suggests that: "…the Philippines bureaucracy is in need of serious reform. One particularly thorny problem facing the sector is the conflict between mineral land use on the one hand, and forest, ancestral and urban lands on the other."[355]

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[350] It must be noted at this point that the following discussion is based on a *preliminary* review of the available literature. The author has not, to date, had the opportunity to conduct a comprehensive review of the literature or the opportunity to discuss the conclusions of the literature with the stakeholders directly involved.

[351] Holden and Ingelson, above, n 159, 385.

[352] Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, prepared by the UN Commission one Human Rights, 59th Session, 2003 (4/2003/90/Add.3), 19.

[353] Roland Simbulan, 'Indigenous Communities' Resistance to Corporate Mining in the Philippines' (2016) 28 (1) *Peace Review*, 29, 29.

[354] Holden, above, n 158, 431-432.

[355] O'Callaghan, above, n 165, 103.

Holden and Ingelson are more direct. They comment:

> IPRA is based on the same principles as [UNDRIP]. IPRA as *legislation*, does describe indigenous peoples' rights; however, the problem lies not in the law, but with the government's reluctance to *enforce* the law.[356]

Despite these apparent administrative shortcomings in the enforcement of the relevant Philippine legislation, the point must also be made that it is not apparent (at least from the available literature) that a potential concession holder is *obliged* to participate in the flawed application of a structurally sound regime. The fact that negotiations under IPRA occur *after* an application for a concession under the PMA is made imply a concession applicant will have a certain negotiation period to satisfy the requirements of IPRA before a final decision to proceed or not with the grant of a concession is made.

The following section of the discussion, which describes the regime in place in the Australian state of Western Australia, suggests that the "problem" there is by contrast not in the *enforcement* of the law but in the law itself.

### 3.2 Western Australia

3.2.1 Background and Legislative Framework

3.2.1.1 Origins of Native Title in Australia

From the original British Imperial assertion of sovereignty over the land mass of the continent of Australia and its adjacent islands commencing in 1788 until the landmark decision of the High Court of Australia in *Mabo & Ors v Queensland & Ors (Mabo No 2)* (1992) 175 CLR 1[357] Australian Law recognised no Indigenous interests in land. Indeed, it was only in the 1971 decision of *Milirrpum v Nabalco Pty Ltd*[358] that there was any recognition of the *existence* of an Indigenous system of land ownership.

The effect of *Mabo* was to declare that upon the assertion of sovereignty Australian common law accepted that Australia's Indigenous people had laws and customs which gave rise to rights and interests in relation to land (native title). Native title is the common law's recognition of those Indigenous rights and interests. Although based in Indigenous traditional laws and custom, native title rights are rights *in rem* and may be enforced against the whole world. The actual content of the rights and interests will vary in accordance with the variation of the traditional laws and customs that give rise to them. Prior to the *Mabo* decision the view taken by the Australian common law was that rights and interests in land could only arise (mediately or immediately) from a Crown grant – the doctrine of tenure. *Mabo* declared native title as an exception to the doctrine of tenure and created the possibility of the existence of Indigenous land rights within the Australian legal system. However, native title rights, not originating in a Crown grant, were susceptible to extinguishment without

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[356]Holden and Ingelson, above n 159 ,389.

[357] Hereinafter, *Mabo.*

[358] (1971) 17 FLR 141.

compensation by effect of an inconsistent Crown grant or reservation. In the earlier decision of *Mabo No 1*[359] the High Court had found that the Crown's ability to make grants of interests in land[360] inconsistent with a continuing native title rights was only limited by the commencement of the Australian Commonwealth *Racial Discrimination Act 1975* (Cth.) in October 1975.

However, as *Mabo* makes clear, between the assertion of sovereignty and 1975 the colonial and (subsequent to Federation in 1901) later (sub-national) state governments who were responsible for land management could validly grant interests in land that affected the (non-compensable) extinguishment of native title rights. Faced with the potentially invalidity of all grants of interests in land made subsequent to October 1975 the Australian Commonwealth government passed the *Native Title Act 1993* (Cth.) (the NTA) which had the effect of validating potentially invalid (post 1975) grants of interests in land but making 'just terms' compensation available where such a grant had the effect of extinguishing or impairing native title rights. The NTA also established procedures which state governments were obliged to follow in the granting of all subsequent (i.e. to 1993) interests in land.

The later High Court decision of *Wik Peoples v Queensland*[361] clarified that a pastoral lease, while extinguishing a native title right to control access to land, did not wholly extinguish all native title rights. This decision was contrary to the expectations of many state governments who had thought (hoped) that a pastoral lease would wholly extinguish native title rights. A pastoral lease was a common feature of land tenure in Australia that provided for a right to undertake pastoral activities but did not provide for exclusive possession of the land contained in the 'lease' In northern Australia the pastoral lease is still predominant with that 56 per cent of land in North Queensland; 45 per cent of land in the Northern Territory and 38 percent of land in northern Western Australia being held under pastoral lease. This amounts to a total land area (in northern Australia) of 1,634,467 km$^2$ held under pastoral lease.[362] In response to this significant expansion of the potential ongoing existence of native title rights, the then conservative Commonwealth government passed significant amendments to the NTA in 1998[363]. Many of these were considered to be antithetical to Indigenous interests. However, the 1998 amendments also introduced the concept of the Indigenous Land Use Agreement (ILUA) as an alternative procedure for the negotiation and authorisation of the grant of interests in land where native title rights subsist. The ILUA mechanism is discussed further below.

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[359] *Mabo & Ors v Queensland & Ors (No 1)* (1988) 166 CLR 186.

[360] In Australian law the grant of a mineral exploration or production title is considered an interest in land. See, for example, *Western Australia v Ward* (2002) 213 CLR 1.

[361] (1996) 187 CLR 1.

[362] Commonwealth of Australia, *Our North, Our Future, White Paper on Developing Northern Australia*, Government Publication, Canberra 2015, 34.

[363] *Native Title Amendment Act 1998* (Cth.)

3.2.1.2 The Western Australian Mining Regime

Native title aside, responsibility for land management (including the grant and regulation of mineral tenures) in Australia resides with the (sub-national) state governments. While each state government has its own mineral titling regime they are in broad terms similar. The State of Western Australia (WA) has a regime typical in this respect and is also the location of much mining activity in Australia with total resource and export sales in 2016-17 of over A$105 billion. [364] Total Australian resource and energy exports in 2016-16 were valued at $157 billion, accounting for 51% of Australia's goods and services exports.[365]

The WA mining regime is regulated under the *Mining Act 1978* (WA) (WAMA) and associated regulations.[366] Section 9 of the WAMA declares property in (essentially) all minerals in the state vests in the Crown and s 155 makes unlawful exploration for or production of mineral unless authorised under the WAMA. Interestingly in these provision sis a clear assertion of PSNR that (in WA) dates back to before 1899.

There are various forms of title under the WAMA however the main two relevant titles are the Exploration Licence (EL) provided for in ss 56C-70. The EL may be held for a maximum period of (usually) five years[367] and can be (again usually) for an area of 70 graticular blocks. A graticular block is defined by latitude and longitude but will be, depending upon latitude an area of between 2.8 and 3.3 square kilometres. Thus, the maximum size of an EL would usually be around 210 kilometres square. More than one EL can be held. The EL involves minimum annual expenditure and activity obligations.[368] Half of the area held under EL must be surrendered each year.[369] The EL allows for exploration and related activities but not for production activities.[370] The holder of an EL has, during its term, an exclusive right to be granted a Mining Lease (ML) in any area contained within the EL.[371] Further, an applicant for an EL has priority over nay subsequent applicant in respect of the grant of an EL in the application area.[372] This last point is of great significance as it means that once an application for an EL (or subsequent ML) is lodged the applicant has priority over any subsequent

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[364] Government of Western Australia, *Mineral and Petroleum Statistics Digest 2016-2017*, Government Publication, 4. Available at: http://www.dmp.wa.gov.au/Documents/About-Us-Careers/AboutUs-StatisticsDigest_2016-17.pdf

[365] Commonwealth of Australia, Department of Industry, Innovation and Science. Australian Mineral Commodities. Government website. Available at https://www.industry.gov.au/resource/Mining/AustralianMineralCommodities/Pages/default.aspx

[366] The most relevant of which are the *Mining Regulations 1981* (WA).

[367] WAMA, s 61.

[368] WAMA s 62.

[369] WAMA s 65.

[370] WAMA s 66.

[371] WAMA s 67.

[372] WAMA, s 105A.

applicant during the time the processes of the application, including resolution of native title processes under the NTA are resolved.

The ML is the main form of productive title under the WAMA. It authorises production (and further exploration) and associated activities within the area of the lease.[373] It may be granted for an initial term of 21 years but can be renewed.[374] The usual maximum size for an ML is 10 square kilometres.[375] Not infrequently significant mineral development projects in WA will be regulated under project specific legislation that will mirror the provisions of the more general WAMA.[376]

With these technical aspects of the predominant WA mineral titles in mind the following passage from the WA Government's Mineral Statistics Digest provides a more practical representation of situation 'on the ground':

> In 2016–17, 42.5 million hectares of Western Australian land was covered by mining tenements – an increase of 13 per cent from 37.6 million hectares in 2015–16. Exploration licences accounted for about 80 per cent of the area covered by mining tenements. The number of exploration licences increased 11 per cent over the year from 4529 tenements in 2015–16 to 5020 tenements in 2016–17. Mining leases accounted for just 6 per cent (2.4 million hectares) of the total area. The number of mining leases fell 1 percent from 5873 in 2015–16 to 5827 in 2016–17, although the area covered under these mining leases rose 1 per cent over the same period.[377]

The WAMA itself does not contain any requirement to satisfy obligations arising from the existence of native title rights as a precondition to the grant or operation of a mineral tenement. Rather these obligations are set out in in ss 24AA and 24OA of the NTA[378] which operate to make invalid any grant of a mining title that has not been undertaken in compliance with the NTA. For the grant of a mining title there are two possible processes established; The ILUA process; and, the Right to Negotiate (RTN) process. To examine these two processes though it is necessary to appreciate the "claims" process under the NTA.

3.2.1.3 The *Native Title Act 1993* (Cth.)

Although *Mabo* established the possibility of the existence of native title rights in any given tract of land, confirmation of this existence in any particular land requires a determination by

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[373] WAMA s 85.

[374] WAMA s 78.

[375] WAMA s 73. The size can be increased to cover a proven ore-body and necessary associated infrastructure.

[376] See, for example, the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) discussed in the context of native title by the High Court of Australia in *Western Australia v Brown* (2014) 253 CLR 507.

[377] Government of Western Australia. Above n 187, 9.

[378] Under s 109 of *The Constitution* of the Commonwealth of Australia, any state Act that is inconsistent with Commonwealth legislation will be invalid to the extent of the inconsistency.

(generally) the Federal Court of Australia.[379] The process of determining the existence of native title rights is a complex litigious process that requires extensive evidence regarding the continued existence and content of traditional laws and customs to support the asserted native title right. It also requires evidence of details of all tenure granted in the relevant land since the assertion of sovereignty in order to determine which, if any native title rights have been extinguished by inconsistent Crown grants.[380] The process will usually take in excess of five years to conclude once initiated. Given these timeframes the NTA provides for a process of the administration assessment and registration of native title determination applications ("claims") pending ultimate finalisation of the matter by the Federal Court.[381]

Once a native title claim is registered and upon ultimate determination of the claim by the Federal Court and native title holding community is afforded procedural rights in respect of any proposed (relevantly) grant of a mineral interest in their lands. These rights are afforded whether the native title rights (claimed or determined) amount to exclusive possession or non-exclusive possession rights.[382] As the Australian Commonwealth government notes currently: "some 94 per cent of the landmass of north Western Australia is subject to a native title claim or determination, as is 62 per cent of north Queensland and 30 percent of the Northern Territory."[383]

As indicated earlier, once a native title claim is registered or determined the grant of a mining title can only proceed if either an ILUA in respect of the proposal is negotiated or the RTN procedure is satisfactorily concluded.

Although technically complex, conceptually the ILUA is straightforward. It is a contract between the native title holding community and the state government and(or) putative miner authorising the grant and (usually) operating conditions a mining proposal will be subject to. It is possible for an ILUA to authorise both exploration and any subsequent production activities. The impact of the mining activity on any native title rights and interests is given statutory authorisation under the NTA.[384] Subject to the discussion below then, the ILUA process is a voluntary, largely unconstrained, mechanism for a proponent to negotiate the FPIC of an affected Indigenous community with respect to their lands.

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[379] NTA, s 13.

[380] NTA, ss 61 and 223.Establishment of a right to compensation in respect of any Crown grants that have taken place since 1975 is a separate and more complex process: *Northern Territory v Griffiths* [2017] FCAFC 106.

[381] NTA ss 184-191.

[382] Non-exclusive possession rights are those generally determined to co-exist with a pastoral lease.

[383] Commonwealth of Australia, above ,n 185, 19.

[384] NTA ss 24BB – 24EBA, particularly s 24EB.

The RTN procedure[385] is less straightforward. Under the RTN in order to make the grant of a mining title the state government must give public notice of its intention.[386] There is then a three-month period in which any native title claiming community can seek to have a claim registered. If the claim is registered the native title claiming community is entitled to commence negotiations with the state and the putative miner.[387] Once a claim is registered (or if there is already a determination of the native title in the relevant area) there is a mandated period of three months negotiations, which must be undertaken "in good faith."[388] The object of the negotiations is to reach an agreement as to the granting of the title. Under the NTA[389] negotiations at this stage can contemplate the ultimate agreement including the payment of "royalties" to the native title holding/claiming community. If an agreement is reached the title can be granted.[390] At the conclusion of the period, if no agreement is reached the state or the putative miner can seek arbitration of the matter.[391]

The arbitration is undertaken by the National Native Title Tribunal (NNTT), an statutory administrative body whose members are appointed by the Commonwealth Governor-General for five-year terms.[392] The NNTT can determine to approve, approve on conditions or not approve the proposed grant. However, the determination cannot include provisions relating to royalty payments.[393] The criteria the NNTT is required to take into account in making its decision include the effect on the native title holding communities and their wishes as well as the "economic or other significance" of the grant and the "national interest".[394]

Between 2012 and 2017 the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two occasions has there been a determination that the grant of a mining title cannot proceed.[395]

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[385] Contained in NTA ss 24MB- 4MD and ss 25-44.

[386] NTA, s 29.

[387] In the event a claim fails the administrative registration process but ultimately succeeds in the Federal Court the subsequent grant of a mining title is valid even though no negotiations with the affected Indigenous community have taken place.: NTA s 24MD.

[388]NTA s 35. The period may be greater depending upon the length of time necessary for a claim to be registered.

[389] NTA, s 33.

[390] NTA, s 31.

[391] NTA, s 35.

[392] NTA, s 111. In fact, the appointments are upon the advice of the relevant Commonwealth Government minister.

[393] NTA s 38(2).

[394] NTA, s 39.

[395] Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); and Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009).

A decision of the NNTT can be overruled by the relevant Commonwealth minister but such action has never been taken.[396]

In addition, the NTA includes a procedure under which a state government can avoid the application of the RTN altogether if it asserts that the proposed grant of title will not significantly interfere with the rights or lands of the native title holding community. This is known as the Expedited Procedure.[397] It is most commonly used in the context of the grant of ELs. A native title claiming holding community can object to the use of the Expedited Procedure. If the objection is unsuccessful the grant of the EL can take place without engaging in the RTN process.[398] If the objection is upheld there is no sanction other than the RTN process must be complied with, causing delay in the grant of the title. In 2016-17 there were over 1000 objections to the use of the Expedited Procedure by native title communities. 44 of these reached the determination stage and in 30 of these cases the objection was overruled.[399]

3.2.2 Consideration of the WA Regime and the NTA

The mining titles regime and the NTA thus described have three significant shortcomings. First, the denial of any compensation for Indigenous peoples' dispossession of lands between the assertion of sovereignty and 1975 offends both contemporary notions of justice and the terms of UNDRIP Art 28. Although this matter is largely beyond the scope of the current discussion. Second, the fact that under the NTA an Indigenous people must be able to establish both the ongoing nature of their traditional laws and customs from the original assertion of British Imperial sovereignty in (generally) the late eighteenth century until the current and that there has been no inconsistent Crown grant on those lands during that period means that many Indigenous peoples (particularly in southern Australia) are largely denied access to the procedures under the NTA altogether. Third, is the RTN.

As described above, the RTN does not satisfy the requirements of FPIC as commonly understood.[400] Moreover, the fact that a putative miner can ultimately resort to arbitration which, in over 98 percent of cases will determine that the grant of the title can proceed without any conditions as to royalties for an affected Indigenous community impacts upon the entire process. An Indigenous people and the putative miner will enter into negotiations with the knowledge that unless an agreement is reached within the mandated negotiation period the alternative is an arbitrated outcome as sought by the miner. This point is well made

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[396] NTA, s 42.

[397] NTA, ss 29(7) and 237.

[398] NTA, s 32.

[399] Commonwealth of Australia, Federal Court Annual Report 2016-2017, Government Publication, Part 5 the NNTT. Available at: http://www.fedcourt.gov.au/about/corporate-information/annual-reports/2016-17.

[400] Although it must be accepted it does come closer to satisfying these requirements as described by Anaya and Puig, above, n 81.

by Corbett and O'Faircheallaigh writing in 2006[401] at which time there had been no determination by the NNTT that the grant of a title could not proceed. The fact that since that time there have now been two such determinations does not alter the accuracy of the analysis.[402] The same authors also suggest that the limited independence granted to the NNTTT as an *administrative* (compared with judicial) body, subject to ministerial override provisions may also impact upon outcomes under the arbitral aspects of the RTN.[403]

This fact also affects the context of the negotiation of an ILUA. Just as with negotiations under the RTN, an Indigenou8s people and the putative miner will enter upon negotiations aimed at achieving an ILUA in the knowledge that should those negotiations not be successful the path leading to a determination by the NNTC is always available to the putative miner. This significantly undermines the Indigenous peoples' negotiation position and calls into question whether any resulting consent can in fact be described as "free".

These factors noted, it must also be noted that, at least the ILUA process, leaves it open to a putative miner to work to achieve a genuine consent, at least while their tenement application remains on foot and are provided administrative protection from the ambitions of their competitors while they do so under the priority provisions of the WAMA.[404]

### 3.3 Analysis and Comparison of the Municipal Regimes

The examination in this section of the discussion has revealed significant similarities, and a number of differences, between the two municipal regimes under consideration. Both regimes assert state (Crown) ownership of mineral resources. Interestingly in the Philippines the granting of a concession under the PMA operates as a contract between the government, who retains joint ownership of the mineral and the operator. By contrast in Western Australia the granting of a productive title (ML) bestows on the grantee the right to work and win the Crowns minerals in situ and having extracted them also bestows title to them (accompanied by a legal obligation to pay taxes and royalties). The distinction may be founded in the earlier origins of the WA regime which is indicative of a less active role for government.

However, both regimes contain provisions that recognise that the state's right to grant interests in "its" minerals is necessarily qualified (to some extent) through consideration of the wishes and interests of affected Indigenous communities. The extent of recognition of Indigenous peoples' rights in this regard is, on the face of the relevant legislation, notably different. Significantly, in both regimes there are available avenues through which an IRC can reach an agreement with an affected community that satisfies the FPIC requirements. Further, both regimes have in place some "priority" protection for an IRC while it is engaged in these processes. There are, however, also avenues through which it appears (anecdotally in

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[401] Tony Corbett and Ciaran O'Faircheallaigh, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions', (2006) *University of Western Australia Law Review*, 153, 172-173.

[402] In fact, it is reinforced by the fact that since the establishment of the NNTT in 1993 there have only been two such determinations.

[403] Corbett and O'Faircheallaigh, above n 2, 175.

[404] Those being ss 67 and 105A as discussed above.

the case of the Philippines) an IRC can avoid the satisfaction of the FPIC obligations if it so chose. These alternative avenues and the aspirational character of the ICMM Position Statement's commitment constitute the "soft place" suggested in the title to this paper.

The final section of this discussion considers the implications of the conclusions reached in each of the preceding sections of the examination as well as proposing suggestions for further research in this field.

## 4. Suggestions for Further Research and Conclusions

The conclusions of this discussion may be fairly simply stated. First, as noted earlier, a State's indisputable sovereignty over the natural resources within its territory is qualified by international legal expectation that the assertion of its sovereignty will be used for the benefits of the peoples that constitute that State. This qualification is particularly manifest in the context of Indigenous peoples affected by natural resource development proposals who have a right to grant, or withhold the free, prior and consent to any such proposal.

Further IRCs (and other corporations) are under an *expectation* to uphold these principles even when relevant municipal legislation and practice does not specifically provide for them. In cases where there is conflict between the expectation placed on IRCs and State practice, IRCs are expected to put in place remediation measures to ameliorate this conflict. The ICMM's Position Statement acknowledges FPIC but portrays it as largely aspirational. It does not address the issue of remediation in circumstances where the aspirational FPIC cannot be satisfied.

The two municipal regimes considered both incorporate consideration of the wishes and interests of affected Indigenous communities in decisions regarding the approval of grants of mining interests' However, in both cases these regimes also provide mechanisms (legislative or – apparently – practical) by which FPIC obligations can be avoided. There is some suggestion that the existence of these mechanisms can undermine more broadly the practical implementation of the FPIC principle.

From these conclusions two additional matters arise. The first is that this discussion has been limited to an examination of the architecture of the relevant international and municipal regimes. There has been no opportunity to consider the application of the principles contained in the regimes in practice, at least apart from secondary reports in academic literature. This deficiency has significant implications. It is impossible in this discussion to consider whether those IRCs that have assumed the obligations under the ICMM's Position Statement are in fact utilising the mechanisms provided for in municipal regimes that allow for the full application of FPIC or whether the other avenues are utilised. There is some suggestion that in fact the mechanisms that allow for FPIC are utilised by ICMM members. The reference to the practice of WMC by Holden[405] is an example of this.

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[405] Holden, above n 158 regarding quote at n 172.

A number of researchers have examined the relationship between proponent IRC and affected Indigenous communities in the context of particular projects and (or) jurisdictions. The work of O'Faircheallaigh in the context of an LNG project in Northern Australia[406], Wietzner in Ottawa[407] or Nygaard's examination of mining and the Sami in northern Norway[408] are examples. These examinations have generally suggested that the ability of Indigenous communities to share the benefits of extractive industry projects is mixed at best.

O'Faircheallaigh[409] suggests that in part these mixed results arise from a failure of both government regulation and the voluntary nature of Industry codes of practice. He comments that even when an industry code or standard may have some aspect of enforceability such as under the World Bank Groups International Finance Corporation (IFC) *2012 Performance Standards on Environmental and Social Sustainability*. Performance Standard 7 which concerns Indigenous Peoples or similar provisions in the Equator Principles[410] they fail due to a lack of effective enforcement of the agreement once concluded.

However, what this existing research has not examined in detail is the application of the ICMM Position Statement by ICMM members, particularly in the period after May 2015 when, according to the Position Statement, its requirements are obliged to implemented by those members. In particular, there has apparently been no research that has examined how IRC practice in this regard varies, if at all, depending upon the individual circumstances in each jurisdiction where ICMM members operate. Given the flexibility in the application of FPIC identified in the two regimes considered undertaking this research into the practical application of the principle by IRCs who have expressed a public commitment to upholding it is crucial to an understanding of the effectiveness of voluntary industry codes of practice referred to by O'Faircheallaigh[411] of which the ICMM Position Statement is an important example.

The second additional matter that arises is that this discussion has not been able to examine the scenario where an IRC fully respects FPIC and the relevant Indigenous community freely determines to *withhold* consent. Presumably in this scenario in due course the state would negatively determine the IRCs development application and seek another applicant, possibly one who may not be as conscientious regarding the FPIC requirements. This scenario

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406 Ciaran O'Faircheallaigh, 'ESD and community participation: The Strategic Assessment of the proposed Kimberley LNG Precinct, 2007–2013', (2015) *Australasian Journal of Environmental Management*, 1-16.

407 Vivienne, Weitzner. *Missing Pieces: An Analysis of the Draft Environmental and Social Impacts Reports for the Bakhuis Bauxite Project, West Suriname*. Ottawa: North-South Institute, 2008

408 Vigdis Nygaard,. 'Do indigenous interests have a say in planning new mining projects? Experiences from Finnmark, Norway' (2016) 3(1) *The Extractive Industries and Society*, 17-24.

409 Ciaran O'Faircheallaigh (2015). 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements", (2016) 132(1) *Journal of Business Ethics,* 91-103 at 94.

410 Equator Principles Association , *About the Equator Principles*, website: http://www.equator-principles.com/index.php/about-ep/about-ep

411 O'Faircheallaigh above, n 232.

suggests that the fundamental issue to be examined is state practice and IRC practice, while relevant is only one factor to be investigated.

This second matter underscores one final conclusion that can be drawn from this discussion even ahead of any further research. That is simply that the necessity to examine IRC practice stems at its core from a failure of state regulation. This failure may arise from the alleged reluctance to enforce the relevant aspects of the municipal regime suggested in relation to the Philippines or it may arise from the deficiencies in the architecture of the regime suggested in relation to Western Australia. In either case, a code of practice such as the ICMM Position Statement suggests a willingness on the part of IRCs to accept the responsibility to *respect* human rights imposed by the *UN Guiding Principles*. Once this is accepted, it becomes clear that the real core of the problem of ensuring the enjoyment of contemporary human rights lies in the failure of states to accept their duty to uphold human rights through the passage and enforcement of effective legislative regimes.

# SARAWAK PALM OIL INDUSTRY AND THE DENIAL OF IBANS' CUSTOMARY LAND

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## Abstract

Malaysia's palm oil industry generated a promising amount of income to the country's avenue. Sarawak, the biggest state in Malaysia with its palm oil industry shows a very encouraging trend record of 1.57 million hectares of planted areas in 2017. The expansion of palm oil plantation areas in Sarawak has caused continuous dispute in court between Ibans community and the state government of Sarawak as well as corporate entities pertaining to the Ibans' customary land. Recent judgments by Federal Courts of Malaysia in Director of Forest, Sarawak vs TR Sandah Tabau, and TH Pelita Sadong Sdn Bhd & Anor vs TR Nyutan ak Jami &Ors and other appeals have denied the customary right of Ibans to customary land in Sarawak. The focuses of this article are on the Sarawak palm oil industry and its infringement of Ibans customary land. Qualitative and quantitative methodologies have been adopted in this study. Results indicate that both the state government of Sarawak and corporate entities failed to uphold the Ibans customary right to land.

## INTRODUCTION

Sarawak is the second largest palm oil plantation state after Sabah (Ahmad, 2017). Records have shown that palm oil plantation has expanded in Sarawak since 2000 (Malaysia Palm Oil Board). The expansion of the palm oil plantation area has caused many disputes between the Ibans and palm oil companies as well as the state government. Dispute cases have been brought into the attention of the court and recently decided cases by the Federal Court have denied the right of Ibans to native customary land. This paper has discussed the decided cases in detail in order to prove the denial of Ibans customary right to land as a result of the expansion of palm oil plantation.

### Problem Statement

The expansion and growth of the palm oil industry in Sarawak has caused denial of Ibans customary land. The state government of Sarawak has denied the claim of Ibans to customary land and disputes have been settled in the court and recent Federal Court judgments have denied the right of Ibans to customary land.

### Research Objective

The study objective was to prove the denial of Ibans customary land by the government of Sarawak and its compliance with the United Nation Guiding Principles on Business and Human Rights.

## Methodology

This study followed qualitative and quantitative methodology. The authors have applied analytical approach and historical approach in this research to ensure the robustness of the research finding. Secondary data collection has also been done through reference to books, the internet as well as phone calls to the relevant agencies.

## FINDING & RESULTS

### UN Guiding Principles on Business and Human Rights

The UN Human Rights Council unanimously endorsed the UNGPs in 2011. The UNGPs operationalize the UN 'Protect, Respect and Remedy' Framework, a document adopted by the UN Human Rights Council in 2008. The two UN documents articulate a three-pillar framework. Pillar I emphasis on States duty to protect human rights. The 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. 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 (UNHR, 2011).

Pillar II emphasizes corporate responsibility to respect human rights, that is to act with due diligence to ensure that businesses avoid infringing on human rights and address any adverse impacts. The responsibility of business to respect human rights exists "over and above legal compliance", and effectively constitutes a global standard of expected conduct applicable to all businesses in all situations, irrespective of whether or not local laws protect human rights. To this end, UNGPs identify mechanisms for corporations to adopt in order to embed respect for human rights within and throughout their operations, including: (i) a policy commitment; (ii) human rights due-diligence process, and (iii) grievance mechanisms (John et al, 2016).

Pillar III focuses on access to an effective remedy, judicial and non-judicial, for victims of any business-related human rights abuses. This includes a duty on the State to take appropriate steps to ensure that State-based judicial mechanisms are able to effectively address business-related human rights abuses, and do not erect barriers that prevent victims from raising their cases. The UNGPs specify that access to remedy should also provide effective and appropriate non-judicial grievance mechanisms with the capacity to hear and adjudicate business related human-rights complaints as part of a comprehensive State-based system for remedy. Further, access to remedy does not only apply to the State: the UNGPs stipulate that business enterprises should provide for, or participate in, effective mechanisms for fielding and addressing grievances from individuals. Such "non-State-based grievance mechanisms" refer to mechanisms administered by "a business alone or with stakeholders, by an industry or multi-stakeholder group." (John et al, 2016).

This study will focus on Pillar I and Pillar III, state duty to protect against human rights abuses by third parties, including business and the access to an effective remedy through the judicial body. Two Federal Court cases have been discussed in detail and both

cases have shown the denial of the judicial body to recognize Ibans right to customary land and infringement of human right by taking away the customary land of Ibans.

**Denial of Ibans customary land by judicial body**

Recently, two landmark cases pertaining to Iban customary land rights had been decided in Federal Court of Malaysia. Both cases have denied and restrained the right of Ibans to customary land.

**(1) Director of Forest Sarawak vs TR Sandah Tabau [2017] 2 MLRA 91**

The appellants are the Director of Forest, Sarawak and the State Government of Sarawak. They were appealing against the decision of the Court of Appeal which affirmed the decision of the high court in granting the Respondents native customary rights over the claimed area of land situated in Kanowit-Ngemah, Sarawak. The respondents and twenty two others they represented are Ibans by race and are natives of Sarawak. The appellants were appealing against the decision of the court of appeal affirming the decision of the high court, *inter alia*, in granting the respondent and the others that he represented, native customary rights over the entire lease which the State Government of Sarawak had granted to Rosebay Enterprise Sdn Bhd. The respondent and the others are Ibans and natives of Sarawak. The case came before the Federal Court of Malaysia. The primary issue raised in the appeal was whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests?

What is pertinent in this case is whether the practice which exists has any ***force of law***. Section 5(1) of the Sarawak Land Code provides as follows:-

> "5(1) as from the 1st day of January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto."

Under subsection 2, the methods by which native customary rights may be created are:-

> (2) The methods by which native customary rights may be acquired are:-
>
> (a) the feeling of virgin and the occupation of the land thereby cleared;
> (b) the planting of land with fruit trees;
> (c) the occupation or cultivation of land;
> (d) the use of land for burial ground or shrine;
> (e) the use of land of any class for rights of way; or
> (f) any other lawful method.
>
> Provided that:
>
> (i) Until a document of title has been issued in respect thereof such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required

to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) The question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958".

Based on subsection 2 of section 5 of the Sarawak Land Code, the underlying basis for the recognition of a particular native customary right to have the force of law is occupation of and its usage according to the customary practices of the community or communities concerned. Therefore, the Federal Court held that the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in primary forest which natives have not felled or cultivated but were forests which they reserved for food and forest produce.

**(2) TH Pelita Sadong Sdn Bhd & Anor vs TR Nyutan ak Jami &Ors and other appeals [2018] 1 MLJ 77**

The plaintiff, who were Ibans, commenced an action on behalf of themselves and 183 other residents of Kampong Lebor, claiming that prior to 1 January 1958, they and their forefathers had acquired native customary rights (NCR) over areas of land which were included in three parcels of land provisionally leased to Lembaga Pembangunan dan Lindungan Tanah and Nirwana Muhibbah Sdn Bhd (the first and second defendants) by the Superintendent of Lands and Surveys Kota Samarahan Division (the fourth defendant). According to the plaintiffs, the intrusion of their native customary land was unlawful and without their consent, or without their NCR being first extinguished or without the payment of any compensation to them. At the Federal Court, the first and second defendants' appeal whether the statutory provisions under s 132 of the Sarawak Land Code pertaining to indefeasibility of title remain applicable even if it can be shown that native customary rights had been created over land in the manner prescribed under the same Land Code.

The doctrine of indefeasibility does not defeat the in personam claim by plaintiffs. It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects (Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd [1988] 2 MLJ 449). The net effect of the protection of indefeasibility accorded to the first and second interveners would mean that any infringement, innocent or express which the plaintiffs seek compensation, cannot override the interveners' registered interest which is indefeasible. The High Court ought to have ordered compensation in lieu of the declaratory orders pleaded for and ought not to have ordered the defendants to deliver possession of the said lands. Once an interest is registered, the court has no power in the absence of fraud to remove or even order the removal of the name of the proprietor by way of rectification (Kho Kwang Choon v Phuman Singh [1968] 1 MLJ 183).

Therefore, the statutory provisions under s 132 of the Sarawak Land Code pertaining to indefeasibility of title remain applicable even if it can be shown that NCR had been created over land in the manner prescribed under the Sarawak Land Code. A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after NCR was asserted. Indefeasibility of title of the land prevails over a NCR claim.

## Conclusion

Clearly, palm oil corporate entities in Sarawak failed to fulfill their corporate responsibility to respect human rights as highlighted under Pillar II of the UNGP. The situation became severe when the state government of Sarawak and the judicial body in Malaysia have denied the Ibans right to "pemakai menoa" and "pulau galau" in 2017 and then denied the right to "temuda" if the indefeasible title have been issued by the Land and Survey on the Ibans customary land.

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# The Current State of Affairs for Access to Remedy for People and Communities Affected by Alleged Arbitrary Takings of Land in the Agribusiness Industry in ASEAN

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## Abstract

Accusations of business-related human rights abuses, particularly in relation to land, are rampant in the Association of Southeast Asian Nations (ASEAN), especially in Cambodia, Laos, Myanmar and Vietnam (CLMV). In response, there have been continuous efforts by ASEAN Member States (AMS) through regulatory reforms and various attempts over the last several years by relevant stakeholders within ASEAN, including businesses, to address the problems and foster responsible business conduct. These attempts, while providing some relief, are not yet adequate in remediating the wrongs perpetrated upon the people and communities who are adversely affected by business-related human rights violations, including land rights abuses. In the meantime, there remains a region-wide lacuna in access to remedy for victims to seek justice and redress. Against this backdrop, this paper provides an overview of access to remedy for abuses perpetrated in the agribusiness industry in ASEAN. The background is provided in the context of the launch of the United Nations Guiding Principles on Business and Human Rights (UNGP) in 2011. This paper will first discuss the current landscape of alleged human rights violations in agribusiness investments in ASEAN, particularly arbitrary takings of land, and will highlight some main causes of such abuses. Then it will discuss some available avenues for affected people and communities for seeking redress. The focus will be on Cambodia, Laos and Myanmar. Available judicial, State-based non-judicial and non-State-based grievance mechanisms will thus be outlined and examined. Some major barriers to access to remedy will be identified. Finally, this paper will examine what has been done by AMS governments and relevant stakeholders to address the barriers, whether such efforts are sufficient in addressing the current limited access to remedy; and if not, what the challenges are.

## I. Introduction

Alleged business-related human rights violations, particularly regarding land, are rife in ASEAN (Mohan 2015; Pietropaoli & Maria 2015; Middleton & Pritchard 2013). Most complaints received by state-based complaints mechanisms in AMS concern land rights abuses (Pietropaoli 2015; Kaufmann et al. 2013, p. 13). For instance, most of the complaints submitted to Myanmar's National Human Rights Commission since its establishment in 2011 involved arbitrary land confiscations by the government and military (APF 2015, para 1). Essentially, land rights violations have been the most critical among major forms of business-

related human rights violations in ASEAN (Pietropaoli & Maria 2015, pp. 11-16; Kaufmann et al. 2013, pp. 13, 25-26).

In the last decade, AMS governments have allocated sizable lands for economic land concessions for large-scale agribusiness plantations run by foreign and local investors. Such land allocations, often carried out with minimal or no compensation or prior consultation with affected communities, have resulted in widespread land conflicts. In this context, the growth of large agribusiness plantations that produce sugarcane, palm oil and rubber have coincided with alleged arbitrary takings of land and forced evictions of hundreds of thousands in the region, most of whom are small-scale farmers and indigenous peoples (see e.g., Neef 2016; Chao 2013). After being dispossessed and evicted from their lands, at times by force, victims often lose their livelihoods and suffer a wide range of other human rights violations, including state-sanctioned violence, criminalisation and even murders (Middleton & Pritchard 2013; see also FPP 2017; Equitable Cambodia & IDI 2013, pp. 55-57; CCHR 2013, pp. 35-36). Many of these people then struggle for years to seek justice and redress, often to no avail.

Under the 2008 UN 'Protect, Respect and Remedy' Framework and the 2011 UNGP, in addition to the state's duty to protect and business's responsibility to respect human rights, both the state and business must provide effective access to remedies for victims of business-related human rights violations (Ruggie 2008; OHCHR 2011). In response to widespread business-related human rights abuses, there have been efforts by AMS governments through regulatory reforms and attempts by relevant stakeholders, including businesses, within ASEAN to foster corporate governance and corporate social responsibility in the region (Thomas 2015; Kaufmann et al. 2013). These attempts, while providing some relief, are not yet sufficient to address the problems and remedy the wrongs perpetrated on the victims (Middleton & Pritchard 2013). While business-related human rights abuses continue to arise in ASEAN, especially in land-related sectors, there seems to be a region-wide lack of access to remedies for victims, especially in the CLMV (Ibid., pp. 42-43).

This paper provides a brief overview of access to remedy options, particularly, for abuses perpetrated in the agribusiness industry in ASEAN, following the launch of the UNGP in 2011. In doing so, the current state of human rights violations in land-related agribusiness investments in ASEAN are first discussed, with some main causes of the abuses highlighted. Then it will examine some of the available avenues for affected people and communities to seek redress. Due to the space limit, this paper will focus on Cambodia, Laos and Myanmar. Thereafter, the paper will identify some major barriers to access to remedy for victims. Finally, it will briefly discuss what has been done by AMS and relevant stakeholders to address the current barriers to access to remedy, whether such efforts are sufficient; and if not, outline some of the challenges.

## II. Alleged Human Rights Abuses in the Agribusiness Industry in ASEAN

Agribusiness plays an important role in the economy and poverty reduction for many AMS. However, this sector has been mired in alleged human rights violations, particularly alleged arbitrary takings of land (FPP 2017; 2016a; 2015; Chao 2013). While rubber plays an important role in the economies of Cambodia, Laos and Vietnam, the industry has been

embroiled in land grabs (Dao 2015; Kenney-Lazar 2012; Global Witness 2013). For instance, the Hoàng Anh Gia Lai (HAGL) and Vietnam Rubber Group (VRG), a Vietnamese corporation and state-owned company, and their affiliated companies own vast rubber plantations in these countries. However, their rubber concessions and business activities have resulted in land confiscations, often without consultation or sufficient compensation to the affected local communities, and infringement of indigenous peoples' rights. The abuses were reportedly severe in Cambodia and Laos (Global Witness 2013, pp. 2-3; see also Howe & Park 2015). There are also well-documented large-scale land confiscations, forced evictions and other human rights abuses in Myanmar's rubber industry (Global Witness 2015).

In Cambodia's sugar industry, land and rights activists claimed that most of the land granted as economic land concessions (ELC) for sugarcane plantations were taken from small-scale farmers (Borras et al. 2016, pp. 33-34; Equitable Cambodia & IDI 2013, p. 1). In a high-profile case, the grant of two adjacent ELCs in Koh Kong province in 2006 to two Cambodian companies led to land expropriations and the forced eviction of hundreds of poor Cambodian families to make way for a sugarcane plantation run by the two companies; both were majority owned by a Thai sugar corporation. Violence, loss of livelihoods and various human rights violations reportedly ensued (Equitable Cambodia & IDI 2013, pp. 55-56; CCHR 2013, p. 30). This case was only 'resolved' recently (Soth 2018c), after decade-long struggles for remedies both inside and outside Cambodia (ERI and CLEC 2013, pp. 9-14). Meanwhile, hundreds of other families in the same province who were similarly affected by sugarcane plantation investments are still seeking acceptable redress (Pech 2018a; 2018b; Soth 2018a).

A similar reality is experienced by farmers and indigenous communities which are affected by arbitrary takings of land and associated human rights abuses in the agribusiness industry in other parts of Cambodia (Soth 2018b). These abuses also occur in other AMS (FPP 2017; 2016a; 2015; Chao 2013). For instance, Indonesia has the world's largest palm oil industry. The industry which is dominated by foreign investors from Malaysia and Singapore is also mired by large-scale land grabs and infringement of indigenous peoples' rights, among other harms (Johnson 2015; Colchester & Chao 2013). Subsidiaries of Malaysian and Singaporean palm oil giants (e.g. Sime Darby, Golden Agri-Resources (GAR) and Wilmar International) and their supplier companies have been involved in large-scale land confiscations. The takings often occur without the free, prior and informed consent of the affected indigenous communities. This violates the free, prior and informed consent of indigenous peoples (FPIC) which is a requirement of the Roundtable of Sustainable Palm Oil (RSPO), to which these companies are members (FPP 2013; see further, Colchester & Chao 2013). Recently, Wilmar was linked to a shooting of two farmers in one of its plantations in Central Kalimantan, where its subsidiary has been in a land dispute with the local communities since 2013 (FPP 2018). Similar land grabs and rights violations by palm oil companies have also occurred in the Philippines, for instance, in Palawan (FPP 2016a, pp. 14-15; see also, FPP 2015).

As discussed above, business-related human rights abuses in the agribusiness sector in ASEAN mainly involve alleged arbitrary takings of land of farmers and indigenous communities to make way for large-scale agro-industrial plantations, often subsequently causing other far-reaching human rights violations.

## III. Main Causes of the Abuses

In ASEAN, one of the main causes of business-related human rights abuses, including land rights abuses, is arguably AMS' preferencing of economic growth over human rights protection (Gilson 2018, p. 54; Pietropaoli & Maria 2015, p. 5; Pietropaoli 2015; Carling, Halip & Tessier 2015, pp. 5-7). The pursuit of economic growth has often resulted in human rights violations, adversely impacting many poor and marginalised people across the region. AMS governments sometimes use laws to support their respective economic agendas, often with an undue focus on attracting investment in land and natural resources-related sectors (Pietropaoli 2015; Lim & Mukherjee 2015, p. 35). In the agribusiness sector, some AMS governments enforced land-related policies and legislation that permitted them to expropriate or requisition lands from landholders and allocate the same to investors. In doing so, some otherwise legitimate land possessors of land users lost their rights to their land and became vulnerable to land confiscation and eviction for agribusiness plantations (Neef 2016, p. 8).

In the meantime, human rights are still considered a sensitive and less prioritised topic which AMS governments tend to overlook (Pietropaoli 2015; Thio 1999, p. 1). This in turn leads to a lack of political commitment by some AMS to seriously tackle human rights-related issues (Jones 2014; Ginbar 2010). Other factors which contribute to, and sometimes intensify, the above problems include widespread corruption, weak governance, lack of respect for the rule of law and lack of regulatory capacity in AMS, especially in the CLMV (Kaufmann et al. 2013, pp. 28-32; see also, Mohan 2015).

## IV. Available Avenues for Victims to Seek Redress

This section discusses some available redress mechanisms for victims affected by arbitrary takings of land in the agribusiness industry. In line with the UNGP's 'Access to Remedy', this section will examine what judicial, state-based non-judicial and non-state-based mechanisms currently exist in AMS. Due to the space limit, this paper will focus on Cambodia, Laos and Myanmar as case examples.

### 4.1 Judicial and State-Based Non-Judicial Mechanisms

<u>Cambodia</u>

According to the NGO Forum on Cambodia (2016a), there are six formal complaint bodies for resolving land disputes in Cambodia. Most land disputes, including instances of alleged arbitrary takings, are first reported to the commune/sangkat councils which exist at commune level across Cambodia. These councils, however, lack formal dispute resolution procedures and decision-making authority (p. 8). Consequently, unresolved disputes are passed on to land dispute resolution bodies, depending on the legal status of the disputed land. For disputes over (yet) untitled lands that arose within areas undergoing systematic land registration are handled by the administrative commissions. Lacking decision-making power, these administrative commissions are limited to reconciling the parties' differences. Disputes that cannot be settled are forwarded to the National Cadastral Commission. Disputes over

untitled lands that arise outside areas undergoing systematic land registration are resolved by cadastral commissions, which exist at both district/khan, provincial/municipal and national level. The district/khan-level cadastral commissions can only re-conciliate the disputing parties. If no resettlement is reached after three attempts, the dispute is passed hierarchically to the next levels. At the top level, the National Cadastral Commission can issue a decision, which a dissatisfied party can appeal at the court (pp. 9-10). Land disputes that are beyond the authority of the National Cadastral Commission or that cannot be resolved by other land complaint bodies, are handled by the National Authority for Land Conflict Resolution (NALDR). Regardless of its rather vague jurisdiction, most high-profile (ELC-related) land disputes have been referred to the NALDR for settlement (NGOF 2016b, p. 4). In May 2016, a Special Unit for Dealing with Land Disputes was established under the Ministry of Land Management to settle pressing land disputes in rural Cambodia through conciliation (NGOF 2016a, p. 11). Finally, the courts have jurisdiction over disputes of registered land and appeal cases regarding the National Cadastral Commission's and NALDR's decisions (Ibid., pp. 11-12).

Following international pressure regarding rampant land grabs and human rights abuses in Cambodia's sugar industry, the EU (see Borras et al. 2016), the major market for Cambodia's sugar, and the Cambodian government created an inter-ministerial working group in 2014 to address highly complex and long-standing land disputes between affected farmers and local communities and sugarcane ELC-companies in Cambodia's three provinces (Pye 2014; Hodal 2014; see also, Pech 2018b). As noted previously, the decade-long Koh Kong sugarcane plantation case was purportedly resolved by the inter-ministerial working group in March 2018.

To recap, Cambodia has various complaints mechanisms that may be used to resolve business-related arbitrary takings of land, depending on the legal status of the land. However, the ability of these mechanisms to resolve the disputes remains limited. Paradoxically, the existence of these many mechanisms have reportedly caused confusion and difficulties for affected people to access them, partly because they operate under unclear jurisdictional lines (CCHR 2014, p. 6; see also Grimsditch & Henderson 2009). Other key factors that undermine these mechanisms include lack of independence and impartiality due to political interference or corruption, particularly in the judiciary; lack of capacity; unpredictability or inconsistency of decisions; and difficulties in implementing and enforcing decisions (ICJ 2017, pp. 3-4; CCHR 2014, pp. 6-7). Notably, the inter-ministerial working group seems to present some potential in filling the remedies gap of the current institutional grievance mechanisms.

Laos

There are customary or informal, semi-formal and formal complaint mechanisms in Laos (UNDP 2011b, p. 75). Village Mediation Units (VMU), which are semi-formal mechanisms, exist at the village level to resolve minor disputes between villagers (UNDP 2011a, p. 83). However, due to their lack of expertise/skill, decision-making authority, capacity and credibility, the VMU is not a popular dispute resolution mechanism among Laotians. In most communities, the most common and preferred systems to resolve local-level disputes are informal mechanisms, using customary law systems and practice (UNDP 2011b, p. 75). Yet,

customary mechanisms are generally "ill-equipped" for resolving disputes involving "outsider" groups (Ibid., p. 97). Difficulties arise, for instance, where the other party is a powerful company. Disputes that cannot be resolved by the customary mechanisms and VMU can be forwarded to higher level state bodies. For instance, unresolved disputes at the VMU can be passed to the District Mediation Units (DMU). Yet, even if disputes reach the DMU, which is not often the case, they too may not be capable of handling the cases (LIWG 2014, p. 1). The last and most formal complaint mechanism is the court (UNDP 2011b, p. 76). However, Laos courts are generally perceived as non-independent, corrupt and too costly for the poor (UNDP 2011a, pp. 107, 112).

Affected communities may also file a petition to a state administrative body, judicial body or to the National Assembly when state officials have made decisions that violate the law or adversely affect the interests of the community (UNDP 2011a, pp. 83-84). While providing an additional option, especially for local communities affected by arbitrary land requisitions by the state, the petition option is also "costly and considered risky as it does not deal with the conflict in a non-confrontational way as many communities prefer" (LIWG 2014, pp. 1, 2; UNDP 2011a, p. 102). Moreover, it is likely that affected communities eventually submit a petition to the same administrative office that allocated their lands to the investors in the first place, which raises issues regarding the conflicts of interest and independence of the office (LIWG 2014, p. 1). Consequently, at present, Laos communities affected by business-related land requisitions have limited viable options for access to remedy (Golay 2015, pp. 240-241).

Myanmar

At the bottom level, land disputes and instances of land rights abuses are arbitrated through formal non-judicial mechanisms at the township offices operated by the General Administration Department (GAD). Given the GAD is also responsible for land acquisitions, this raises important questions regarding conflicts of interest and its independence and impartiality in arbitrating land acquisition cases. This also apparently undermines the likelihood that affected people and communities will be awarded remedies or reparations. Consequently, the GAD is not an effective redress mechanism (ICJ 2018, p. 29).

To address massive land confiscation complaints, a number of state-based mechanisms have been established by the legislature and executive to investigate and resolve these complaints. These bodies include the Farmland Investigation Commission (FIC), the Land Utilisation Management Central Committee (LUMCC) and the Central Reinvestigation Committee for Confiscated Farmlands and Other Lands (CRCCF), along with other related regional and State committees (Bernard 2017; MRLG 2017). Established in June 2016, the CRCCF replaces and undertakes the responsibilities and mandates of the FIC and its recommendation-implementing body, the LUMCC (Bernard 2017, p. 11). The CRCCF operates at all levels in Myanmar. Its composition includes GAD officials and civil society or community representatives at lower levels and Parliament Members at the Union-level. At present, the CRCCF committees' exact scope and authority remain uncertain while their priorities seem to vary in each state and region in Myanmar (NAMATI 2017, pp. 1, 8). At the outset, the CRCCF resolved to settle all land confiscation cases within the first six months of its mandate (Htet Naing Zaw 2016). Regardless of its initial ambitious target, the CRCCF has

faced several shortcomings that hinder its work. One major factor is the lack of communication between its various level committees regarding case decisions and implementation of the decisions. Another shortcoming is its inadequate systemic dissemination of information and updates regarding cases received and/or handled. Without sufficient updates on their cases, complainants use various forums causing extra works for other complaint bodies (Bernard 2017, p. 12). Moreover, the unclear line of authority and continually shifting case priorities of its committees in different regions and states cause confusion and create barriers to remedy to affected people and communities (NAMATI 2017, p. 8). Lastly, alleged conflicts of interest in the CRCCF committees (Bernard 2017, p. 13) inevitably affect its independence and impartiality as a complaint mechanism.

Affected people also submitted thousands of complaints to Myanmar's National Human Rights Commission (NHRC). The NHRC could assist the parties in conciliating their dispute, investigate alleged human rights violations and make recommendations on its findings to relevant state authorities. However, the NHRC has been criticised for its lack of power and, more notably, its limited role in securing remedies for victims (ICJ 2018, p. 26; Aguirre 2017; Min & Kuan 2016). Other institutions such as the Parliament's Rule of Law and Tranquillity Committee and ombudsman offices may provide additional avenues for remedies; however, they too have provided little relief (Bernard 2017, p. 13; Aguirre 2017).

The courts are rarely considered an option for redress due to a lack of independence and impartiality. Most people avoid the courts, especially in cases where the state or military is involved, which is common in land confiscations and related human rights violations. Fear of retribution among the people in Myanmar is prevalent as judicial harassment is reportedly perpetrated to those seeking justice and redress against the state or military (ICJ 2018, pp. 25-26; Aguirre 2017). Consequently, there is next to no public trust in the judicial system (ICJ 2018, pp. 4, 19). Corruption is also prevalent in the judiciary (Ibid., p. 19), as Aguirre (2017) emphasised, "particularly at the township level where most people access it". While going to court is costly and time-consuming, the chance of affected people and communities being awarded remedies or reparations is negligible. Consequently, rather than resorting to the courts, affected people often opt for other means for relief or simply give up their cases (ICJ 2018, p. 26).

As discussed above, although there are numerous complaint mechanisms in the countries discussed, effective access to remedy for affected people and communities remains a problem. Moreover, although mechanisms for legal redress are quite diverse and uneven among AMS (see, Kaufmann et al. 2013; Middleton & Pritchard 2013), the situation regarding access to remedy is quite similar across the ASEAN region. In most AMS, courts often either lack independence, impartiality, capacity or willingness to address human rights and politically sensitive cases, which are often characteristics of arbitrary takings of land. Where cases are accepted, courts also often fail to provide timely and appropriate remedies to affected people. On the other hand, existing state-based non-judicial mechanisms are flawed in different ways and are not yet able to provide effective access to remedies for affected people and communities. Major weaknesses in existing judicial and other state-based mechanisms include corruption, lack of capacity, overlapping or unclear lines of responsibilities and jurisdiction among the different complaint bodies, complex procedures

for lodging complaints, unpredictable or inconsistent decisions and difficulties in enforcing the decisions or judgements. On the other hand, while being able to receive complaints and investigate cases, NHRCs are currently limited to issuing findings and recommendations, which do not offer practical relief to the affected people.

In the absence of gaining redress through state-based mechanisms, victims must resort to other means to voice their grievances and seek appropriate redress. Those means include petitions to relevant government ministries, the National Assembly, powerful ruling elites and related foreign embassies; public protests; international campaigns; and the use of media (see e.g., Scurrah & Hirsch 2015, p. 2; Biard 2017). In Vietnam, apart from using the media and organising public demonstrations (Kerkvliet 2014), affected people have used intermediaries such as retired state officials to help them negotiate with state authorities in land requisitions cases. In the short-term, this strategy may be an alternative to Vietnam's state-based complaint mechanisms, especially the courts, that are currently unable to provide effective remedies to the people (Gillespie 2017; 2014). These 'self-help' mechanisms or 'collective actions' have led to mixed results. While sometimes there have been successful outcomes, these approaches often incur various risks, for example, state-sanctioned violence or criminalisation, to the affected people trying to seek redress. Moreover, some members of the affected communities, especially women, who are unable to sustain these protests or collective actions may be left out from the settlement package later (Scurrah & Hirsch 2015, p. 2).

### 4.2 Non-State-Based Grievance Mechanisms

Following the launch of the UNGP, businesses have been increasingly pressured to address human rights violations associated with their business operations and to remediate the wrongs suffered by victims. In ASEAN, there have seen some businesses setting up company- or operational-level grievance mechanisms in recent years. For instance, VRG, the Vietnamese company involved in alleged systemic land grabs in Cambodia and Laos, established a complaint mechanism in 2014 (Global Witness 2014). GAR, the Singapore-based palm oil giant, also established a complaint handling system in 2015 (GAR n.d.). In the Philippines, some agribusiness business companies may be legally obliged by the Philippines's Revised Code of Corporate Governance to establish company-level grievance mechanisms to settle internal-corporate and third parties-related disputes (Lim & Mukherjee 2015, p. 47). Yet, at present, company-based or operational grievance mechanisms have done little in providing effective remedies to victims. Conversely, they are said to be biased toward the company and fail to protect human rights (ERI n.d.; Chau 2018).

Affected people may also seek remedies in industry-based complaint mechanisms. For example, local communities affected by palm oil plantations can seek redress under the Roundtable on Sustainable Palm Oil (RSPO) complaint mechanism against RSPO's member companies, which are more likely held accountable and more responsive to complaints (Persch-Orth & Mwangi 2016, p. 1). So far, many of the complaints submitted under the RSPO complaint mechanism remain unresolved (see e.g., Balaton-Chrimes & Macdonald 2016, pp. 6-7). For instance, a complaint submitted to the RSPO mechanism against Wilmar's subsidiary in the case mentioned earlier has not been resolved. In the meantime, abuses

continue to occur, even leading to the recent two casualties mentioned above (FPP 2018; 2016b).

In Cambodia, a novel process to resolve business-related land disputes has been introduced by the Independent Mediation Group (IMG), a privately-funded NGO. IMG is using "Neutral Mediation" to settle a long-standing land dispute between six indigenous communities affected by a foreign rubber company. The pre-mediation stage has concluded and the first negotiation stage has succeeded in part. The mediation process will continue until the end of 2018. Despite this early success, there are some key issues that need to be addressed, such as trust-building, communication with the parties, power balance between the parties and capacity-building, particularly community representatives' negotiation skills (Poch 2018). Other challenges also include the project's sustainability and the government's endorsement and enforcement of the mediation outcome. Consequently, at this juncture, the mediation approach is seen as a "test case" (ICJ 2017, p. 30).

Mediation has also been used to resolve the lengthy land disputes between Hoàng Anh Gia Lai (HAGL) and thirteen indigenous communities in Ratanakiri province, Cambodia. The mediation, which is being run by the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC), has made some breakthroughs. Since 2015, a series of agreements have been reached between the parties, where HAGL has promised, among others, to halt land clearance or development on contested land; establish an operational grievance mechanism; provide compensation or if so required return the communities' land; and support the villagers in securing title to their lands. The case has not concluded, however (CAO 2018). In the meantime, whether these promises can be actually delivered is unclear. For instance, while HAGL promises to return land to the affected communities, the Cambodian government claims that the contested land actually belongs to the state. Thus, it is up to the government whether to allocate the land to the affected communities (Thuon 2018, p. 162).

### 4.3 Access to Remedies Within ASEAN

There is no ASEAN regional grievance mechanism that can receive complaints about business-related human rights abuses in general, or instances of business-related arbitrary takings of land in particular. The ASEAN Intergovernmental Human Rights Commission (AIHRC) does not have investigative power or a complaint mechanism. It is also unlikely that the AIHRC could undertake human rights investigations, including alleged land-grabbing cases, in the foreseeable future (Aguirre 2017; Scurrah & Hirsch 2015, p. 6).

In the absence of a regional human rights grievance mechanism, affected people and communities, assisted by international and local NGOs, have sought other means to seek redress in ASEAN, especially in cases involving extraterritorial business-related human rights abuses. For instance, Cambodian farmer families affected by sugarcane plantations owned by Thai sugar companies made several complaints to the Thai NHRC. Although this body is limited to issuing findings and recommendations, its acknowledgement of the human rights violations perpetrated on the Cambodian farmers has played an important role in their journey to seek redress. It essentially paved the way toward extraterritorial access to remedy

for business-related human rights abuses. Recently, a ground-breaking lawsuit was filed on behalf of hundreds of Cambodian farmers in the Thai court against the Thai sugar giant Mitr Phol for alleged land grabs and associated human rights abuses in its plantations in Cambodia (IDI 2018a; 2018b).

## 5. Major Barriers to Access to Remedy in ASEAN

For most farmers and indigenous communities affected by alleged arbitrary takings of land in ASEAN, the first and major barrier to accessing remedies is the lack of formal recognised rights to their lands. These people are unable to claim legally recognised rights to the lands they possess, occupy or use. This is either because the property system of some AMS do not recognise informal or customary land tenures, or weaknesses and loopholes exist in their land-related legislation. Thus, when the state expropriates the land and subsequently evicts these people from places that they have occupied or possessed 'illegally', that is, without a formal ownership title or legally recognised land use rights, the state may deny that its measures constitute an arbitrary taking of property. It can argue that the people do not have any land to be deprived of in the first place (Neef 2016, pp. 8, 17-48, 58; Fitzpatrick 2015, pp. 77-78). This in turn deprives affected people the right to redress in their home state. As mentioned in the HAGL mediation case above, although the company agreed to return land, the state argued that the land did not belong to the affected communities from the beginning. It is thus at the state's sole discretion to decide whether to allocate to them the lands they perceived to be theirs. The lack of formally recognised land rights also potentially puts these people at a disadvantage when negotiating with companies (FPP 2017, p. 4). Similar difficulties are also experienced by people who lack evidential documents to attest their property and land rights (see e.g., NAMATI 2017).

Furthermore, the implementation of existing laws and regulations has been poor, uneven and/or selective across AMS, especially in the CLMV (see e.g., Kaufmann et al., 2013). For instance, while Cambodian laws recognise and protect possessory rights, in practice, such rights are often ignored and violated (HRN 2012, p. 12). Consequently, although affected people may be able to prove their legitimate right to the land, their possessory rights may not be necessarily enforced.

Compounding the above problems is the lack of an effective grievance mechanism for them to seek redress. Existing grievance mechanisms in AMS face various institutional and procedural weaknesses and challenges. The existence of multi-layer complaint bodies in some AMS, but with overlapping and blurred responsibilities and jurisdiction, creates another barrier, on top of other barriers, to affected people seeking redress. Political interference in state-based grievance mechanisms in some AMS leads to a 'culture of impunity' for perpetrators of human rights abuses, while affected people and their lawyers are sometimes subject to threats, reprisals and judicial harassment. This situation creates a barrier for victims to access domestic remedies and further diminishes the already minimal confidence and trust they have in existing state-based mechanisms, especially the courts (Scurrah & Hirsch 2015, pp. 4-5). Other barriers include corruption, weak rule of law and lack of capacity in AMS (see e.g., Kaufmann et al. 2013; Middleton & Pritchard 2013). Company- and industry-based grievance mechanisms, on the other hand, have provided limited redress to affected people

and communities. Meanwhile, at the ASEAN level, there is no human rights complaint mechanism through which victims can seek justice and redress.

In the meantime, affected people often lack awareness or knowledge regarding their rights and redress routes, legal aid and resources to pursue their cases. While NGOs provide them with some limited support, NGOs' activities have been increasingly restricted in various ways in AMS. In turn, this will weaken affected people's capacity and confidence to seek redress (Scurrah & Hirsch 2015, p. 2). Poverty is another major obstacle for affected people to seek redress, especially in poorer AMS.

**6. Efforts to Address Barriers to Access to Remedy**

There have been efforts in AMS to improve recognition of customary tenures and land rights. Supported by international donors, land reforms had been carried out in some AMS, e.g. Laos and Cambodia, aiming to improve tenure security in these countries. The results, however, have been controversial (Hirsch & Scurrah 2015, p. 19; see also, Dwyer 2015). New land-related policies and legislations have been introduced in AMS to strengthen land rights. For instance, in 2016, Myanmar unveiled a new National Land Use Policy. Its 2012 Farm Land Law and Vacant, Fallow and Virgin Land Acts are also currently being revised. Laos has also taken up its National Land Policy, compiling the National Master Plan on Land Allocation and undertaking land-related regulatory reform; for instance, Land Law revision (LIWG, 2018; 2017a; 2017b). Laos draft land law revision, in which civil society are involved, is expected to clarify how customary land rights and communal tenures can be secured and ensure a fair prior compensation for land requisitions by the state (LIWG 2017b, pp. 2-3). Indonesia has introduced a new agrarian reform strategy to tackle social inequality in land ownership through land conflict resolutions and a land redistribution scheme which particularly priorities indigenous peoples. New legal innovations have also been introduced to secure indigenous peoples' and local communities' rights to forests and farmlands (FPP 2017; 2016a). However, these regulatory efforts have been met with challenges and delays, especially as some AMS governments still considerably prioritise agribusiness investments. In turn, legal protection of local communities' land rights, as well as their right to remedy, remains weak and sometimes are undermined by competing investor-friendly laws and corporate interests (Ibid.). Gilson (2018: 53) argues that efforts by AMS governments are not yet sufficient or taken seriously enough to address the overarching and dire consequences of current land issues. He also argues that AMS's aspiration in furthering regional economic integration will likely continue to keep land-grabbing issues off ASEAN's agenda (Ibid.). Meanwhile, NHRCs and NGOs have been at the forefront of land rights advocacy in ASEAN, aiming to mainstream land rights as human rights in the region (FPP 2017; 2016a; see also Hirsch & Scurrah 2015, pp. 18, 22). A notable achievement was the Bali Declaration on Human Rights and Agribusiness in Southeast Asia in 2011 (FPP 2011). Such efforts will inevitably require AMS's political will to be fruitful.

As discussed earlier, there have been increasing efforts by AMS governments and relevant stakeholders to improve *access* to remedies for people affected by arbitrary takings of land. Some of the new grievance mechanisms; for instance, the inter-ministerial working group and IMG-introduced mediation in Cambodia, may help to fill the current gap in access to

remedies in AMS. In the meantime, given their respective challenges, it is too early to assess their long-term success. AMS governments have also been working together to prevent and combat corruption and build cooperation in efforts to bolster the rule of law, judicial systems and legal infrastructure as well as good governance in the region (Mohan 2015, pp. 140-142; Thomas 2015, pp. 13-15). In recent years, some NHRCs have been working on a National Action Plan on Business and Human Rights. In 2017, the NHRC of Indonesia (KomnasHAM) launched a National Action Plan which creates normative standards for state and business, among others, regarding remedies for victims of business-related human rights abuses (FIHRRST 2017). Malaysia has also recently launched its National Action Plan (Naidu 2018).

## 7. Conclusion

Allegations of arbitrary takings of land by AMS governments to make way for agribusiness plantations are rampant across the region. There are various state-based and non-state-based grievance mechanisms to resolve instances of alleged arbitrary takings of land in AMS. However, existing mechanisms have their own shortcomings and are not yet able to provide effective access to remedies for affected people and communities. Their institutional and procedural weaknesses create various barriers to justice and remedies for people seeking redress. Victims of arbitrary takings of land and related human rights abuses also face several other barriers in accessing domestic remedies, including a lack of formally recognised rights to their land, awareness of the law and available redress options, legal assistance and poverty.

New redress mechanisms have been introduced for affected people to address their grievances. While some of these new mechanisms have shown some potential in filling the current lacuna in access to remedies in AMS, their long-term success is yet to be seen. In the meantime, affected people will have to continue to seek redress through other international avenues, such as the IFC's CAO, the OECD's national contact points or international human rights complaint mechanisms. Although remedies for business-related human rights abuses, including land rights abuses, at the international level remain rare and limited, a creative use of multiple forums and complaint mechanisms may improve affected people's chance of success. The recent reported conclusion of the Koh Kong sugarcane plantation case in Cambodia, following strenuous decade-long efforts using and exhausting all possible domestic, regional and international forums (ERI & CLEC 2013, pp. 9-12), provides a perfect example on this matter. Notably, the recent lawsuit filed on behalf of Cambodian farmers in the Thai court potentially paves the way for extraterritorial corporate accountability and remedies. If successful, cross-border litigation will be another option for affected people and communities to seek redress in ASEAN against companies coming from another AMS. The likely challenge for this option though is the general lack of independence, impartiality and effectiveness of most AMS' judicial systems, as discussed above.

In short, while there has been some progress, access to remedies for abuses perpetrated in the agribusiness industry in ASEAN, since the launch of the UNGP in 2011, remains generally limited. The continued lack of an effective forum for affected people to seek redress may exacerbate the tensions and alleged social injustice in AMS and may even lead to social unrest (see e.g., 'No man's land' 2017). Moreover, given the growth of extraterritorial

business-related human rights abuses in ASEAN, concerted efforts by all AMS governments are especially needed to address the current problems, particularly in providing a more effective access to remedies for victims. There is thus an urgent need for AMS, ASEAN and businesses to explore additional or alternative forum(s) that are accessible, effective and time-efficient for victims to seek redress.

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**Holistic Learning In "Maternalistic" Management Educational Environment as a Way to Close the Gender Gap in South East Asia. The Case of Thailand**

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## Abstract

Management schools and business universities have developed throughout the years a curriculum that highlights the importance of technical skills and specialized knowledge (giving priority to financial and scientific disciplines), undermining at the same time the transversal, interdisciplinary and systemic approach that holistic learning brings into management education. From this perspective, human and social sciences play a very important role to the students for understanding the complexities and non-quantitative factors that are crucial for our transcultural global managers. Behind this traditional mechanical thinking, perspective lays a perception of the world that takes as a referent an eurocentric, logocentric and paternalistic view of management, discriminating other ways of learning that can incorporate emotional, integral and even spiritual learning across cultures into the curriculum. This new way of understanding education can challenge and open up organizations and corporations into a maternalistic and feminine approach to management in ASEAN economies still dominated by a very deeply rooted male oriented vision about business. This paper will focus on how maternalistic management perspective is taking place in management university education in a new curriculum related to Corporate Social Responsibility, Diversity Management in ASEAN business universities. This has had an impact on the reduction of the gender gap in Southern Asian countries. A holistic new learning approach emerges today as a tool for accomplishing the sustainable development goals, caring for the organizations, employee teams, customers and the whole community. Holistic learning from a maternalistic management perspective is understood as a caring way to deal with people and encourages sustainable growth, leadership and corporate responsibility. This paper will show how this new management educational philosophy provides radical tools for a different management style: autonomy, self-management, self-governance, decentralized control, transformational leadership, etc. Questioning traditional educational business, maternalistic learning will change the business educational environment with responsible potential leaders, perceived by the business community as "coordinators", "caring employees", "associates" which incorporate the notions of pleasure and well-being into the workplace. This maternalistic and sustainable perspective in education can be another way to develop an understanding about how to create a positive work atmosphere that encourages worker's involvement and sustainable growth. This presentation will discuss the effects of maternalistic management in 21st century business ASEAN organizations and how paternalistic management has been identified with the family male leaders. From this perspective, maternalistic sustainable business education rethinks responsibility for guiding, making decisions, taking leadership and promoting a holistic way of working, questioning preconceived notions of productivity, performance and profitability from a pure economic perspective. Holistic learning will be therefore related to motherhood as a supporter and nurturer of a community that care about all its members. This new way

takes into consideration the notions of caring, well-being, sustainable happiness and global responsibility.

**Keywords:** holistic education, maternalistic management, well-being, global responsibility, caring.

## Introduction

In this article we are going to focus on a maternalistic management perspective learning and how this new approach cares for the organization, employees team, customers and the community. Maternalistic management is understood as a caring way to treat stakeholders and a different way to encourage sustainable growth, development, leadership and corporate responsibility. This new management approach provides radical tools for a different management style: autonomy, self-management, self-governance, decentralized control, transformational leadership and so on. All this will change the business environment with responsible managers, seen as "coordinators", "caring employees", "associates" which incorporate the notions of pleasure and well-being into the workplace.

This can be another way to develop a positive work atmosphere that encourages worker's involvement and well-being. What are the effects of Maternalism Management in 21st century business organizations? We are going to see how paternalistic management has been identified with the family male leaders, responsible for guiding, making decisions, taking leadership and promoting a materialistic and mechanical way of working: productivity, performance and profitability. Maternalistic management is in the traditional view related to mothers as supporters, nurturers and the persons who care about others.

This new way takes into consideration these notions of caring, well-being, sustainable happiness and global responsibility. Maternalistic management has the key elements and behaviors to be more "inside" this new perspective. Being paternalistic or maternalistic in your business is not a question of gender, rather a new vision that implies other ways of being. These new skills will allow employees to take risks, discover new things, involving learning, innovation, creativity and sustainable growth.

This paper will try to understand the specificities of educational management as more feminine, oriented and closely related to caring and "maternalistic" practices. From this perspective, it will be relevant to consider the management skills required, such as high achievement motivation, ability, and self-efficacy, all aspects that are very important in a business area full of uncertainties and challenges. Another aspect is how performance can increase under working conditions of challenge, collaboration, and autonomy (Eagly & Carli, 2007), doing better at managing risk (Barber & Odean, 2001), being more talented and hardworking than their male peers in order to be recognized as successful (Ibarra, Ely, & Kolb, 2013). Therefore, it will be very relevant for this paper to establish links and interdependent relations between Caring, Maternalistic Management, – Corporate Social Responsibility and woman – Sustainability (sustainable production, sustainable products, sustainable management, corporate democracy -governance– and Well Being) and Education.

To better understand the implications of a maternalistic perspective in management education it is necessary to refer to the changing paradigms related to male and female role in our Modern Societies and how this has an enormous impact in the management of organizations.

**Systemic and Sustainable Educational Approach towards Maternalistic Management Education**

Business schools and universities across the world have been changing their curriculum as our business, financial environments become more responsible, and transparent because of the continuous crisis emerged from bad and irresponsible practices. The new challenges for responsible leaders towards the creation of a more sustainable planet are also present in the training of future managers. As a result, there has been an increasing interest in how business education can incorporate in their courses and seminars social and human sciences as a way to embrace systemic and holistic education as the new way for learning and teaching. This implies the creation of interdisciplinary departments and the hiring of teachers from different fields to give the students a transversal perspective about business and the economy.

Maternalistic Education also is a need many universities are considering, as specialization for management studies is becoming less and less relevant (Rabasso & Rabasso, 2011). Business students across the world are now trained to understand and "pilot" corporations in a more responsible manner without the specific technical male oriented knowledge that was predominant before. Finance and accounting are not any longer indispensable tools for becoming a business leader. The collective intelligence of our learning corporations encourages the creation of interdisciplinary teams with specialist "knowledge" workers and transversal managers more "feminine" oriented (caring, responsible, sustainable) coming from very different fields such as engineering, medicine, architecture, physics, fine arts, sociology, literature, history, philosophy and so on. Systemic thinking as a way of understanding our business world is a must for the education of future business leaders as creating links and hybrid solutions is part of a more complex "fuzzy" environment where binary oppositions and monolithic views have been replaced by complex and integral approaches to find solutions and new ways to cope with the challenges of sustainability and global responsibility. Maternalistic educational business training means the creation of multidisciplinary departments and research projects with a staff coming from different fields and geopolitical backgrounds, as well as culturally diverse milieus, with opposing views about many issues, scholars that will open up the debate and enlarge the scope for alternative and creative solutions and practices. The implementation of critical thinking in many disciplines, questioning traditional and obsolete values in the context of our global world will encourage business educational institutions for radical changes in their vision and in the "genetic" cultural print of the corporate world.

Business environments are looking for creative ways to develop sustainable practices and responsible behavior among their participants. A new humanistic vision is needed (Melé, Argandona and Sanchez-Runde, 2011) after the latest global financial practices initiated in Western countries, cultures where the European Enlightenment of the late XVIIIth century envisioned the construction of a better world thanks to Technology, Modernity and Progress. Our global environments need a new foundation to build future sustainable businesses that

will be able to deal with the world human needs (Acevedo, 2012; Pirson and Turnbull, 2011; Spitzeck, 2011). Responsible leaders across the planet should be perceived as ethical and caring managers with moral sensitivity (Whetstone, 2003). Global humanist management enlarges the concept of culture towards visible minorities and silent voices that with the emergence of the internet can participate actively with their views, understandings and creative solutions for the construction of a "green" and responsible planet. As a result, global humanism renders human beings more truly human as everyone can participate actively with their talents and virtuosities (Maritain, 1996, 153), to seek for a state of mind that will value the "human wellbeing" (Dierksmeier and Pirson, 2009; Llano et al., 1992; Sison, 2007, 2008). This requires a more holistic vision of business and management that is closely related to sustainability (Melé, Argadona & Sanchez-Runde, 2011).

How can education be sustainable in a world where practical matters undermine the power of humanities and humanity? Since the emergence of Modernity, a city culture has been giving too much importance to Western art and sciences, literature, philosophy, history, social sciences and so on. The history of all these disciplines from a global perspective, including the contribution of non-Western cultures has not been written yet. If we look at most Nobel prizes of literature, more than 90% come from Western languages in a world with almost 6000 languages spoken and many of them written, with their own writers, thinkers, artists and scientists. The very narrow-minded view of culture is the result of an anthropocentric, Eurocentric, logocentric, patriarchal and colonialist understanding of this matter. Sustainable maternalistic management education opens up the debate about dissident and alternative voices coming from emerging countries and minority groups that have been oppressed and indoctrinated by Western education.

A sustainable life has become necessary to save citizens from consumerism as an ideal way of acquiring happiness based on material things, which are the consequence of manufacturing products from raw materials overused from a damaged environment. Our planet is sick because of over production and consumption. A sustainable world is a real necessity if it wants to be saved. "Simple living" becomes, therefore, a way to encourage individuals to downsize their belongings and downshift their overworked and overconsumption schedule. Sustainability claims for a less consumptive society with many voluntary ways to simplify one's lifestyle reducing the amount of material things so that people will be satisfied with what they need rather than want. A responsible maternalistic manager has to understand that quality of life demands from corporations questioning mass production to create better products and services for a planet that will understand luxury as related to the inner value of the things and the activities people do and have through time, as the world of obsolescence is already an obsolete concept. Lasting becomes, in a sustainable environment, a benefit for the products, services and networking relationships people will develop through their lifetime. For this purpose, quality time, work-life balance, personal taste and opinions away from standard views, frugality and slowness, reducing the personal ecological footprint, de-growth, ethnic diversity, pacifism, primitivism, ecology and a total rejection of conspicuous consumption are different aspects of sustainable maternalistic education for responsible leaders trained to manage the planet and not only serving the private interest of the corporate world. To accomplish this, maternalistic management education has to look back and learn from the history of responsible actions and movements through history across cultures, from the "Sharamana" traditions in Iron Age India to the Amish simple living practices in United

States, as well as individuals inspired by ascetic practices like Francis of Assisi, Rabindranath Tagore and Mohandas Gandhi. A Global Humanist perspective into business education will take into consideration the teachings of Confucius, Mohammed, Zarathustra, Buddha as well as Judeo-Christian ethics and Greco-Latin culture and philosophy. There has been an increasing grassroots awareness in recent years with the creation of the National Downshifting Week in United Kingdom since 1995 which encourages "Slow Down and Green Up", giving many suggestions for individuals and corporations, as well as educational institutions to adopt green policies and habits to create environmental and corporate responsibility. Some radical thinkers like John Zerzan (*Against Civilisation*, 2005) and Tom Hodgkinson (*How to Be Free*, 2006) as well as committed ecologist like in Thailand Martin Wheeler and Jon Jandai encourage people not to consume in order to be self-sufficient and start producing at home fruits and vegetables for instance.

Sustainable maternalistic education encourages the consumption of local products (also highlighted by the *Slow Food Movement* and the *Green Belt Movement* founded by the Nobel Peace laureate Wangari Maathai) with the idea of food miles, as well as producing films and literature online (Annie Leonard's ecological videos is the best example). Green politics and deep ecology are part of this new "simple living" maternalistic trend against mass consumption and pathological growth, claiming like David Wann for "simple prosperity" (2007) as the preservation of public space in cities and natural environments for the benefit of a collective Dionysian intelligence where man and nature will exchange a creative and spiritual dialogue for the benefit of the planet. Maternalistic management education has to consider the basic founding principles of many spiritual movements that are part of the foundations of our "green" responsible environments today. The Taoist principle "Wu wei" is at the core of this radical ecological view, a very important concept in the Tao te Ching sacred book written by Laozi. It explains how we have to live and behave in peace with the universe without effort, accepting ourselves for who we are. Becoming or projecting our lives into the future, as Modernity and European Humanism claimed through history, is not the purpose of our existence but living the present, living it within and not fighting, arguing, opposing or changing Nature so people will not alter the harmony already existing in our environments. This is a very conservative and sustainable principle, which claims the Mozi Universal Love principle (*Jian ài*) and goes against the "episteme" of Modern Times where progress is always looking for newness and originality. The Indian natural concept of "Sahaja" practiced in yoga is also related to sustainable feminine practices as it encourages its practitioners to be in conformity through a state of freedom and dialogue with the Natural Law of the Universe.

A different set of values is necessary today to give our business communities and its participants the spiritual needs our Western civilization and our global environments are undermining through relentless consumption and violent masculine ways of exploiting people and natural resources. These maternalistic values question the very essence of our Modern economy, the notions of economic growth and individual profit putting forward the importance of concepts like Well-being and Gross National Happiness as working tools for a more sustainable environment. Postcolonial feminist thinkers can help the business community and our educational management institutions to confront, discuss and try to resolve the problems caused by the abuse and irresponsible patriarchal and self-centered behavior of Western brands. Many of these thinkers are embracing a maternalistic and caring

concern about the economic in relation to other aspects of everyday life. Global humanism as a result dialogues with the ethics of care and feminist theory as a way to come to a universal pattern of responsible behavior through corporations and individuals engaged in sustainability. Female scholars since the nineteen eighties like Carol Gilligan (1982) and Nel Noddings (1984) established a very fruitful dialogue on caring with dissident postcolonial thinkers coming from emerging countries since the nineteen seventies like Chandra Talpade Mohanty (2003), Homi K. Bhabha (1994), Achille Mbembé (2001), Roberto Fernández Retamar (2002), Arjun Appadurai (1996), Gayatri Chakravorty Spivak (1988) and Dipesh Chakrabarty (2000). All of them question domination in a growing "hybrid" environment of different cultures in permanent dialogue towards global responsibility, solidarity, caring and sustainable practices.

Maternalistic management is slowly becoming an important part of the curriculum in business education as a kind of subaltern or peripheral way of learning about sustainability and corporate social responsibility. For this purpose, systemic and emotional thinking are ways to decenter colonialist and mechanical (Cartesian and structured) education incorporating intuitive, collective and feminine approaches to education to break down binary oppositions as the base of Eurocentric education. The importance of the irrational, the invisible field, the sacred and the spiritual are elements to take into consideration for global humanism as tools or heuristic devices to embrace wisdom through sustainability. From this perspective, the voice of subaltern business education becomes global, as Western thinkers and scholars undermine the contributions of other cultures, languages and identities have overpowered maternalistic management. Modernization mainstream theory based in business education on the teachings of free trade, open markers, individual profit, representative democracy and capitalist economy becomes less important in the learning process of business students as postcolonial feminist thinking questions the pre-existing condition of a superior culture base on Western values (Lawson, 2007). Maternalistic management speaks from the silent voices that did not participate in the social, cultural, political and economic process, as they were not considered subjects of history such as ethnic minorities, women without proper rights, "challenge" people, subordinated or colonized cultures and children. As a consequence, critical thinking will be an indispensable tool for this matter, playing with binary oppositions and negotiating contradictory views in a fuzzy and a hybrid way of learning the questioning and not the answering, embracing confusion and chaos as well as entropy, disorder and ambiguity, dealing with opposite solutions and accepting paradox and irrational understanding as a feminine way to confront complex realities (Rabasso & Rabasso, 2010). Maternalistic management education dialogues with the founding texts of postcolonial theory such as the works of Aimé Césaire (1955, published in English in 2000), Frantz Fanon (1952, published in English 1967; 1961, published in English in 1963), Albert Memmi (1957, published in English in 1965), Kwame Nkrumah (1970) and Edward Said (1978). Critical theory finally established connections with a "maternalistic" way of understanding business and the management of organizations (Sanford, 1998) through love and caring for people and the environment. Self-responsibility, trust, interdependency, encouragement, collective responses, positive criticism and transversal thinking are part of the business educational learning as corporations are part of a living organism interconnected and changeable as all its participants are co-creators of a Cosmos which requires sustainability for its own survival.

**ASEAN situation related to women and human rights for a better educational management environment**

The ASEAN Community was established in 2008 with three main pillars: the ASEAN Political-Security (APCS); the ASEAN Economic Community AEC) and the ASEAN Socio-Cultural Community (ASCC). ASEA is a regional intergovernmental organization founded on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. The countries were joined later by Brunei Darussalam, Vietnam, Laos, Myanmar and Cambodia. The population is around 622 million people, the 7th largest in the world. At the beginning, ASEAN treated women's rights with a paternalistic perspective but in 1980, this issue became more important on ASEAN's Agenda. On July 5th, 1988 was adopted the Declaration of the Advancement of Women in the ASEAN Region with a normative gender framework. The Inter-Parliamentary Union (IPU) reports that the female parliamentary participation of women in SouthEast Asia is 18.9 percent, one of the lowest in the world (28 per cent in the world in 2018) (1). The Philippines, Laos and Vietnam rates 29,5 percent, 27,5 percent and 26,7 percent, radically better than the rest of the region : Thailand with 4,8 percent ; Myanmar with 10,2 percent and Malaysia with 10,4 percent (2). One of the main objectives of the ASEAN community is the support of the empowerment of ASEAN women in politics. In the ASEAN global framework, we find the most important gender body as the ASEAN Committee on Women (ACW) which was created in 1976, renamed the ASEAN Committee on Women in 2002 (ACW's). This Committee evaluates the implementation of the ASEAN Declaration of the Advancement of Women and they publish a status report every three years analyzing the state of women's participation in the political area (Prime & Carter & Welbourne, 2009). At the same time, the Committee works on the implementation of different international instruments such as the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), the Sustainable Development Goals (SDG's) and the Beijing Declaration and Platform of Action. Finally, the ACW takes the responsibility to develop the actions of national governments, their policies and best practices in relation to women.

Another important gender body in the ASEAN Community is the Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), created in 2010 with the objective to protect the human rights and fundamental freedoms of women and children in ASEAN Community. They established a link between the international human rights system and the policies on women's rights and women's political empowerment. Each member of ASEAN Community has two representatives to the ACWC: one for women's rights and one for children's rights. The ACWC meets twice a year and reports to the ASEAN Ministerial Meeting on Social Welfare and Development. The ACWC supports the ASEAN members' states in relation to the women's rights issues and works with UN agencies, concretely with UN Women to develop the instruments for the rights of women (national policies, strategies and programs that will help the good practices between the member states). The ACWC includes NGO practitioners and experts working towards implementing human women's rights (Gutierrez 2015).

Recently the ASEAN Ministerial Meeting on Women (AMMW) created in 2011, plays a very important role in relation to women's empowerment. The AMMW works with the ACW and the ACWC to promote in the ASEAN Community the status of women at the regional level.

The main goal is to provide annual executive leadership and consultation on gender issues (Bear & Rahman & Post, 2010). Then as we saw, ACW, ACWC and the AMMW are the core bodies at the ASEAN Community working on gender equality and women's political empowerment. At the same time we can find the Women Parliamentarians of the ASEAN Inter-Parliamentary Assembly (WAIPA), established in 1998 as a branch of the ASEAN Inter-Parliamentary Assembly (AIPA 1978). WAIPA try to implement and increase the representation of women in the parliaments of the ASEAN countries. Finally, we have the ASEAN Confederation of Women's Organizations (ACWO), established in 1981, that brings together women's voluntary organizations and civil society actors in ASEAN to work towards the full integration of women at the international and national levels. They belong to the CSO Regional Entity accredited to ASEAN and the main objective is «Enhancing Women's Effective Participation towards Peaceful, Prosperous and Sustainable ASEAN'.

Following the principles of the Universal Declaration of Human Rights in 1948, the World Conferences on Women in Mexico City in 1975, in Copenhagen in 1980, in Nairobi in 1985 and the Beijing Declaration and Platform for Action in 1995[412] during the Fourth World Conference on Women, the Gender Equality with ESCAP (United Nations Economic and Social Commission for Asia and the Pacific) and UN Women (United Nations Entity for Gender Equality and the Empowerment of Women)[413] came up with a responsible report about women empowerment across Asian countries: "Women in most developing countries are more likely to participate in the informal sector, where they become family workers of self-employed…Women suffer frequent discrimination in formal credit markets in developing countries because of their poor education, inferior legal status and unpaid reproductive responsibilities" (Meng, 1998: 8; McKee, 1989; Lycetter and White, 1989)[414].

**Maternalistic management education in Thailand: opening up society for sustainability**

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[412] For the 20th anniversary of this Beijing Declaration in 1995 a resolution E/RES/2013/18 was made to encouraged « The regional commissions to undertake regional reviews so that outcomes of the intergovernmental processes at the regional level can feed into the 2015 review », by the Commission on the Status of Women and the Beijing+20 respondent countries.

[413] The global policy documents through gender equality were endorsed by the United Nations General Assembly in 1996 (principles established during the Beijing Declaration and Platform for Action : http://www.un.org/womenwatch/daw/beijing/platform/)

[414] This study focus on South-East Asia countries and mainly in three key areas of progress : a) Gender equality in national governments and governance ; b) Violence against women and girls ; c) Promoting the leadership and political participation of women, comparing the results of Human Development Index and Gender Equality Index rankings with the Social Institutions and Gender Index Categorization (SIGI), for example from Bangladesh SIGI 2014 Category « Very High » – SIGI 2014 Value 0.3899 to Thailand SIGI 2014 Category « Low » - SIGI 2014 Value « 0.1055 » or Mongolia SIGI Category « Very Low » - SIGI 2014 Value « 0.0344 ». The study is a very important tool to understand the achievements and implementation related to gender equality policies, legislation, action plans and strategies focused on the Convention on the Eliminations of All Forms of Discriminations against Women.

The case of Thailand reflects on a national scale the need for radical changes in management education and in a corporate world where a patriarchal dominant structure reflects the political, economic, cultural and social power of the elites present in religion, the army and royalty. Following the *Global Gender Gap Report 2017*[415], Thailand ranks out of 144 countries, number 75, behind Singapore 65 and Vietnam 69 and ahead of Myanmar 83, Indonesia 84, Cambodia 99, China 100, Malaysia 104 and Japan 114 (number 1 country in the *Country Brand Index 2015*[416]). 20% of the 62 million people of Thailand live in slums, as the country does not offer enough public housing. In 2001 the Prime Minister Thaksin Shinawattra (today in exile) tried to alleviate poverty with universal health care for all Thais (applied only in their home residence). This was part of the "Sufficient Economic Philosophy" (SEP), created in 1974 at Kasetsart University and developed by the late king Bhumibol Aduyadej (Rama IX), applied afterwards to 23000 villages during the economic crisis in 1997. The three basic components of SEP (wisdom, moderation and prudence) have its origins in the previous practices of Princess Srinagarindra (mother of Rama IX) with the Mae Fah Luang Foundation (MFLF, www.maefahluang.org ) in Doi Tung, Chiang Rai, from the 1980s onwards. As a very high respected public figure, the mother of Bhumibol engaged in a Sustainable Alternative Livehood Development (SALD) in the Northern territories (the Golden Triangle marked by the opium production), improving social and economic conditions for many rural communities and ethnic minorities (11000 people and 29 villages), preserving the environment and supporting local art and culture. It was similar to what Vandana Shiva[417] did in Indian villages with her eco-feminist practices. Today the Chaipattana Foundation (created in 1988) founded by Maha Chakri Sirindhom[418], daughter of Rama IX and candidate inheriting the throne (legally possible by the Constitution in 1974 but rejected by the Thai Parliament) continues the SEP principles with integrated farming and Buddhist economics which emphasized limited production in order to protect the environment and conserve scarce resources. Production aimed at individual consumption so the poor should consume resources without borrowing. The actual Prime Minister of Thailand, Surayud Chulanont wants to promote well-being in line with SEP ("Pit thong lang phra").

Other committed ecologist educators and popular figures in Thailand follow similar sustainable maternalistic practices across the country. Is the case of Jon Jandai, earthen builder, with the *Pun Pun Center for Self-Reliance* in Chiang Mai. Since 2003 Pun Pun is a small organic farm and learning center in Northern Thailand where its participants practice sustainable living through seed saving, natural building and green technologies. The whole

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415 World Economic Forum, Global Gender Gap Report 2017, Geneva (http://www3.weforum.org/docs/WEF_GGGR_2017.pdf ).

416 https://www.futurebrand.com/uploads/CBI2014-5.pdf

417 Vandana Shiva (5 November 1952) is an Indian scholar, environmentalist activist, food sovereignty advocate and alter-globalization author.

418 Another princess from the Thai Royal family, Ubolratana Rajakanya is also very committed to responsible practices in rural communities. She had the leading role in a fictional film, "When the Miracle Happens" (2008), were she played the role of a CEO becoming philanthropic in a rural community.

community believes in learning by doing and that there are many different ways of doing things. Instead of relying upon experts, its members learn together by sharing experiences (it is similar to the practices of the *Barefoot College* in Tilonia, Rajasthan, India, founded in 1972 by Bunker Roy and today present in many countries around the world). For the Pun Pun Center for Self-Reliance (www.punpunthailand.org) the classroom are the working fields and the learners are the instructors in a holistic environment of exchange and continuous improvement. Another important activist and university lecturer about his simple living practices is the British Martin Wheeler. His seminars and lectures as well as television interviews are well known in the whole country. His farm in Baan Kham Play, Khon Kaen, allows him to cover his basic needs and to show how people have to rely on themselves and the resources they already have to live happily and sufficiently. To help the poor in the slums of a big city like Bangkok with sustainable education and ecological practices Ms. Prateep Ungsongtham Hata founded the Duang Prateep Foundation (www.dpf.org) in the Klong Toey slum, where more than 80000 people live in very poor conditions and many of them work at the Bangkok Port or for shipping companies. The DPF operates over 20 educational projects for the most vulnerable in community kindergarten, rehabilitation centers, home support and local credit for entrepreneurship, targeting specially children, women and the elderly. Other projects concern children and female youth who have been sexually abused, are homeless, orphaned, or from a broken family.

Maternalistic Management Education reaches also the universities and contributes for positive change in a society still very much dominated by men and a paternalistic view present in all levels and sectors of the social and economic life, including the mass media. Thammasat University has always been a committed learning environment where many Thai activists and scholars got their education. One of the best examples is Chalidaporn Songsamphan, an associate professor at the Faculty of Political Science. She participates in a Masters of Arts Degree about Women's Studies, which is interdisciplinary and committed as it questions, debates and challenges power relations and social structures as well as analyses many problems concerning various dimensions of gender relations. Her research contributes also to enlarge the scope of a maternalistic view with very critical papers like "Localizing Feminism: Women's Voices and Social Activism in Thai Context" (Gunda Werner Institute, 2012)[419]. In her study, Chalidaporn Songsamphan refers to the contribution of academic theory and social movements for gender equality and a different way of managing society[420]. Different organizations in Thailand have been very active in changing the patriarchal paradigm that still dominates throughout the country. Just to mention a few, the Foundation for Women, the Association for the Promotion of the Status of Women (APSW), Women Network Reshaping Thailand, Empower Foundation, Women's Health Advocacy Foundation and so on. The issue of rural women uneducated is also referred to in the paper, as there is a need to give a chance to the new generations against the unskilled labor, which is what

[419] https://www.gwi-boell.de/en/2011/03/09/localizing-feminism-women's -voices-and-social-activism-thai-context

[420] Another important contribution to feminist theory and social activism is the work of Duanghthai Buranajaroenkij, *Political Feminism and the Women's Movement in Thailand*, Bangkok: Fredrich-Ebert-Stiftung, 2017.

international corporations are looking for in the industrial and the service sector[421]. There is also a clash between the new generation of Thai people and the image of women reflected by the mass media as wives/housewives/mothers/girlfriends/lovers. The paper refers to a contradictory image of women as "passive" homemakers portrayed by the male oriented cultural channels (television commercials, cinema, advertisement, newspapers and magazines) and the very active role many women have in agriculture and industry.

The Thai Constitution of 1974 gave equal rights between men and women. The reality is very different as the salaries and the working conditions of women are not the same as the ones getting by men. Breaking the "glass ceiling" is a challenge for the entire Thai society in the years to come. The best example of flagrant discrimination against women is religion. There are 300000 monks in Thailand. 99,99% are men. The Thai Buddhism governing body does not respect the constitution, as women cannot be ordained in the country. There are 170 bhikkunis or female monks in Thailand, ordained in Sri Lanka, one of the few Theravada Buddist countries which allows women to become monks (in Burma they are also accepted). Varanggana Vanavichayen was the first monk to be ordained in Thailand in 2002. After that, the law was revoked. King Rama X appointed, in 2017 Somdet Ambor Ambaro as the Supreme Patriarch or Sangharaja of the Rattanakosin, which is the head of the order of Buddhist monks in Thailand. He is responsible for renewing the Sangha or monastic community of bhikkhus (male monks) and bhikkhuni (female monks). The Sangha in Thailand has been worshiping capitalism and consumerism because of a large male domination, which is against birth control and abortion (only legal in cases of rape, incest and when the mother's health is at risk). This conservative vision that dominates Thai society, as Buddhism believes in rebirth and teaches that individual human life begins at conception, confronts a cruel reality of more than 300000 illegal abortions with hundreds of clinics all over the country where unmarried pregnant teenagers and married women go to be treated. The Western consumerist lifestyle, present today in the Sangha Thai community, requires changes in this masculine perception of Buddhist teaching. Kanitha Wichiencharoen is a pioneer of women's rights advocacy in Thailand. She created in 1991 the Mahapajapati Their College, the first college to train women as Buddhist nuns in Southeast Asia. With a BA in Buddhism and Philosophy and a lawyer from Tammasat University, she founded also the Association for Promotion of the Status of Women (APSUN), the Educational and Training Center (We-Train), The Gender, and Development Research Institute (GDRI), caring for women's welfare and assisting abused, unemployed and elderly women. She became a "maechee" or lay nun in Sri Lanka in 1993. Another important radical Buddhist educator and activist was Samana Phothirak, "Rak" Rakpong, born in Ubon Ratchathani, Northeastern Thailand. He created the Santi Asoke secSt and ordained about 80 bhikkhunins in 1998 (going to prison for 5 years). This group follows Taiwanese Buddhism were the female "sikhamats" practice vegan diet, simple life, organic farming, and daily manual labor, learning self-management responsible education and critical anti-establishment Buddhist studies, with a contempt of money and wealth, criticizing the corruption of the mainstream sangha neo-liberal practices. *Santi Asoke* has primary and secondary schools, factories, small

[421] Many of the young factory workers will prefer after several years of unhuman hand labor to offer their service in Pattaya, Patpong, or Suhkumvit bars and go go dancing places as the low paying salaries of most of the companies cannot allow them to live with the basic needs of a teenager in the age of global branding.

cottage industries, recycling workshops and organic restaurants managed by foundations headed by laypeople. The Asoke centers teach agriculture and Buddhist economics. Following these ideas, Sulak Sivaraska founded and directed the *Sathirakoses-Nagapradeepa Foundation*, using religious beliefs to create social change. His books developing his vision and practice are important contributions to an emerging spiritual sustainable society across the planet[422].

"Dhammananda" Chatsumarn Kabilsingh was the first Thai bhikkhuni ordained in Sri Lanka in 1973. She is a monk and a feminist pointing out that Buddha, 2600 years ago said that women could achieve to Enlightment. In December 2016, she and 72 bhikkhuni and samaneri (female novices) could not enter the Grand Palace to pay tribute to the late king Bhumibol as they were perceived as a big threat to the Thai society. "Dhammananda" teaches a new way of understanding and practicing Buddhist faith in the Abbess of Songdhammakalyani monastery, in Nakhon Pathom, the only temple in Thailand where there are bhikkhunis, founded by her mother, Voramai, a Mahayana Bhikkuni in the 1960's. There is an "orange revolution" of female monks or bhikkhuni fighting not only for recognition but for change in a society full of paradoxes and in deep identity crisis as contraception and sterilization are widely available in a country where women had in the 1960's an average of 6.5 children and today about 1.8 per family. Theravada Buddism is still unable to accept these changes co-existing with a capital city, Bangkok, perceived by many as the commercial sex capital of the world (Cook, 2011).

In 1991, "Dhammananda" wrote a book, *Thai Women in Buddhism* (Berkeley, CA: Parallax Press, available in pdf, Kabilsingh, 1991), where she examines the social and cultural roles of women generally in Thailand. She highlights in her study among other ideas that it has been accepted for many years that Thai women do not have critical or intellectual capacities; that many textile factories prefer to hire women because they produce better work, are less trouble to control or manipulate, and are paid less than men. Therefore, Thai women continue to be suppressed in economics, politics, culture and educational methods relied on rote memorization, and women were never encouraged to exercise independent critical thought. Another interesting issue in her book is the theme of prostitution, as a reflection of a capitalist system made by man for its own interests. When Rama V abolished slavery, many female slaves were turned over to men who started brothels. Rama V legalized prostitution in 1934 until 1960 when the United Nations declared the abolition of prostitution. Thailand's prostitution industry increased dramatically during the 1960s when the United States established military bases during the Vietnam War. After the bases were, dismantled prostitution continued to spread, as many women without education could not find honest jobs for decent living wages. As women could not easily enter the Army and the Buddhist Sangha community, many did not have much choice for their future. Because prostitution is illegal, there are not official records about the number of sex workers in Thailand. Some scholars like Pasuk Phongpaichit, economic professor at Chulalongkorn University, said that in the early 1990s the number of prostitutes was between 700000 to one million, with more

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422 Sulak Sivaraska, *The Wisdom of Sustainability: Buddhist Economics for the 21st Century*, Kihei, Hawai: Koa Books, 2009; *Conflict, Culture, Change: Engaged Buddhism in a Goblalizing World*, Boston: Wisdom Publications, 2005.

than 200000 Thai sex workers abroad (the Middle East, Singapore, Malaysia, and Hong Kong)[423]. 70% percent were from the north, where the economic conditions in rural areas are very bad and the majority of prostitutes had only four years of primary education and the majority of their families worked on borrowed land with no financial guarantee of their annual product. Prostitution can be perceived in partly as the result of Thailand's unsuccessful agricultural system which worsened in the north after the overthrown in a military coup in 2016 of Thaksin Sinawatra and his political party, outlawed and barred from political activity because allegations of corruption and conflicts of interest. The SEP implemented by the Thaksin government with village-manage microcredits development funds, low-interest agricultural loans and the local entrepreneurship stimulus program (One Tambon –village- One Product, OTOP) suffered from political turmoil. The military government though tried to keep the OTOP system functioning. However, the income prostitutes coming from the northern rural areas were important for the survival of their families, unable to make a living with their agricultural activities.

Chantawipa "Noi" Apisuk, a sociologist and an anthropologist from Thammasat University founded in 1985 the EMPOWER Foundation. She is still in her seventies very active directing 11 centers across the country where 20000 sex workers (50000 in 27 years) get continuous education about management, health, human rights, labor conditions, English language, culture and arts and so on. It is the most successful organization for sex workers in South East Asia. Around 300000 women in Thailand decide to leave the exploitation of the factory, the restaurant, the farm and apply to work in a bar, a karaoke lounge, a massage parlor, a go go dancing, or even freelancing. Many of them became the head of the family and build up the country: "The International Labor Organization found sex workers send home 300 USD million a year to rural areas, which is more than any government development project"[424]. Many sex workers speak better English than most of university students across the country building up a positive brand country image as ambassadors of Thai culture and traditions. Still they are considered as bad women. The Empower Foundation give them confidence about their work, making sex workers visible as hardworking and responsible women. The Rockefeller Foundation sponsored some of its activities, with interns from Thai Police, John Hopkins University, Harvard University, Brown University and other international organizations. Sex workers learned about financial transactions and birth control as well as political, economic and social events getting an education and awareness about the world that many other women did not get in Thailand. They are survivors in a male oriented environment questioning the unfair practices of globalization with their rejection to be exploited in the sweatshops and most of the factories in South East Asia with little health care and security conditions at the workplace:

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[423] Phongpaichit, P. (1982) *From Peasant Girls to Bangkok Masseuses*, Geneva: ILO. Fourth impression, 1988. Her book, *Thai Capitalism after the 1997 Crisis*, Chiang Mai : Silkworm Books, 2008, is a must to understand what happened in Thailand with globalization.

[424] *Reading Between Lines, Empower Foundation in the press since 1995*, Nonthaburi, Thailand: Empower University Press, 2014, p. 430.

> Women had little choice except to follow the sewing machine into the factory. Schools taught girls to use sewing machines and when they left school many followed their mothers and older sisters who had followed the sewing machines into large factories. The unwaged work of sewing for the family in the home became sewing for the factory for slave wages. When electric motors were added to the machines, the 'hell factories' or sweatshops had finally arrived. This was called modernization and progress but the women doing the work knew better (EMPOWER Foundation, 2017: 291).

However, bad working conditions are not exclusive to factory environments. When many of these women work in the nightlife entertainment business where most of the owners do not declare them as workers, without paying them charges or health care coverage. On top of this there are many human rights violations perpetrated by both state and non-state' actors against minors and women who are found to be trafficked of prostitution, as well as adult sex workers, from Thailand and neighboring countries. Among the human rights violated by raids against sex workers are the right to non-discrimination; the right to work (free choice of employment); the right to life, liberty and security of the person (right to be treated with humanity and respect); the right to privacy and family life, reputation and honor; the right to health; right to fair trail and so on[425]. EMPOWER Foundation published a Bad Girls Dictionary to make sex workers more conscious about their positive active role in society. In the cover of the publication, the letter B highlights the term "Bad Girls", referring to "any women who behaves outside the space society maps out for women" (Noi Apisuk & Liz Hilton, 2017: 27). EMPOWER Foundation created in Bangkok the Museum of Sex Workers in Thai Society named "This is Us", going back to the origins of sex work in Thailand. Another publication, "Bad Girls of Lanna: Our Story of Sex Work in Chiang Mai" (EMPOWER Foundation, 2011) gives a historical perspective to the history of exploitation of men by domestic slavery and the appearance of the first brothels in Chiang Mai 200 years ago[426].

The case of Thailand illustrates very clearly how our liberal capitalist economy has been made for the benefit of men as they preserve ancient discriminatory practices, traditions and religious beliefs. Our global culture has also reinforced a patriarchal view of society with the increasing violence very much present in mass media, films, video games and corporate world practices (downsizing, tax evasion, aggressive branding). Digital technologies favor also with the acceleration of exchanges, the speed of communications and the overwhelming presence of screens in our private lives the importance of technology, robotics and the virtual over nature, human beings and the "real" world. The challenge of our emerging globally

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[425] See Chapter 6, « Specific Violations Incurred » in *Hit & Run : Sex Worker's Research on Anti trafficking in Thailand* by RATS-W Team and Empower Foundation, Bangkok: Mama Cash, 2012, pp. 83-97.

[426] The large Chinese migration (400000 workers by 1889) to Bangkok contributed to the opening of 71 brothels along Soi Sampaeng as well as massage parlours (a Thai tradition for the last 2000 years).

responsible environments is to understand that only a systemic, holistic, and integral view will be able to confront many of the problems our global society has created in the past 30 years. The presence of women in political, economic, social, educational and cultural organizations can contribute, as well as the actions of responsible managers, activists and scholars for a caring environment where education will consider loving and interdisciplinary approaches to improve the living conditions of a majority of people struggling for survival. Maternalistic management education can be an inspiring way to find solutions for a better world where solidarity and community activities will overcome the extreme individualism our consumer society has been putting forward as the answer to the loss of spiritual values in our Modern Times.

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**"Designing a Human Rights Management Systems Standard framed by the Value of Human Life: a practical approach to business enterprise human rights in Asia"**

**Robert Sadleir**
Initiative to Value Human Life

## Abstract

The statistical value of human life (VHL) is important in a world where measuring net benefit is a cornerstone of policy. The intent of organisations and institutions that use this idea is to optimise the allocation of resources and improve the quality of lives of citizens, stop lives being needlessly lost, and enhance sustainability. Calculating the VHL has been particularly important in health care and the transport safety sector and it has been spectacularly successful in the commercial aviation sector. For instance, the United States' Federal Aviation Administration (FAA) has used the target of zero fatal accidents to design safety engineering and management systems for commercial passenger aviation. In 2016, over 42,000 flights were handled by the FAA a day, carrying 2.5 million passengers a day (source: FAA). Yet since 2009 (as of May 16, 2018) there has only been one commercial passenger fatality in the US. In part, this is because the statistical value of a human life in the US is high (≈USD 10m). Can a similar approach be used in the context of human rights to help business improve human rights? Can we apply metrics and indicators to value human life as a mechanism to protect what it means to be a human being and make more resilient the Universal Declaration of Human Rights and International Humanitarian Law framework? In a global world where terms such as dignity are extremely indeterminate, and complex we need to develop different approaches to protection, or look for different approaches to reinforce the principles. Moreover, human rights and respect of humanitarian law take a long time to "trickle down" from state actors to vulnerable people whose lives are blighted by conflict, unfair and unsafe work practices, human trafficking, and the slow dehumanisation and desensitisation of incremental bureaucratic social justice systems of governments. By learning how to systematically value our own lives we can improve the quality and dignity of our lives both at a personal level and in the context of the workplace.

## Introduction

A challenge for those seeking to protect against human rights abuses in a globalised, liberal, capitalist world is that State governments are not best placed to protect them. Corporations can arbitrage international boundaries to seek competitive advantage. Governments are bureaucratic, slow to respond, and can be subject to regulatory capture by business as nations seek economic growth and development. State-directed capitalism which is found throughout Asia suggests corporations and the State can be too closely aligned in their interests to engage in meaningful human rights protection. Moreover, in Asian societies

there is the emphasis on the collective as opposed to the individual. As well human rights have increasingly become a vehicle to remedy a broad range of wrongs from social problems and social welfare; as a consequence human rights policy in general has become too unwieldy for governments to engage effectively from the perspective of human rights *law.*

Assuming this context for the purposes of this paper, my aim is twofold: first, to suggest how we can apply management systems standards, and the process of standardisation, to develop a prevention tool for human rights abuse by establishing a human rights management system within a business enterprise, thereby reducing reliance on the State and government institutions to enforce human rights. Second, seek to ensure corporations employ these systems effectively by adhering to their standards and ensuring they allocate the appropriate amount of resources within an organisation to prevent and curtail human rights abuses. I suggest this can be achieved by introducing the measurement of the Value of Statistical Human Life (VHL) as a tool to enhance accountability. It means a business enterprise needs to ask: How do companies value a human life? How valuable is an employee or a stakeholder? What values, indicators and metrics should a company use to value a human life for human rights purposes. By measuring VHL we can determine whether the amount of resources spent on preventing human rights abuses is proportionate to what a corporation values and its assets.

**Brief overview of the Asian regulatory environment**

To understand why standardisation is a viable method for business enterprises to approach human rights we need to step back and look at approaches in the Asia region to integrating the capitalist system as an engine of growth for economic development. Initially, when the economies of Asia sought pathways to development they were wary of the *laissez-faire* economics of *entrepôt* states like Hong Kong. Instead from the 1970s onwards, economic development was the result of directed State capitalism, a partnership between government and corporations in strategic industries. The approaches in Asia may have been different: partnerships with family conglomerates in *zaibatsus* in Japan or the *chaebols* in South Korea; in Indonesia, Vietnam and Burma this partnership also included the military. China espoused corporatism by encouraging state enterprises to model themselves on western enterprises; the effects were similar in all countries: politics and business became entwined. The **measure of effective policy** for technocrats in Asia over the last half century has been political **stability** and **economic growth**.

Thus, in Asia the challenge to regulate human rights by the State is compounded by directed state capitalism and the notion of 'regulatory capture' where those bodies regulating industries become sympathetic to the businesses they are supposed to be regulating. One should add this is not just an issue in Asia alone, but a problem arising from capitalism in general. Modern capitalism, itself, "is a complex game," according to Joseph Stiglitz, the former IMF and World Bank economist:

those who win at it have to have more than a little smarts. But those who win at it often possess less admirable characteristics as well: the ability to skirt the law, or shape the law in

their own favour; the willingness to take advantage of other, even the poor and to play *unfair* [427]when necessary[428].

And as *The Economist* points out:

With the West in a funk and emerging markets flourishing, [Asian economies] no longer see state-directed firms as a way-station on the road to liberal capitalism; rather, they see it as a sustainable model. They think they have redesigned capitalism to make it work better[429].

In short, state capitalism is here for the long haul and those seeking mechanisms to improve human rights must find solutions within this environment. It should also be noted at this point that as technocrats design policy to enhance their governance system from an economic perspective, one of the challenges that both corporations and governments have is investing resources (money, time, people), is they are unable to allocate resources to human rights because it is difficult at a national level or corporate level to **measure** the return of investment (contribution to national wealth) in human rights and because they cannot measure the net benefit of human rights. In short, there are few frameworks to build the **business** case for human rights. Therefore, one of the challenges is: how can you adapt to the process, mindset or culture for policy development and implementation within government, their parliaments, and the wider community including most importantly businesses.

**Asian Values**

The second check on effective measures to prevent human rights abuse in the context of Asia is *'Asia values'*. In Asia, the debate on human rights has been obscured by notions of 'Asia Values' a blend of authoritarian and family values and a greater emphasis on collective social welfare as opposed to individual rights. This topic is well-known and was propounded by Lee Kuan Yew and Mahathir Mohamad, leaders of Singapore and Malaysia in the 1990s[430], as the second generation of tiger economies came to the fore. The discussion is framed by both the notion of Asian values and the 'Rights vs Security' debate which holds that since Asian nations are less economically developed compared to Western nations, it is not realistic to expect them to uphold all of the rights listed in the *Universal Declaration of Human Rights*. China and Pakistan, for example, have argued they may sacrifice political and civil freedoms to provide economic security for their people and maintain stability in their society as they develop. To be fair to Asia, balancing the collective well-being over the notion of individual human rights, is also challenged in the West by ambiguity.

**Ambiguity of Standards**

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[427] Stiglitz Joseph (2013) *The Price of Inequality* Penguin Books, London p.46

[428] ibid p.46

[429] 'The rise of state capitalism:' (2012) https://www.economist.com/node/21543160

[430] Prime Minister Mahathir has recently returned to power in Malaysia.

The third impediment to human rights is that it is hamstrung by ambiguity. Human rights means different things to different people: particularly among those people who are not directly engaged in human rights issues or well versed in legalities. Sometimes we use a proxy term so that people may grasp the concept – the word "dignity." Yet:

Dignity is sometimes invoked as another way of justifying human rights. The problem is that dignity is extremely indeterminate and historically complex concept, often used as a placeholder in morality[431].

Other approaches speak of human rights in terms of self-evident "standards of behaviour." But as Kenneth Roth, head of *Human Rights Watch* points out, "the great challenge facing human rights groups is often less concerned with arguing the law's finer points or applying them to the facts of the case than with convincing the public that violations are wrong.[432]"
Ambiguity is also present even in the use of the term: 'standards'. The challenge, with using the word: 'standard', is that it also means different things. According to *The Oxford Dictionary,* a standard may be defined as:

A) a required or agreed level of quality or attainment;
B) something used as a measure, norm, or model in comparative evaluations;
C) principles of conduct[433]

Understanding standards in the human rights context using definition "A" or "C" means building consensus and this can be a slow, frustrating and a costly exercise particularly in the context of business enterprise and human rights. Moreover, it encourages a passive acceptance of circumstance or indifference, as the solution is perceived to be in the hands of technical experts, bureaucrats, politicians and lawyers. The question is how can we improve human rights standards in a proactive manner? One, in which business can develop standards aligned with their organisational culture, management structure, corporate values, shareholders and other stakeholders, but reinforced by internal company systems and rules?

A mechanism for enforcement is important to encourage better behaviour. For Kenneth Roth, "shame is a powerful motivator." Yet within the context of the corporate world I would disagree. It may be effective at a personal level but not at a corporate level. Perhaps a better approach is to encourage the design of management systems within companies to be more responsive to human rights, and changing corporate culture within rather than relying on governments to be the driver of change. At any rate, globalisation means corporations can arbitrage national boundaries and regulatory obligations. We can speak of brand damage, loss of reputation, providing some form of censor; yet the 24 hour news cycle, opinion poll driven policy and the silos created by internet tribes means corporate

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[431] Moeckli Daniel, Shah Sangeeta and Sivakumaran Sandesh (eds); (2014) *International Human Rights Law* Oxford: Oxford University Press p.34

[432] Moeckli et al p.9

[433] https://en.oxforddictionaries.com/definition/standard

abuses are quickly forgotten, smoothed over, or were never a priority. Furthermore, corporations have resources to slow legal proceedings or can use sharp business practice to reduce the damages of any conviction. Recall Union Carbide, in Bhopal. If you recall, in December 1984, the Union Carbide chemical plant in Bhopal released at least 30 tons of a highly toxic gas. 600,000 people were exposed to the deadly gas cloud; 15,000 died over the years; 40 000 were maimed and the surrounding area contaminated with toxins Union Carbide's headquarters transferred liability by claiming sabotage and sold its stake in the Indian subsidiary. In 1989, Union Carbide did settle with the Indian government for USD$470m. The court in India delivered its judgment in 2010, 26 years after the incident, holding seven senior employees responsible for the world's worst industrial tragedy[434] -a hollow justice.

Therefore, the pathway lies in definition "B", - the means to build a standard where accountability can occur through measurement, norms, or models in comparative evaluations. All these characteristics are found in the process of standardisation. In doing so the solution to reconciling ambiguity in standards and perspectives, and ensuring business enterprises' accountability on human rights in a state capitalist system in Asia, lies in the process of standardisation through the mechanics of systems management. Thus, the focus of my paper is designing a self regulatory approach grounded in the practice of businesses that can prevent human rights abuse by developing a management systems process using International Standards Organisation (ISO) guidelines.

**International Standards (ISO) and Management Systems**

An international standard "provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose. "[435] Standards are popular (well regarded?) tools in the commercial sector to enhance systems and improve quality of services and production and manage assets. Standards act as a framework to design organisational behaviour without government regulation. Perhaps the most popular standard and most well-known is ISO 9001: Quality Assurance. There are over one million companies and organizations in over 170 countries certified to ISO 9001 and many more who choose to self-certify. In Asia, as the private sector has grown, ISO 9001 has also become an important marketing tool to enhance the value of a brand and improve pricing. The following chart highlights the take up of ISO 9001 in China (See Chart 1)[436] Currently, around 350 000 companies in China across all business sectors from primary industries such as mining and agriculture to the services sector are certified against ISO 9001.

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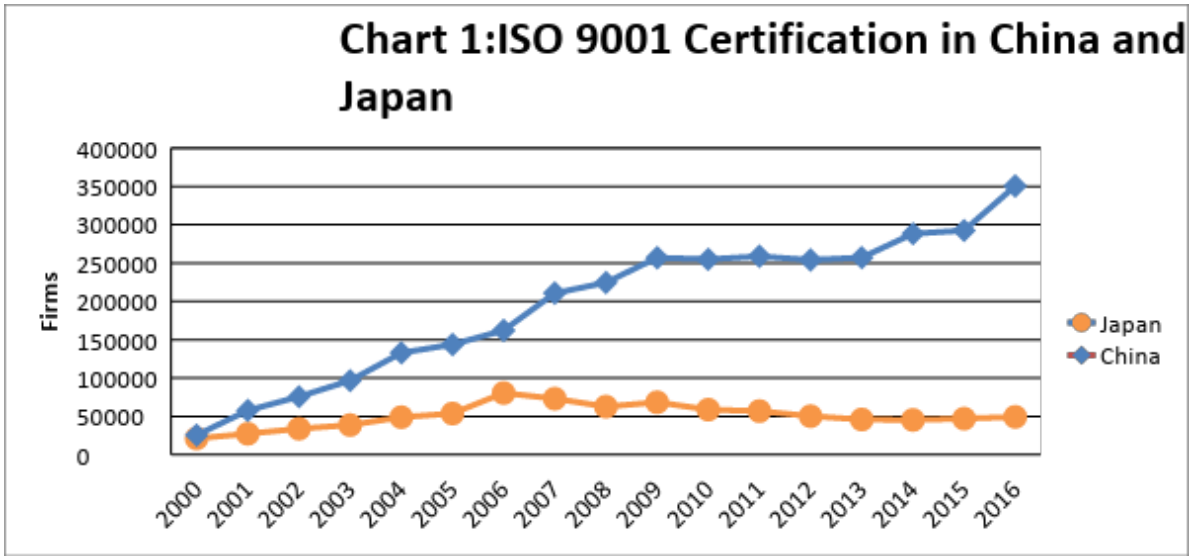
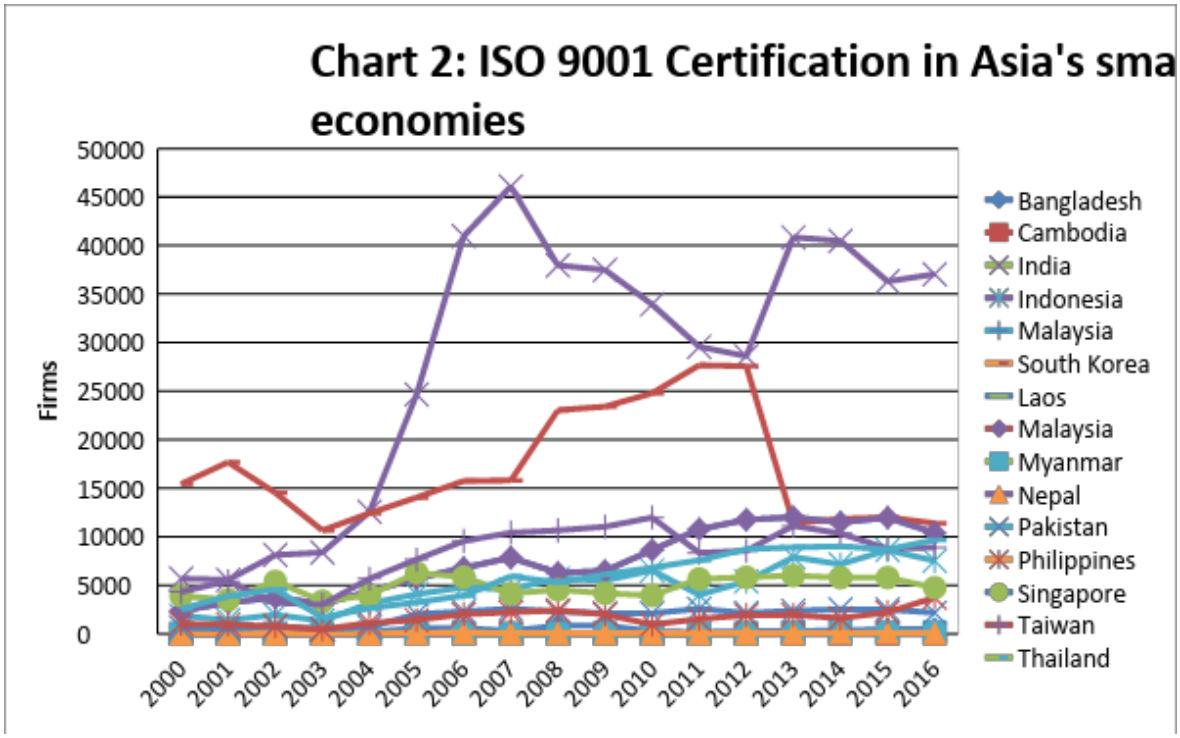
[434] https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/

[435] https://www.iso.org/standards.html

[436] This chart only shows companies who are formally certified to ISO 9001. Many firms choose to self-certify and are not included in this chart. The stabilisation of Japanese companies may reflect a preference for developing bespoke standards for companies as companies mature; and/ or the preference for self-certification; or the choice to switch to other types of standards as a company matures.




Most businesses in Asia[437] have become increasingly familiar with ISO 9001 (See Chart 2). As the market economy grew since the standard and the practices it encouraged provided guidance for companies and organisations who wanted to ensure that their products and services consistently met customer's requirements, and that quality consistently improved. This enabled the creation of extensive and dynamic supply webs throughout Asia supporting intra regional and international trade on a vast scale. Businesses adopting and adhering to ISO 9001 have greater opportunities to create wealth through such networks; businesses operating without ISO 9001 certification are less likely to be integrated directly into such networks.




[437] https://www.unido.org/sites/default/files/2012-05/ISO%209001%20Impact%20Survey-eBook_ver2_0.pdf

From a human rights perspective, the significance of ISO 9001 in Asia is not a quality assurance system per se but that ISO 9001, once embedded in the management and organisational structure of a company, over time influences the system and changes the culture of a company: from creating a customer complaints system, and sensitivity to external stakeholders, that managers are accountable for implementing, and managing, as well as introducing the concept of continuous improvement within a company.

A standard, in short, is an internal mechanism or platform to change a company from within. Not from without which is often a human rights activist approach to change. Standards channel employee and management behaviour and are enforced by internal incentive mechanisms such as Key Performance Indicators (KPIs), promotions, and internal company processes, rules and regulations. ISO 9001 Quality Assurance is traditionally considered the introductory standard for most companies and as firms develop and mature they incorporate management system standards to improve performance. And management systems standards influence management behaviour as they evolve. The ISO defines a management system as:

the way in which an organization manages the inter-related parts of its business in order to achieve its objectives. These objectives can relate to a number of different topics, including product or service quality, operational efficiency, environmental performance, health and safety in the workplace and many more.[438]

The attraction of a systems management approach is manifold:

- Firstly, the level of complexity of the system will depend on each organisation's specific context. For some organisations, especially smaller ones, it may simply mean having strong leadership from the business owner, providing a clear definition of what is expected from each individual employee and how they contribute to the organization's overall objectives, without the need for extensive documentation. More complex businesses operating, for example, in highly regulated sectors such as the chemical industry, may need extensive documentation and controls in order to fulfil their legal obligations and meet their organizational objectives. [439]
- Management system standards help firms improve their performance by identifying repeatable steps that organisations consciously implement to achieve their goals and objectives, and to create an organisational culture that reflexively engages in a continuous cycle of self-evaluation, correction and improvement of operations and processes through heightened employee awareness and management leadership and commitment.[440]
- A management system once it comes into existence has to perform. Thus, performance management often in the form of KPIs encourages the delivery of results

[438] https://www.iso.org/management-system-standards.html

[439] https://www.iso.org/deliverables-all.html#IS

[440] ibid

over time. Indeed this is the beauty of management systems for they create an environment where those who are unfamiliar with a concept are obliged to understand and deliver against it, in order to receive benefits whether pecuniary or other. So firms do not have to change behaviour due to altruism alone but due to pragmatic organisational reasons.

- A management system can be embryonic, but over time as resources (however small) are allocated to it, it creates an ecosystem of its own within an organisation which develops robustness to influence a corporate culture and modify corporate behaviour. An analogy may be risk management in the financial sector, which may have been viewed with scepticism initially by the front office of an investment bank who are incentivised to take greater risk for greater reward, but gained traction during the financial crisis as banks sought to protect their capital.
- Systems management is about capacity building, encouraging enterprises to implement their own reforms rather than relying upon regulation, and seeing human rights as a component of an effective and successful business enterprise.
- Systems can be integrated into IT platforms allowing the barriers to reporting human rights abuses being reduced and processed more quickly; and human rights can be integrated to the broader ecology of systems and data collection. Moreover, once data is introduced into the system there is a data footprint that is difficult to remove or cover-up.

In short, any business enterprise can employ a management system whether it be a sole proprietor, a small to medium enterprise, a large corporation or a multinational corporation. Once the management system is embedded in a corporation it can be scaled up as a firm grows. Indeed, there is much to be said for a human rights management system being embedded in a company when it is small because it becomes ingrained in the firm's culture from the outset - it becomes part of the corporate DNA. Whereas when such systems are bolted on at a later stage, the culture of the organisation has to adapt and change to accommodate the new system. Such circumstances can lead to resistance and the necessity for assertive and sustained change management practices. In the short term, a new management system simply raises awareness and through the organigram is disseminated across the corporation. It may be viewed with scepticism at first, but over time it creates a *raison d'etre*. A similar internal wariness to new systems occurred with *Occupational Health and Safety* or *Environment Management* systems. Yet today most companies would employ a management system in these areas. Within corporations there are employees and managers who champion these causes. The evolution of firms' attitude towards Climate Change and environmental management could be a pathway for human rights engagement by business enterprises.

When considering current ISO management standards there are a number which could be employed to frame a *Business Enterprise Human Rights Management Systems* standard. The solution lies in developing an ISO standards approach to human rights.

**A Human Rights Management System Standard**

ISO has developed a range of tools, one of which is management system standards. A *Human Rights Management System (HRMS)* could be designed using components of existing management system and quality assurance standards (See Table 1): These include:

- The International Standard (ISO) on Quality Assurance - ISO:9001
- Environmental Management - ISO:14001
- Risk Management -ISO:31001
- Supply Security Chain- ISO:28001
- Occupational Health & Safety-ISO:45001

Each of these standards have principles or characteristics which drawn together can become the ingredients of a nascent HRMS: ***Quality Assurance*** brings the notion of creating a customer complaints system and the notion of using feedback for continuous improvement; ***Environmental Management*** highlights the importance of incorporating a management structure within a company to deal with environmental issues and ensuring this management team review environmental processes regularly; ***Risk Management*** that any decision must truly analysis the cost and benefit of each action and the importance of stakeholder engagement as well as identifying and treating risk events appropriately; ***Supply Chain Management*** reminds a firm that it does not act in isolation but must also consider its whole business ecosystem of suppliers and treat risks along the supply chain. ***Occupational Health and Safety*** highlights not just protecting workers; and prevention but collecting data and setting targets to reduce work place absences and change culture.

**Table 1: Possible Components for a Business Enterprise Human Rights Management System**

| Standard | ISO:9001<br>Quality Assurance | ISO:14001<br>Environmental Management | ISO:31001<br>Risk Management | ISO:28001<br>Supply security chain | ISO:45001<br>Occupational Health & Safety |
|---|---|---|---|---|---|
| Key Principles | Customer focus | Compliance statutory/ regulatory requirements | Develop a risk management strategy | Assess threats in their supply chain | Improve employee safety |
| | Leadership | Employee Engagement | Identify and mitigate risks | Facilitate global trade | Reduce workplace risks |
| | Engagement of people | Confidence of stakeholders | Protect assets | Reassures stakeholders of firm's commitment to the safety of individuals and security of goods and services | Reduced absenteeism and staff turnover, leading to increased productivity |
| | Process | Strategic business aims alignment | Cost Benefit Analysis | | Creation of a health and safety culture |
| | Improvement | competitive and financial advantage | Decision making to effectively allocate resources | Benchmarks firms security management practices with international best practice | Employees take an active role in their own OH&S |
| | Evidence-based decision making | Environmental performance of suppliers by integrating them into the firm's business system | Improving an organisation's governance | | Reinforced leadership commitment to proactively improve OH&S performance |
| | Relationship building (Complaints systems) | | | | Enhanced reputation |



An example of a highly effective management system is the United States' Federal Aviation Administration (FAA) approach to commercial aviation. The FAA system has used the target of zero fatal accidents to design safety engineering and management systems for commercial passenger aviation. In 2016, each day over 42,000 flights carrying 2.5 million passengers were handled by the FAA (source: FAA). Yet since 2009 (as of June 30, 2018) there has only been one commercial passenger fatality in the US. Why has this system been so successful?

Obviously, regulatory enforcement is important as airlines fear losing a license to operate but this is not the whole picture when considering the extremely low fatality rate. A key component is the statistical value of a human life (VHL) which in the US is high (≈USD 10m). Thus, a typical commuter plane in the US, e.g. a Boeing 737 carrying 120 passengers, needs to have a safety management system and security management system designed to protect an asset (people) worth USD$1.2bn excluding the aircraft. That means safety is designed with much greater redundancy i.e. protection, to ensure the likelihood of accidents is reduced. In short, the FAA errs on the side of caution. Moreover, the complete ecosystem feeding

commercial aviation in the US needs high safety and security processes from the supply chain of high quality of spare parts to high quality maintenance and security systems to ensure the system is not compromised. Another thing that is interesting about the aviation model is that once people are seated in the aircraft and during the flight all passengers' lives are valued equally for the duration of the flight and that welfare is John Rawls "Good" principle where the proper maximand is the welfare of the worst-off individual[441].

**Value of Statistical Human Life[442]**

VHL is an important measurement in a world where determining net benefit is a cornerstone of public policy. The intent of organisations and institutions that use this concept is to optimise the allocation of resources and improve the quality of lives of citizens, stop lives being needlessly lost, and enhance sustainability. It raises the question from a human rights perspective: could we strengthen human rights protection by incorporating VHL as a component of the HRMS for business enterprise? Such a question is perhaps not completely aligned with human right advocacy where the justification of human rights are self-explanatory - there is an irreducible value that is not in need of further justification[443]. Yet, it may be a practicable solution for human rights in Asia.

Afterall, the FAA model illustrates that if a human is valued highly enough then a robust protection system can be created. Would VHL enhance the enforcement of human rights? The likelihood is, "yes" as at the very least it allows managers a mechanism to determine the optimal allocation of resources for human rights; and facilitate decision-making through measuring impact. Key factors for managing a project in business. Applying a VHL model would also raise questions about the appropriate methodology companies would use to measure the value of human life and such decisions would raise questions within a corporation about the ethos of the company. Should the value of a human life be based solely on human capital measures; or on the quality of life and or "well-being." What indicators and metrics should be used to measure the VHL?

In essence, in a HRMS -as described above- the VHL would be a key component to determine the cost-benefit of human rights measures. It suggests that if methodologies for VHL determined the value of a human life to be higher, investment on protecting human rights would be greater not just within the company but also in measures taken in understanding how sub-contractors, suppliers and other stakeholders treat their workers. From a human rights activist point of view it would give those who wish to improve human rights an additional approach to improving human rights: developing a methodology to measure the VHL in a human rights context.

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441 Sen Amartya (2017) *Collective Choice and Social Welfare*, Penguin Random House, London p.193

**442** There are different methodologies to measure the Value of Statistical Human Life. The most common are: Human Capital Method, Cost of Indemnisation, Willingness to Pay or Accept Risk etc. Deciding upon the appropriate methodology is context specific.

443 Moeckli Daniel, Shah Sangeeta and Sivakumaran Sandesh (eds); (2014) *International Human Rights Law* Oxford: Oxford University Press p.34

VHL also would also provide greater transparency as benchmarking of VHL across companies by external consultants or human rights activists would give greater insight into the broader culture of an organisation. Just as quality assurance under ISO 9001 has been used as a marketing tool in business, a HRMS backstopped by VHL could make firms more marketable and competitive. This may generate a virtuous circle: as one human rights delegate at the recent *38th Session of the Human Rights Council* in Geneva, Switzerland commented: "When you have the money, you fight for your rights. When you are poor, you fight for your money.[444]"

## Measuring the impact of Human Rights using VHL

Public policy good practice has -as its cornerstone- the measurement of impact. Developing and designing good human rights practice is hampered by the inability to measure the net benefit of human rights. Allocating resources to human rights at the corporate or government level is challenging because it is difficult to measure the return of investment in good human rights practice when additionally one is unable to measure the cost of human rights abuses. Determining the VHL is one way this can be realised through firstly attributing a value to human life and then modelling a cost to human rights abuse at a national level and also a corporate level. See the following table:

**Table 2: Cost of Human Rights Abuses based on VHL[445][446][447]**

| Country | Value of a Human Life[21] USD 2004 | Violence Cost [22] | Cost violence per capita (USD) | Population (2018) | National Annual Cost (USD mn) |
|---|---|---|---|---|---|
| China | 562,225 | 3.5% | $19,678 | 1,415,045,928 | 27,845,097 |
| India | 147,403 | 8.6% | $12,677 | 1,354,051,854 | 17,164,852 |
| Thailand | 222,056 | 7.1% | $15,766 | 69,183,173 | 1,090,740 |
| Malaysia | 722,022 | 4.3% | $31,047 | 32,042,458 | 994,820 |
| Indonesia | 92,433 | 2.0% | $1,849 | 266,794,980 | 493,213 |
| Bangladesh | 71,066 | 3.8% | $2,701 | 166,368,149 | 449,279 |
| Philippines | 41,330 | 8.4% | $3,472 | 106,512,074 | 369,780 |
| Vietnam | 53,063 | 7.0% | $3,714 | 96,491,146 | 358,408 |
| Singapore | 924,420 | 4.6% | $42,523 | 5,791,901 | 246,291 |
| Myanmar | 51,245 | 8.5% | $4,356 | 53,855,735 | 234,586 |
| Cambodia | 18,864 | 7.3% | $1,377 | 16,245,729 | 22,372 |
| Laos | 4,617 | 6.5% | $300 | 6,961,210 | 2,089 |

444 Quote: Aishwarya Raghu, Intern, Maldives Permanent Mission to the UN quoted at 38th Human Right Session Geneva, *Advancing Access to Justice for All* 25th June 2018

445 This table is for illustrative purposes and the data needs to be refined particularly in the GDP cost for violence and the total cost to a country annually. But the basic premise remains: violence reduces the value of a human life and is a cost to society.

446 Kate McMahon, Said Dahdah; (no date) *The True Cost of Road Crashes: Valuing Life and the cost of serious injury IRAP*

447 The Institute for Economics and Peace (IEP) (2018) *The Economic Value* of *Peace* 2016 Sydney

In essence, *Table 2* determines the VHL in USD$(2004) in selected countries in Asia. It then looks at how violence reduces this value in percentage terms. It multiplies the loss from violence by the national population to get an overview of the cost of violence at a national level. Overall the table shows that the scale costs to violence are in the billions and trillions of dollars. Recognising such large costs of violence should further incentivises both governments and business enterprises in Asia to invest resources in human rights because the cost of violence makes an economy less wealthy and consumers less able to participate in the economy by purchasing goods or services or contribute to government services by paying taxes.

**Conclusion**

We need to develop different approaches to human rights protection, or look for different approaches to reinforce the principles. Justice arising from human rights law takes a long time to "trickle down" from state actors to vulnerable people whose lives are blighted by conflict, unfair and unsafe work practices, human trafficking, and the slow dehumanisation and desensitisation of incremental bureaucratic social justice systems of governments.

This paper suggests that standards incorporated into management systems and the process of standardisation can be applied to human rights, to develop more robust prevention mechanisms for business enterprises in Asia to strengthen business's role as a human rights actor. Such an approach reduces reliance on the State and government institutions to enforce human rights. Secondly, to ensure corporations employ these systems effectively by not only adhering to their standards but ensuring they allocate the appropriate amount of resources within an organisation to prevent and address human rights abuses, I argue the Value of Statistical Human Life can be applied as a measurement to enhance accountability. For if the value is too low change is less likely to occur. Moreover, VHL can be used to benchmark business enterprises' commitment to human rights.

The creation of a *Human Rights Management System Standard* for business enterprises would blend the qualities of ISO standards such as: *ISO 9001:Quality Assurance* with its customer feedback and complaint system; the contextual sensitivity of *ISO 31001: Risk Management Standard* which seeks proportionate allocation of resources; *ISO 28001: Sustainable Supply Chain* to ensure suppliers and other stakeholders are engaged in the process; and *ISO 45001: Occupational Health and Safety* for its system of data collection and use of targets to reduce workplace injuries. Human rights technical experts can add further insight into the design. The approach makes sense in Asia as Asian businesses are

already familiar with the standardisation process through ISO 9001- the ubiquitous quality assurance standard. It also makes sense when we understand the cost of human rights abuse to Asia's national economies.

I hope in considering this paper, the reader may reflect upon how he/she systematically values their own life, and how together we can improve the quality and dignity of all lives both at a personal level, and in the context of the workplace.