

## **EXPERT WORKSHOP on National Action Plans**

### **UN Working Group on Business and Human Rights**

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Lead discussant remarks for session on “Gaps, risks, regional considerations and identifying essential elements of process and substance with respect to guidance on NAPs”

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Each time a new NAP is announced, we celebrate it even before we’ve clicked on the download button because we know that this project is important and to keep it going and demonstrate seriousness we need to see the continuous and expeditious roll out of NAPs.

And yet there’s a danger, which I think we are all aware of and which has called us here, to ensure that this is not an empty exercise - or merely a thumb on the scale. We need to ensure that NAPs really meet the goals that we need them to: to push states to write and implement policies and regulations, such as reforming procurement policies, embedding human rights into BITS, etc., and create laws that will hold to account companies who have committed or are complicit in human rights violations, as well as provide clear guidelines and messaging about human rights to business.

In the NAPs that have been launched so far there are some good and promising nuggets, which I won’t be talking about because I’ve been asked to flag gaps in the short time I have. In general, however, we see a lot more emphasis on guidance and dialogue and a lot less by way of concrete policies, regulations and laws, which is the purview of state duty to protect.

A thumb on the scale is a NAP that heavily emphasizes providing tools and guidance and dialogue with companies, thereby perpetuating the voluntarization of corporate respect for human rights, without accompanying rules that make that conduct mandatory. A thumb on the scale is a NAP without hard commitments, clear goals, success criteria, timelines for completion of action points, and an effective monitoring and evaluation procedure that is reviewed regularly and is inclusive of all stakeholders.

It should be a no-brainer that embassy officials talk with trade missions and investors in the host countries about human rights, as should government officials with CEOs at home. That needs to start, if it hasn’t already. But it’s certainly not enough.

It has been noted that the existing NAPs reveal the influence of that country's business sector in the NAP development. I found it interesting that the text of the Dutch NAP reads like a narrative of how certain new policies, legislation and other measures were considered and then in many cases rejected. I didn't count but it seemed to me that the Dutch NAP articulated its commitment to creating a level playing field even more times than its commitment to ensuring that companies respect human rights. It is true that a NAP can make a valuable contribution to leveling the playing field, especially for workers and communities – but too often the “level playing field” argument is invoked as an excuse for government inaction in order to avoid disadvantaging its own businesses in the global marketplace.

This points to the universal problem of how governments can meet their duty to protect when domestic politics does not allow. A recent example, among many, in my own union-busting, NAP-less country is the Republicans blocking of the equal pay law. Given this fact, how can NAPS help? And how can we push for states to shift from a CSR approach to NAPS to a NAP for BHR?

Along with concrete measures, specific timetables for action points, and monitoring and evaluation, we also want to ensure that we are all on the same page about what we are even talking about with respect to protecting, respecting and fulfilling human rights – what human rights are at stake. There is a sense in some of these NAPs that we have lost sight of the victims – in particular, the most vulnerable and marginalized groups.

CALS is particularly concerned that gender considerations, which are embedded in some of the UNGPs, not be lost in NAPs. NAPs need to address the role of gender discrimination internal to a corporation's operations and to the gendered impact of the corporation's operations on surrounding areas.

A similar concern surrounds indigenous peoples – without an articulation of the vulnerabilities of this affected community in NAPs there is a risk their rights will be lost sight of. This was brought out in the ICAR/DIHR report on the Asia consultation, which notes the need for NAPS to clearly articulate that FPIC is mandatory.

There are also cultural rights at stake that are typically not recognized, even as the violation of these rights is leading to calls for change. In Zimbabwe, recently two local advocacy groups addressing the impacts of mining companies called upon its government to adopt the UNGPs, citing not only evictions of people from their lands, but disturbing ancestral sites and graveyards, thereby violating the cultural respect for the dead.

The risk of sidelining the rights of vulnerable and marginalized groups points to the question: How specific must governments be in their NAPs in order for them to be effective?

[It is noteworthy that the draft Spanish plan, under Measures 6, does refer to updating existing regulations with respect to “vulnerable groups” and the Italian Plan included a NAP guideline to include the labor rights of specific groups, including LGBTI, people with disabilities, women, migrant workers, and Roma, Sinti and Travellers. Should there be more of this?]

In the existing NAPs (again with the exception of the draft Spain NAP) we see scant attention to conflict zones, where the most serious human rights abuses occur. The attention to PMSCS in some of the NAPS is good, but not enough.

A specific issue that is addressed in each existing NAP is investment in Myanmar. The UK, Netherlands and Denmark plans note that they are supporting the Myanmar Centre for Responsible Investment, essentially a human rights advisory service for companies. This cannot be compared with the mandatory human rights reporting requirement that the US government put in place when it lifted sanctions. In order for remedial frameworks to be effective transparency and access to information is key. While capacity building and support of the judiciary and lawmakers in Myanmar is crucial, these are tasks that (with government support) universities such as Singapore Management University and Columbia University can and are undertaking. But only governments can regulate their businesses to ensure they respect human rights.

Question: Should we identify particular topics, such as Myanmar investment or conflict minerals that NAPs should address? And then if we do, how can we make sure that those policies have bite, that they make a difference in ensuring that investment happens that respects rights?

The issue of specifying critical issues points to the thorny question of prioritization. If, as the SRSR’s research found, all companies are capable of impacting all rights, how should countries be instructed to prioritize issues? What should be the guidelines for prioritization?

It is widely recognized that a critical issue for states to address is legal accountability – in particular, creating legislation that provides for extraterritorial jurisdiction and access of victims of corporate human rights violations to courts. The emphasis in the existing NAPs so far has been on strengthening the OECD NCP in home states – this points to a real risk given the well-known limitations of mediation (and I say this as a mediation practitioner.) I know we have a whole session devoted to this so I won’t say more here except to remind ourselves that victims of corporate human rights abuse are doubly harmed when they are denied their legal right to remedy under international law.

Do the existing NAPs contain the “smart mix “of measures that Ruggie called for and which Mark Taylor pointed to in his report last year on *The Role of States*? This involves getting the

right combination of business engagement, procurement requirements, disclosure rules, criminal and civil remedies, etc. I'm not sure we've seen much of that yet in the existing NAPs.

In terms of developing NAPs in the Global South – the lack of which so far is a particularly big gap - clear messaging is needed from investment-sending countries to investment receiving countries in the Global South that creating a BHR NAP will not scare away investors or deter future growth – to the contrary, the message needs to be that markets grow and profits increase in societies that are stable and respect human rights.

The debates are just starting in the Global South. If we want to see NAPs emerge in the Global South in a way that will truly assist in the implementation of the UNGPs, then Global North governments need to signal that they mean it when they say they want to see the development of NAPs in the countries in which they invest through dialogue backed up with technical assistance and capacity building.

The UK NAP had this – in fact, the text of the UK NAP starts with its work together with Colombia. Likewise, the Philippines is an example of a NAP process underway because of that support and messaging about its importance from investors in the North - in this case coming from the European Chamber of Commerce.

In addition to support from the North it is also critical that there be engagement of regional institutions who can build momentum for NAPs processes in their regions. It is noteworthy that in Southeast Asia, next month the ASEAN Intergovernmental Commission on Human Rights (AICHR) will release a baseline study of business and human rights policies in the region. The study, led by CALS-SMU team member, Thomas Thomas, is expected to inform NAPs in ASEAN states.

Civil society also has an important role to play in capacity building and technical assistance on a country-by-country basis. Government-to-government cooperation and regional government support is crucial, but so is the work of academic centers like CALS, SMU and our partners that are ideally situated to work with governments in their regions to identify needs and build capacity on a country-by-country basis to meet them.

In developing NAPs in the Global South, it goes without saying that it is important to be sensitive to resource constraints. A stand-alone NAP might not be desirable. Instead it is important to identify appropriate entry points in existing policy.

A number of countries are finding that entry point in a National Action Plan on human rights. China, for example, is developing a National Action Plan on Human Rights into which they have built a number of labor rights clauses. Another option is to incorporate BHR into a country's existing National Development Plan, which is often required by donors, for the Planning Agency

to take the lead in coordinating the effort, and for the NHRI to be closely involved in monitoring the development and implementation of the plan. A step of this kind would not only be consistent with the UN's post-2015 development agenda, but it would also help to provide the very "policy coherence" that is prescribed in the UNGPs.

I will stop here.