PRIME MINISTER'S DEPARTMENT
LEGAL AFFAIRS DIVISION

National Baseline Assessment on Business and Human Rights in Malaysia

FIRST PRINTING, 2024

Published in Malaysia by:
LEGAL AFFAIRS DIVISION, PRIME MINISTER'S DEPARTMENT (BHEUU, JPM).
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Printed in Malaysia.

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GOVERNANCE, LABOUR AND THE ENVIRONMENT

Ministerial Foreword

In an era of globalisation and interconnected economies, the impact of business operations on human rights cannot be overstated. As such, it is imperative that governments, businesses, and civil society work together to promote responsible business practices that prioritise the well-being and dignity of all individuals.

The National Baseline Assessment on Business and Human Rights (NBA) in Malaysia marks a critical first step towards fostering a strong business environment that respects and upholds human rights. This assessment serves as a comprehensive overview of the current state of business and human rights within our country, providing valuable insights into areas of strength as well as areas that require improvement. By conducting this assessment, we reaffirm our commitment to transparency, accountability, and continuous improvement in promoting and protecting human rights in the context of business activities.

This assessment is only the beginning. Its findings will be to inform the development of a National Action Plan on Business and Human Rights (NAPBHR) which will establish concrete steps for all stakeholders, including businesses and the government, to work together to create an ecosystem where businesses can flourish, and flourish in a way that is consistent with our values. It is my firm belief that this assessment will serve as a catalyst for meaningful dialogue and action among stakeholders, including government agencies, businesses, trade unions, civil society organisations, and affected communities. By working collaboratively, we can identify opportunities to enhance regulatory frameworks, strengthen accountability mechanisms, and promote sustainable business practices that respect and uphold human rights.

I extend my gratitude to all those who have contributed to the development of this assessment, including government officials, experts, civil society organisations, business and union representatives. In particular, I would like to express recognition to the members of the Working Group on Business and Human Rights, namely the Legal Affairs Division, Prime Minister's Department (BHEUU, JPM), Human Rights Commission of Malaysia (SUHAKAM), United Nations Development Programme (UNDP), and the lead agencies focusing on their respective thematic areas. Your dedication and expertise have been instrumental in bringing this important initiative to fruition.

As we embark on this journey towards a more inclusive and sustainable future, let us remain steadfast in our commitment to promote business practices that not only drive economic growth but also foster social progress and respect for human rights.

As former UN Deputy Secretary-General Jan Eliasson once said, "There can be no peace without development, no development without peace, and no lasting peace or sustainable development without respect for human rights and the rule of law".

> *"By conducting this assessment, we reaffirm our commitment to transparency, accountability, and continuous improvement in promoting and protecting human rights in the context of business activities."*

DATO' SRI AZALINA OTHMAN SAID

Minister in the Prime Minister's Department

(Law and Institutional Reform)

Director General Legal Affairs Division

Prime Minister's Department

Assalamualaikum warahmatullahi wabarakatuh and Greetings.

I am honoured to introduce the National Baseline Assessment on Business and Human Rights (NBA). This report represents a significant milestone in Malaysia's endeavour to foster responsible business practices and uphold the fundamental principles of human rights. It serves as a testament to the Malaysian Government's firm and continuous dedication to addressing human rights concerns, particularly those arising within the domestic business sector.

BHEUU expresses its deepest appreciation for the collaborative spirit demonstrated by all parties involved in this project. This includes the lead agencies for the three thematic areas, namely the Ministry of Human Resources, the Ministry of Natural Resources and Environmental Sustainability, and the National Governance, Integrity and Anti-Corruption Centre together with BHEUU.

Special recognition is extended to the Working Group on Business and Human Rights comprising BHEUU, SUHAKAM, UNDP and the respective lead agencies focusing on the thematic areas for their unwavering commitment and invaluable support throughout the report's development. Their contributions were instrumental in ensuring the comprehensiveness and effectiveness of the NBA.

Furthermore, we sincerely appreciate the significant contributions of Non-Governmental Organisations (NGOs) and Civil Society Organisations (CSOs). Their active participation in public consultations and focus group discussions provided valuable insights and constructive feedback. The engagement enriched the national baseline assessment process and ensured a well-rounded perspective.

Looking forward, we firmly believe that continued engagement and support of stakeholders at all levels, particularly those at the grassroots is essential. Their active participation will be critical for the successful development and implementation of the forthcoming National Action Plan on Business and Human Rights (NAPBHR). It is undoubtedly the insights gleaned from this NBA that will serve as a foundation to promote and protect human rights for the benefit of all people in Malaysia, both present and future.

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ZAMRI BIN MISMAN

Director General, Legal Affairs Division
Prime Minister's Department

Acknowledgements

This is the first National Baseline Assessment (NBA) report on business and human rights in Malaysia. The assessment was conducted from July 2022 to March 2023 by a team of experts led by Edmund Bon Tai Soon of AmerBON, *Advocates*.

The NBA chapters were written by the following individuals:

- Governance: Dr Tricia Yeoh Su-Wern and Alissa Marianne Rode, Institute for Democracy and Economic Affairs (IDEAS)
- Labour: Dr Andika Ab. Wahab, Institute of Malaysian and International Studies (IKMAS), Universiti Kebangsaan Malaysia (UKM)
- The environment: Ili Nadiah binti Dzulfakar, Klima Action Malaysia (KAMY)
- Special issues: Jacqueline Hannah Albert, AmerBON, *Advocates* and Umavathni Vathanaganthan, Collective of Applied Law and Legal Realism (CALR)

The team extends their gratitude to the following individuals: Rehanna Rachel Vergis, Sherise Sarah Vergis, and Nur Izni Syazwani binti Ahmad, for providing their support to the engagement sessions with stakeholders as part of the data collection process.

The Working Group on the Development of the National Action Plan on Business and Human Rights (Working Group NAPBHR), consisting of BHEUU, SUHAKAM and UNDP, supported the team throughout the assessment process. Dr. Punitha Silivarajoo, Dr. Cheah Swee Neo and Jehan Wan Aziz deserve a special mention for their contributions to the NBA.

Editing and proofreading was completed by Clara Chooi, Edmund Bon Tai Soon and Umavathni Vathanaganthan. Artwork, design and layout was by Melisa James. Editorial review was completed by Edmund Bon Tai Soon, Umavathni Vathanaganthan and Jehan Wan Aziz.

The team also greatly appreciates the government agencies, businesses, trade associations, industry organisations, financial institutions, civil society groups, and individuals for sharing their thoughts and experiences, and providing substantive inputs and feedback.

The national baseline assessment was supported by UNDP under the B+HR Asia project.

The information in this report is stated as of June 2023.

Figure 1: “Unveiling Insights and Actions: Malaysia’s Baseline Assessment on BHR” event on 25 October 2023.

Contents

Abbreviations

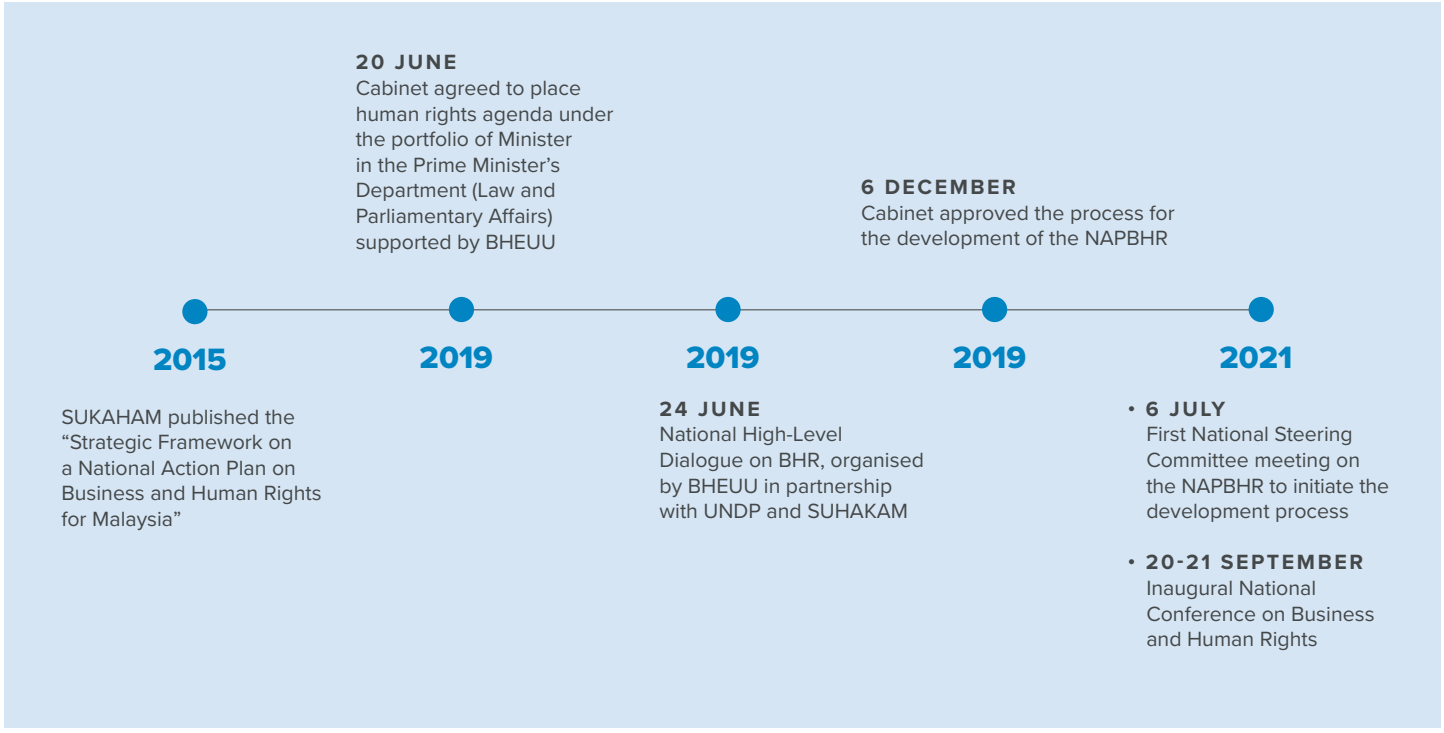
12MP	12th Malaysia Plan
2030 Agenda	2030 Agenda for Sustainable Development
Aarhus Convention	UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998
AATHP	ASEAN Agreement on Transboundary Haze Pollution 2002
ABB	ASEA Brown Boveri Ltd
ABMS	Anti-Bribery Management System
AICHR	ASEAN Intergovernmental Commission on Human Rights
APA	Aboriginal Peoples Act 1954
APPG-SDG	All-Party Parliamentary Group Malaysia on Sustainable Development Goals
ASEAN	Association of Southeast Asian Nations
ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
BEPS	Base Erosion and Profit Shifting
BHEUU	Bahagian Hal Ehwal Undang-Undang (Legal Affairs Division of the Prime Minister's Department)
BHR	Business and Human Rights
BHRRC	Business and Human Rights Resource Centre
BNM	Bank Negara Malaysia (Central Bank of Malaysia)
BO	beneficial ownership
BRR	Business Review Report
CA	Companies Act 2016
CBAM	Carbon Border Adjustment Mechanism
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIMB	CIMB Group Holdings Bhd
CLBG	Company Limited by Guarantee
CMA	Communications and Multimedia Act 1998
CoST	Construction Sector Transparency Initiative
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSDDD	Corporate Sustainability Due Diligence Directive
CSO	civil society organisation
CSR	Corporate Social Responsibility
DASN	Dasar Alam Sekitar Negara
DEI	diversity, equity, and inclusion
DOE	Department of Environment
DOSM	Department of Statistics Malaysia
DRR	disaster risk reduction
EA	Employment Act 1955
EHRDs	environmental human rights defenders
EIA	Environmental Impact Assessment
EMS	Environmental Management Systems

EPF	Employees' Provident Fund
EPU	Economic Planning Unit
EQA	Environment Quality Act 1974
ESG	Environment, Social and Governance
ETO	Extraterritorial Obligation
EU	European Union
FDS	Forest Department Sarawak
FMU	Forest Management Unit
FPIC	Free, Prior and Informed Consent
FTA	Free Trade Agreement
FYE	Financial Year End
GHG	greenhouse gas
GIACC	National Centre for Governance, Integrity and Anti-corruption (Pusat Governans, Integriti dan Antirasuah Nasional)
GLCs	Government-Linked Companies
GRI	Global Reporting Initiative
HCV	High Conservation Value
HFA	Hyogo Framework for Action 2005-2015
HRDD	human rights due diligence
HRDs	human rights defenders
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEAS	Institute for Democracy and Economic Affairs
ILO	International Labour Organization
IPPs	independent power producers
IRBM	Inland Revenue Board of Malaysia
ISO	International Organisation for Standardisation
JAKOA	Jabatan Kemajuan Orang Asli (Department of Orang Asli Development)
JC3	Joint Committee on Climate Change
JDN	Jabatan Digital Negara (National Digital Department)
JPN	Jabatan Pendaftaran Negara (National Registration Department)
KASA	Kementerian Air dan Alam Sekitar (Ministry of Environment and Water)
Maastricht Principles	Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights
MACC	Malaysian Anti-Corruption Commission
MAMPU	Malaysian Administrative Modernisation and Management Planning Unit
MATRADE	Malaysia External Trade Development Corporation
MCCG	Malaysia Code on Corporate Governance
MFA	Ministry of Foreign Affairs Malaysia
MGGI	Malaysia Gender Gap Index
MGI	Malaysian Governance Indicators
mHREDD	mandatory human rights and environmental due diligence

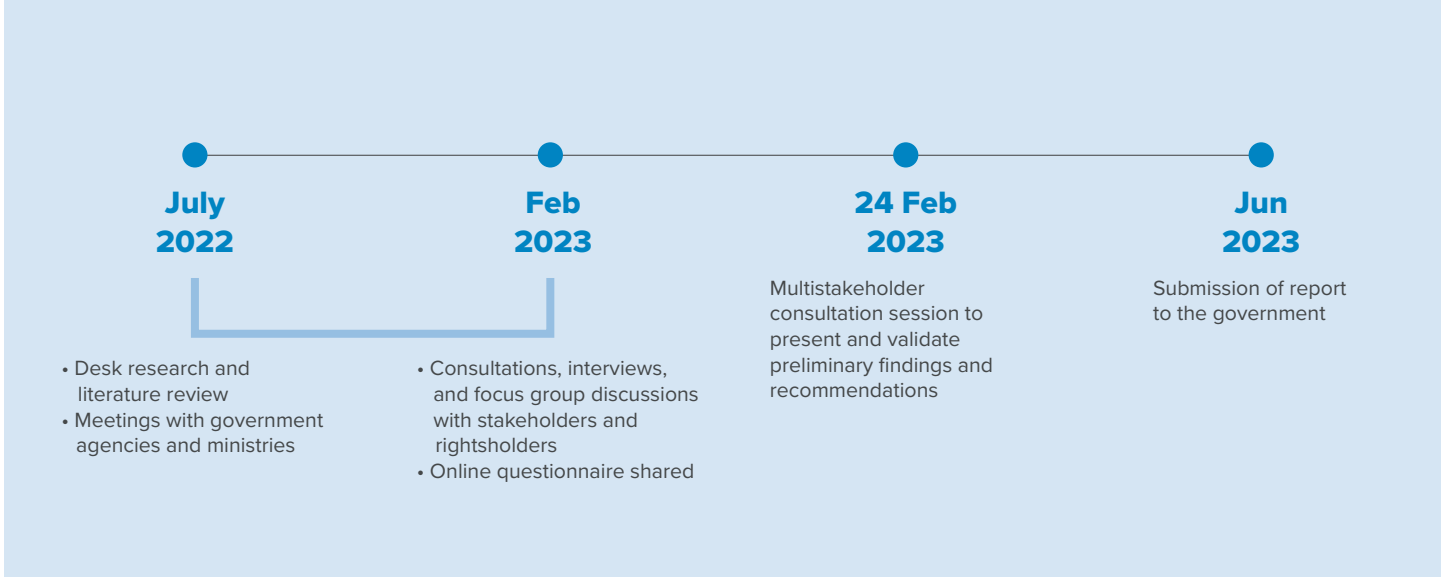
MHRJ	Ministry of Human Rights and Justice
MNCs	multinational corporations
MOF	Ministry of Finance
MOFA	Ministry of Foreign Affairs
MOH	Ministry of Health
MOHA	Ministry of Home Affairs
MOHR	Ministry of Human Resources
MSPO	Malaysian Sustainable Palm Oil
MTCC	Malaysian Timber Certification Council
MTCS	Malaysian Timber Certification Scheme
NACP	National Anti-Corruption Plan 2019-2023
NAP	National Action Plan
NAPBHR	National Action Plan on Business and Human Rights
NBA	National Baseline Assessment on Business and Human Rights
NCA	Nature Conservation Agreement
NCR	native customary rights
NDC	Nationally Determined Contribution
NEP	National Energy Policy 2022-204
NFA	National Forestry Act 1984
NGO	non-governmental organisation
NHRAP	National Human Rights Action Plan
NPBD	National Policy on Biological Diversity
NPCC	National Policy on Climate Change
NREB	Natural Resources and Environment Board
NRECC	Ministry of Natural Resources, Environment and Climate Change
NRES	Ministry of Natural Resources and Environmental Sustainability
NSC	National Security Council
OACP	Organisational Anti-Corruption Plan
OECD	Organisation for Economic Co-operation and Development
OECD Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSA	Official Secrets Act 1972
PD	Public Defender
PDPA	Personal Data Protection Act 2010
PLANMalaysia	Town and Country Planning Department
PLCs	Public Listed Companies
PLCT	Public Listed Companies Transformation
PPA	Power Purchase Agreement
PWDs	persons with disabilities
RCEP	Regional Comprehensive Economic Partnership
REA	Renewable Energy Act 2011
REDD	Reducing Emissions from Deforestation and Degradation

RSPO	Roundtable on Sustainable Palm Oil
SC	Securities Commission Malaysia
SDGs	UN Sustainable Development Goals
SESSS	Self-Employment Social Security Scheme
SFDRR	Sendai Framework for Disaster Risk Reduction 2015-2030
SFM	sustainable forest management
SIA	Social Impact Assessment
SLAPP	Strategic Lawsuit Against Public Participation
SME	small and medium-sized enterprise
SOCSO	Social Security Organisation
SOEs	State-owned enterprises
SSE	Sustainable Stock Exchanges
SSM	Suruhanjaya Syarikat Malaysia (Companies Commission of Malaysia)
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia (Human Rights Commission of Malaysia)
TCFD	Task Force on Climate-related Financial Disclosures
TCPA	Town and Country Planning Act 1976
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNWG	United Nations Working Group on Business and Human Rights
US	United States of America
VPTE	Visit Pass for Temporary Employment
Working Group	Working Group on the Development of the National Action Plan on Business
NAPBHR	and Human Rights
WBA	Whistleblower Protection Act 2010
WRO	Withhold Release Order

Brief Timeline



TOWARDS A NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS



NATIONAL BASELINE ASSESSMENT ON BUSINESS AND HUMAN RIGHTS

List of Consultations

Consultations for the National Baseline Assessment were conducted between July 2022 and February 2023.

Date	Event
8 Jul 2022	Introductory meeting with the Working Group NAPBHR
15 Jul 2022	Meeting with the Working Group NAPBHR and the lead agencies/ministries
27 Jul 2022	Consultation with vulnerable communities (e.g. migrants, refugees, and asylum-seekers)
29 Aug 2022	Roundtable discussion with international agencies and UN agencies
6 Oct 2022	Consultation with civil society organisations (CSOs) and vulnerable communities (Peninsular Malaysia)
11 & 13 Oct 2022	Interview and focus group discussion with a financial institution
20 Oct 2022	Roundtable discussion with a chamber of commerce and businesses
20 Oct 2022	Roundtable discussion with businesses
26 Oct 2022	Consultation with CSOs and vulnerable communities (Sabah)
26 Oct 2022	2nd meeting with Working Group NAPBHR
28 Oct 2022	Consultation with CSOs and vulnerable communities (Sarawak)
2 Nov 2022	Interview and focus group discussion with a government agency
4 Nov 2022	Roundtable discussion with CSOs
9 Dec 2022	Roundtable discussion with businesses in the manufacturing sector
22 Dec 2022	Interview and focus group discussion with a CSO working on sustainable financing
16 Jan 2023	Roundtable discussion with business members of the UN Global Compact Network Malaysia and Brunei (UNGCMYB)
27 Jan 2023	Roundtable discussion with a chamber of commerce and businesses
Feb 2023	Release of online public questionnaire to gather further inputs for the report
15 Feb 2023	Consultation with the Working Group NAPBHR and lead agencies and ministries
20 Feb 2023	Roundtable discussion with businesses in the palm oil sector
24 Feb 2023	Multistakeholder consultation on the preliminary findings and recommendations attended by 170 participants in-person and online

Note

The report was written based on findings from consultations with, and written submissions from, businesses and civil society as well as legal and policy developments made available and accessible up to June 2023, and was subsequently submitted to the Government.

Following the submission, the NBA report underwent a government review process in the post-assessment period (July 2023 to June 2024), which included written comments from various ministries and agencies, as well as in-person meetings:

1. 2nd Steering Committee Meeting - 2 November 2023

2. Meeting with government agencies on the Environment chapter - 11 December 2023

3. Meeting with government agencies on the Labour chapter - 8 January 2024

4. Meeting with government agencies on the Governance chapter - 19 January 2024

5. Meeting with National Security Council - 12 March 2024

6. Meeting with Ministry of Finance - 25 March 2023

As a result, the report was further edited and refined, with clarifications and relevant updates highlighted in summary boxes throughout the report, "Government response (July 2023 – June 2024)".

Figure 2: Meeting of the Working Group NAPBHR on 15 February 2023.

Briefing Note: Re-Imagining A New, Human Rights-Friendly Malaysia

Edmund Bon Tai Soon, Lead consultant

This National Baseline Assessment (NBA) is a collection and evaluation of data from various stakeholders on critical issues in the business and human rights (BHR) landscape in Malaysia. It assesses the State's current level of implementation of the United Nations Guiding Principles on BHR (UNGPs) by documenting the adverse impacts of business operations on human rights and identifying the issues affecting the most vulnerable communities; analysing the legal and policy gaps that allow the proliferation of these impacts; and finally, providing recommendations for the formulation of Malaysia's National Action Plan on BHR (NAPBHR).

This assessment encompasses three parameters. First, it looks at State and business obligations in terms of governance, labour and the environment. Second, it tackles how these obligations are being translated to the domestic human rights landscape. Matters that are not related to human rights, while critical, are not part of the scope of this report. Third, it looks at good practices that may not necessarily have been translated into local law, and then makes recommendations for the NAPBHR.

The "Protect, Respect and Remedy" Framework of the UNGPs prescribe three core obligations and duties: for governments to protect human rights; for corporations to respect human rights; and for both to guarantee effective access to remedies for victims and survivors of business-related human rights abuses. The principles are rooted in international human rights standards and are widely adopted by governments and businesses in their efforts to promote, protect and uphold the rule of law and human rights. In particular, the UNGPs call on businesses to identify, prevent, mitigate and account for how they address adverse human rights impacts by conducting human rights due diligence (HRDD) on their operations and those of their suppliers.

The Malaysian government, businesses and civil society have no quarrel about the selection of what is increasingly seen as problematic matters of governance, labour and the environment. The point of contention, however, is how far do they need to go? Answering this question becomes particularly challenging when "sustainability", in business speak, revolves mainly around compliance within the ESG (Environmental, Social and Governance) framework. But as this report will show, ESG does not go far enough and can only do so much. Discussing governance, labour and the environment through a human rights lens – though not exclusively – serves the sustainability agenda far better.

> *The issues raised here should not be viewed as exhaustive, given how human rights are inherent, interconnected, and indivisible.*

The selection of the priority areas for each chapter was the result of a literature review and evaluation of the numerous stakeholder consultations held for this report, alongside an assessment of their critical state, meaning, how urgently the Malaysian government and businesses need to address them. The issues raised here should not be viewed as exhaustive, given how human rights are inherent, interconnected, and indivisible. The NAPBHR should, as such, be treated as a living document to be updated at the end of its given tenure.

Business and human rights in Malaysia: What we heard from the NBA consultations

While the consultations surfaced a variety of reactions from businesses, the common threads were mostly anxiety and confusion over how and where BHR fits into the sustainability picture, and how a set of new or enhanced compliance rules may impact their bottom lines.

Many had the same questions. For example, how will the NAPBHR be any different to the other national action plans? Here, it is important to note that the NAPBHR is the first plan to be designed exclusively for BHR matters. Secondly, this assessment draws from, and enhances, the recommendations of other related actions for inclusion in the NAPBHR. This document should ultimately be complementary and read together with other national action plans and hence, may overlap at times. In fact, it will be innovative if the NAPBHR be made into more than an executive decreed action plan but a law in itself, and therefore justiciable in the courts. This action plan will be no

different than the rest if there is no willingness to do more. Voluntary measures can only go so far. The “right thing to do” mantra will only work with a minority of companies, so voluntariness will not be adequate.

Businesses have also confused ESG with BHR and want to know if more would be expected of them under the BHR framework. The short answer is yes. While ESG prescribes good practices and is important, most of its measures are not couched in rights. Rights give rise to justiciable claims and empower victims and survivors to go to the courts. Without rights, companies do not hold any duty and cannot be held accountable. Substantial accountability mechanisms in ESG are still in their early stages, primarily centred around the identification of companies that are accused of greenwashing or whitewashing, or downplaying the true consequences of their actions in their reports. These measures are insufficient as they do not adequately address issues related to fundamental human rights.

Often, there is a misconception that human rights, from the perspective of business, is limited to only one area: labour. However, as evidenced by the latest revisions to the Universal Standard of the Global Reporting Initiative (GRI), disclosures on human rights-related impacts of business operations are central to sustainability reporting and how companies demonstrate accountability. The changes, which came into effect on 1 January 2023, incorporated expectations set out in the UNGPs and made human rights impact reporting applicable to all reporting organisations, rather than merely if the company determines it material. The thinking is that with increasing regulations for mandatory human rights and environmental due diligence, human rights must be operationalised in all areas and not just as a standalone intervention.

Further, the definition of human rights is often derived from international human rights law and instruments such as the Universal Declaration of Human Rights (UDHR). This has created confusion among sustainability practitioners over the relationship between ESG and BHR. Specifically, they wonder if the larger umbrella is human rights or vice versa, and whether the overlaps mean compliance with either one is sufficient. Has human rights moved the needle?

What was once Corporate Social Responsibility (CSR), then Sustainable Development Goals (SDGs), then the ESG, is now “BHR”, or as some would describe, ESG+ (ESG Plus). Not only is HRDD required, but the BHR framework demands more effective stakeholder engagements and grievance mechanisms, as issues must utilise a rights-based approach. It elevates ESG standards, which does not sufficiently prescribe a rights dimension, and emphasises human rights accountability. Additionally, the UNGPs apply across the board and demand that companies check that for each of its components, their operations do not impact people and the planet adversely.

The consultations organised also cast a spotlight on the shortcomings of domestic law when it comes to human rights. Businesses pointed out that they were already compliant with the law, which should be sufficient. However, Malaysian law and practice do not meet international human rights law and standards, and are neither sufficient nor adequate. An example is the issue of forced labour. The Federal Constitution prohibits forced labour but because Malaysia does not define forced labour in the same terms as articulated by the International Labour Organization (ILO) through its 11 core indicators, the gap results in businesses here failing to stamp out modern slavery practices. Without a revision to the law, forced labour will continue to be an issue as the gap will never be bridged.

While the UNGPs do not impose new obligations on businesses and even if a State has not ratified a human rights treaty, nevertheless, corporations are asked to meet human rights obligations under treaty law. It is innovative and a way of implementing human rights without needing State acceptance, as the UNGPs speak directly to companies. It is the gold standard that we advocate be followed.

For many of the larger companies, the argument against enhanced or mandatory due diligence requirements is the inability of the small and medium-sized enterprises (SMEs) in their value chain to comply with the same requirements. This is the wrong way of looking at it. Big players should lead by example, and help bring on board their supply and value chains. If requirements are made mandatory for the big players, then the SMEs can learn and grow and eventually, through a phased approach, be subject to the same mandatory requirements. While resource shortage is a very real problem, these are capacity issues that can be dealt with. But some companies are not even willing to come to the table for the time being, because there is no driver.

Many businesses also object to the lack of common or uniform standards to comply with, making it difficult to know what and how much to do when it comes to BHR. This is true. Some may, for example, look at the GRI reporting standards and work backwards from there because reporting is what the regulators require. Although little effort is better than none, such a practice only relegates the entire process into a box-ticking exercise.

Further to that, existing sustainability requirements, while commendable, focus too much on reporting obligations. Despite some companies already exhibiting mature sustainability reports, many of their own sustainability team staff members are not aware of what is being reported and if what was reported is true. This happens when reporting activities are often outsourced to third-party consultants. The internalisation of sustainability practices is non-existent. Once exposed, this will lead to allegations of greenwashing and whitewashing. Alongside other examples explored in this report, we show why there is an urgent need to entrench human rights into Malaysia's domestic laws and institutional and structural practices on governance, labour and the environment, as opposed to merely paying lip service to them.

Summary of key recommendations

As a baseline assessment, this report has its limitations. But its findings will resonate with stakeholders, especially those who have suffered, or are still suffering, from business-related human rights violations and abuses. Many end up turning to litigation for redress but find the odds stacked against them. Even more do not have the resources to go to court. There are major structural gaps in the law when it comes to human rights in Malaysia. Our legal system is, in many ways, outdated. Human rights are not expressly recognised in the Federal Constitution and not justiciable per se under any law. Those wanting to seek justice for any rights transgressions are therefore forced to use a patchwork of laws to bolster their cases, but often with little success. We need to mainstream human rights in public administration and governance. Human rights should no longer be a dirty word. Why should we not consider a new Human Rights Act and a new Ministry of Human Rights and Justice (MHRJ)? They are long overdue.

With the NAPBHR, there could be a better way. BHR can be a tool to maintain social equilibrium as it serves to balance out the power dynamics between the State, business and society on matters concerning human rights. The COVID-19 pandemic offered the world an important lesson in humility. It not only showed it was possible to do things better and differently, but also exposed the urgency with which changes must be made because business-as-usual was becoming simply too harmful and too painful.

We must not lose sight of what the UNGPs truly fight for. Enough time has been given to the State and corporations to do more for human rights. Will companies only act when they are publicly implicated, named and shamed? Thus, the NAPBHR must at least contain actions to impose on businesses mandatory HRDD, and the establishment of effective internal and external grievance mechanisms to provide for remedies in the name of corporate accountability.

Even as we sit in the United Nations Human Rights Council (UNHRC, 2022-2024), we should not lecture the world on human rights or express concerns about atrocity crimes without taking concrete steps to put the recommendations here in motion. The NBA process has allowed us to re-imagine a new human rights-friendly Malaysia, and how we are to achieve that. We hope that through this report, we have in a small way provided a template for that.

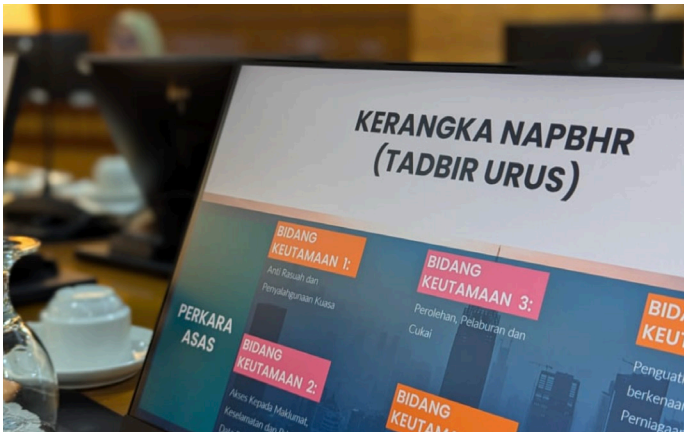


Figure 3: Meeting of the Working Group NAPBHR on 30 July 2024.

Context, Methodology And Limitations

The relationship between businesses, societal development, and well-being became more evident at the global level with the establishment of the United Nations (UN) Millennium Development Goals. The global instrument made businesses think more about how their operations were impacting their surroundings and encouraged them to align their actions with global efforts to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women. Soon, social, environmental, and governance issues became part of the global mainstream. Importantly, the goals supported much of what human rights groups and activists were advocating for, at a time when human rights terminology, and the term itself, remained excluded from corporate lingo.

The turning point in shaping business conduct came 11 years later through the UNGPs. It is currently the most comprehensive global instrument to offer guidance on how businesses should respect human rights. Although the UNGPs are not binding, this report pivots on it.

Drawing on longstanding international human rights instruments, the UNGPs have three main pillars (Office of the United Nations High Commissioner for Human Rights [OHCHR], 2011):

PILLAR 1:
The State has the duty to protect individuals and communities against human rights abuses by businesses. This can be done through policies, regulation, monitoring, and enforcement.

PILLAR 2:
Businesses have a responsibility to respect human rights. Where domestic laws are inadequate or conflict with international human rights law and standards, companies must go beyond domestic laws to comply.

PILLAR 3:
Effective access to remedies must be provided to survivors and victims of human rights abuses. It entails a grievance-handling mechanism, remediation, compensation, or other forms of restitution. It can be at the operational level of the business, or through State-based judicial or non-judicial remedies.

Following the UNGPs, the 2030 Agenda for Sustainable Development (2030 Agenda) and 17 SDGs were adopted by the UN General Assembly in 2015. The 2030 Agenda seeks to achieve transformative change with respect to people, planet, prosperity, peace, and partnerships. It calls on States to ensure that their efforts to implement it are in line with the UNGPs and other international agreements. The SDGs provided another avenue for businesses to reassess their thinking on, and relationship with, human rights.

> *"The SDGs provided another avenue for businesses to reassess their thinking on, and relationship with, human rights."*

The SDGs may be couched in the language of "sustainability," which is more palatable (than "human rights") for businesses. However, in truth, all the SDGs are rooted in human rights. As seen today, companies are racing to be "sustainable" and wanting to comply with ESG standards. However, discussions held with leading ESG practitioners indicate a lack of understanding of how the concept of sustainability or ESG relates to human rights (Bon, 2022, p. 110). The problem stems from the attempt to get companies to respect human rights without terming them as such or trying to get around their reluctance or disavowal to respect and advance human rights explicitly.

This report shows there is indeed a relationship between sustainability and human rights, as seen through State and business practices in Malaysia. However, since using explicit human rights terminology to describe sustainability matters will likely require a profound behavioural shift for Malaysian companies, perhaps the use of "Environmental, Social and Governance – Business and Human Rights", commonly referred to as ESG-BHR, instead, will successfully establish the relationship between both concepts and increase its popularity as a term of choice.

The UN Working Group on BHR (UNWG) is mandated to promote the effective and comprehensive dissemination and implementation of the UNGPs (OHCHR, n.d.). To this end, the UNWG has recommended States to adopt national action plans (NAPs) on BHR as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs" (UNWG, 2016, p. i). A NAPBHR could include

ways to meet the SDGs; hence, making the link between sustainability and human rights a reality on the ground.

The BHR agenda in Malaysia

The BHR agenda in Malaysia is over a decade old. Efforts began in 2010 with a series of roundtable discussions among civil society and business groups organised by the Human Rights Commission of Malaysia (SUHAKAM) to examine growing human rights issues in the logging and plantation sectors. In 2015, SUHAKAM launched its strategic framework for an action plan on BHR (SUHAKAM, 2015). It also identified several industries where adverse business-related human rights impacts were evident. However, despite strong advocacy from SUHAKAM, the document was not immediately acted on as there were no government agencies spearheading the human rights agenda. At the time, the government had yet to establish a governance structure and mechanism to drive the BHR agenda.

From 2016 onwards, the region saw a flurry of BHR activities hosted by the ASEAN Intergovernmental Commission on Human Rights (AICHR), which promoted the idea of its member states having NAPs. Many of these programmes were led by Thailand, then the only ASEAN country conducting domestic consultations and organising meetings with the purpose of developing its own, and first, action plan. The Thai government agreed to develop its NAP after it adopted recommendations presented during Thailand's Universal Periodic Review process. In October 2019, the Thai cabinet adopted its first NAPBHR for a period of three years until 2022. The country is now into second cycle of its plan. Thailand was the first in Southeast Asia to have a NAPBHR.

Nevertheless, it must be noted that BHR in its nascent form had emerged earlier in 2018 in an official Malaysian document: the National Human Rights Action Plan (NHRAP) (BHEUU, 2018). While it was not in a form of an action plan, some key economic and social issues were highlighted. The document was primarily referred to by government agencies to inform their human rights work.

The regional platform, offered by AICHR, through its BHR activities helped further advocacy efforts, with the government considering having its own NAP. After continued engagement with, among others, then SUHAKAM Commissioner Prof. Dato' Dr. Aishah Bidin, then National Centre for Governance, Integrity and Anti-Corruption Deputy Director General Anis Yusal Yusoff, and

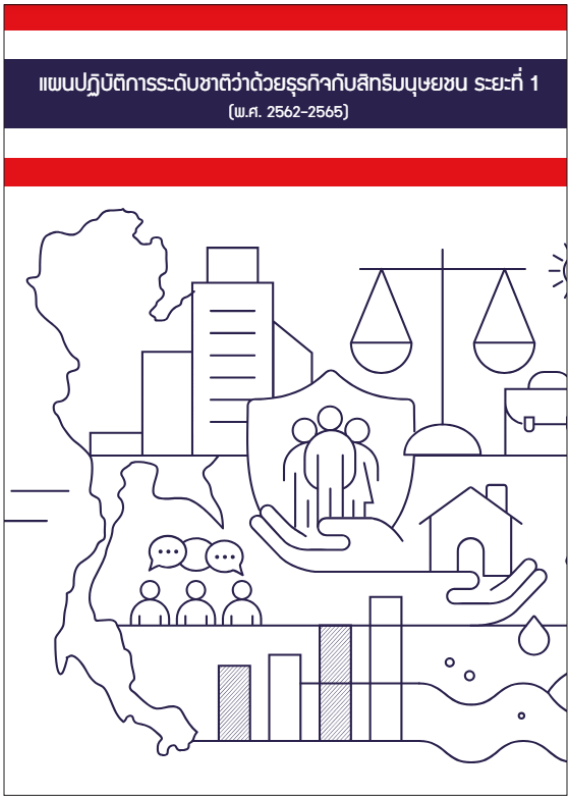


Figure 4: Thailand's National Action Plan on Business and Human Rights (2019 - 2022).

Government response

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Appropriate steps were taken to implement the Strategic Framework recommended by SUHAKAM. The outcome from SUHAKAM's recommendation is the government's decision to develop a National Action Plan on Business and Human Rights.

then Representative of Malaysia to AICHR Edmund Bon, the then Minister in the Prime Minister's Department (Law and Parliamentary Affairs), the late Datuk Liew Vui Keong, was keen to launch Malaysia's NAP process.

On 24 June 2019, Liew announced the government's policy commitment for a Malaysian NAPBHR during the national high-level dialogue on BHR. The Legal Affairs Division of the Prime Minister's Department (BHEUU), which held the human rights portfolio, was mandated to operationalise the

NAPBHR's development. Dr. Punitha Silivarajoo at BHEUU led the initiative from within.

A National Steering Committee on the NAPBHR chaired by the Minister was subsequently established, meeting for the first time on 6 July 2021. The Steering Committee embedded Technical Committees led by ministry and agency representatives representing each of the NAPBHR's three thematic focus areas, namely:

1. **Governance:** then National Centre for Governance, Integrity and Anti-Corruption (GIACC), now placed under BHEUU on the Technical Committee.

2. **Labour:** Ministry of Human Resources (MOHR).

3. **Environment:** then Ministry of Environment and Water (KASA), now the Ministry of Natural Resources and Environmental Sustainability (NRES).

The government also formed the Working Group NAPBHR to kickstart development activities. On 20 and 21 September 2021, Malaysia had its first national conference on BHR organised by the Working Group. The meeting saw the government reiterate the country's commitment to improve its BHR landscape through its first action plan, to be launched in 2023.

An important phase of the development of the NAPBHR is the baseline assessment of a country's BHR landscape. The assessment provides an analysis of the legal and policy gaps, identifies the most salient BHR issues, and includes recommendations on steps to be taken by the State and businesses. This is that report.

The team sought to assess the current level of implementation of the UNGPs in Malaysia, with dives deeper into the identified focus areas (governance, labour, and the environment). An additional fourth "Special Issues" chapter complements the three chapters and reminds us to incorporate important cross-cutting issues that might not neatly fit into the focus areas.

Developing the NAPBHR

NAPs are policy documents where governments can articulate their commitment to support the implementation of international, regional, or national obligations on a given subject matter. The NAPBHR aims to address priority areas identified as most challenging and in urgent need of attention to prevent and mitigate adverse impacts of business activities on human and environmental rights. The findings in this report reveal why putting in place a NAPBHR is imperative.

To develop a NAPBHR, the UNWG recommends a five-phase, 15-step process. With the publication of this report, Malaysia has concluded the first two phases.

Five-phase process to develop a NAPBHR

Phase 1: Initiation
- Seek and publish a formal Government commitment
- Create a format for cross-departmental collaboration and designate leadership
- Create a format for engagement with non-governmental stakeholders
- Develop and publish a work plan and allocate adequate resources

Phase 2: Assessment and consultation
- Get an understanding of adverse business-related human rights impacts
- Identify gaps in State and business implementation of the UNGPs
- Consult stakeholders and identify priority areas

Phase 3: Drafting of initial NAP
- Draft the initial NAP
- Consult on the draft with interested stakeholders
- Finalise and launch the initial NAP

Phase 4: Implementation
- Implement actions and continue cross-departmental collaboration
- Ensure multi-stakeholder monitoring

Phase 5: Update
- Evaluate impacts of the previous NAP and identify gaps
- Consult stakeholders and identify priority areas
- Draft updated NAP, consult on, finalise, and launch it

Figure 5: Five-phase process to develop a NAPBHR (UNWG, 2016).

Methodology used in the NBA

The assessment team sought to undertake an inclusive, transparent, and participatory process to gather information for this report. Primary and secondary data, as well as information from various stakeholders and rightsholders were collated. To be impact-driven and results-based, these steps were taken:

- **Desk research and literature review:** Desk research was conducted to explore and identify key salient human rights issues in Malaysia's BHR landscape. This included identifying existing issues, gaps, and challenges within national policy frameworks and compliance with relevant international human rights law and standards. The data sources included official data and statistics, and human rights and media reports.

- **Consultations with businesses, civil society and vulnerable groups:** Consultations with stakeholders and rightsholders including interviews and focus group discussions were held. Once inputs were obtained, the information was then validated. As a baseline study, the convenience sampling method was adopted to collect data and obtain an overview of the issues and challenges in the BHR context. Convenience sampling was a feasible method to employ given the short duration to conduct the NBA. The final multistakeholder consultation offered an opportunity for participants to provide additional inputs and recommendations. Simultaneously, the exercise helped to get buy-in and acceptance by interested parties in the process.

- **Inputs from the Working Group NAPBHR and Technical Committees on the draft NBA report:** The draft report which contained preliminary findings and recommendations was circulated among the ministries and agencies for their comments and feedback.

Throughout the entire process, the team worked with BHEUU alongside other relevant government agencies to ensure that inputs from the government were thoughtfully considered and that there was a thorough understanding of implementation issues.

Limitations of this report

This report is limited by two key factors: time and the reluctance of some corporations to speak about human rights.

As the report had to be completed within a year, we would have benefitted from more consultations with SMEs and a broader segment of the business sector. However, the most common issues raised by businesses have been adequately covered. Time constraints also prevented the team from expanding on some of the more challenging and novel issues found in the "Special Issues" chapter. These issues, nonetheless, will be carried through, raised and discussed in the next phase of NAPBHR development.

Secondly and unsurprisingly, some businesses were reluctant to come forward to have confidential consultations or even private interviews with the assessment team. The responses received from those contacted ranged from disinterest (i.e., inability to see how BHR was relevant to their operations) to not having the resources to attend. Despite this, the information gathered from other sources is believed to have sufficiently captured a holistic sense of core business issues for the purposes of a baseline.

It is hoped that all stakeholders and rightsholders whether in government, business, civil society or academia – will support the NAPBHR process and see it through to the next phase. The action plan provides Malaysians, and everyone living and working in Malaysia, with a unique opportunity to enable progress, elevate standards, and accelerate human rights acceptance. Let us not miss this chance.

Figure 6: NBA consultation with CSOs and community members in Kota Kinabalu, Sabah on 26 October 2022.

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CHAPTER 1

GOVERNANCE

This chapter sets out Malaysia's obligations under international and domestic law on corporate governance matters related to human rights while assessing the priority areas and making recommendations for the NAPBHR. The governance priority areas identified are as follows:

- **Anti-bribery and anti-corruption**
- **Access to information, and personal data privacy and security**
- **Procurement, investment, and tax**
- **Diversity, equity, and inclusion**
- **Enforcement of business-related human rights standards in governance**

Dr. Tricia Yeoh Su-Wern and Alissa Marianne Rode led the study in the area of governance and wrote this chapter in consultation with Edmund Bon Tai Soon who also edited and provided inputs on the same. Elisha binti Mohd Fadzil and Angeline Ho, and the research team at the Institute for Democracy and Economic Affairs (IDEAS), contributed their research and drafting for this chapter.

The term "governance" covers a broad spectrum of subject matter. Malaysia is no stranger to numerous initiatives, laws, and regulations to advance greater corporate governance. For this chapter, the assessment was restricted to matters of governance directly relevant to human rights.

Based on the literature review and stakeholder engagements conducted, five priority areas for Malaysia were identified that the NAPBHR must immediately address:

- Anti-bribery and anti-corruption
- Access to information, and personal data privacy and security
- Procurement, investment and tax
- Diversity, equity, and inclusion (DEI)
- Enforcement of business-related human rights standards in governance

Each of the five areas links to human rights in a myriad of ways. For clarity, a brief elaboration of these links is necessary.

Corruption cannot be tackled without respect for human rights (OHCHR, 2013). Corruption erodes and undermines the foundations of the rule of law and legal compliance. It does not reward merit and is an obstacle to fairer distribution of income and wealth in the country. It distorts public spending without providing the concomitant benefits targeting the poor to uplift them from poverty. It increases the cost of doing business and thereby the overall cost of living in the economy (IDEAS, 2021). It removes financial resources from the State to provide for, and protect, the economic and social rights of its people. Governments are obliged to provide an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, countries that face more corruption have lower public expenditure on healthcare and education (Mauro et al., 2019). Corruption incapacitates the State from social provision as it depletes resources that are intended to meet the human rights demand.

Access to information is the basic building block for a democracy that protects human rights and fundamental freedoms such as freedom of expression. The right to express oneself also includes the right to receive the information that empowers people to make informed choices. Without information, citizens, lawmakers, and civil society are unable to hold the government and corporations accountable for their actions. For example, citizens should have free access to information on the planning, procurement, and implementation phases of infrastructure projects to be able to understand the impact of these projects on the immediate community and public resources.Thus, transparency is a necessary part of good governance, combating corruption, and ultimately, protecting human rights, as it limits the ability of wrongdoers to shield themselves from public scrutiny. Transparency is a necessary element of meaningful public participation.

Procurement, investment, and taxation are pathways for State and non-State actors to contribute to human rights by exercising human rights-consistent practices in their procedures and facilitating development programs aimed at meeting the SDGs. The SDGs include strong and just institutions and reducing inequality, among others, and these form part of the larger goals of achieving good governance. The State can exercise its responsibility to protect human rights by assessing its own policy and regulatory frameworks for overall impact on human rights. Where businesses are concerned, the State should employ policy tools that encourage respect for human rights. This

may include putting in place frameworks to ensure that the government only deals with, and attract investments from, businesses that respect human rights. Policies on procurement, investment, and tax can be set to incentivise the protection of human rights and deter or penalise businesses from infringing upon human rights. Good governance and anti-corruption measures also preserve public resources that are needed to ensure equity and social provision. Ultimately, these pathways provide the necessary resources for governments to support human rights-based initiatives and provide for "human rights" as an essential public good.

Human rights carry the fundamental concept that all persons must be treated equally – under the law and in policy delivery. Diversity, equity, and inclusion are different ways of saying there should be no discrimination based on any of the prohibited grounds, namely, age, gender, ethnicity, religion, disability, and political views. The principle of non-discrimination and equality is the foundation of diversity and inclusion. It has also been included in the SDGs.

Finally, Malaysia faces a crisis of human rights enforcement, particularly on governance matters related to business-related abuses. Law and regulatory enforcement are weak and inconsistent, not least because the country has yet to confidently embrace and constitutionalise human rights as a complete, standalone concern accepted and mainstreamed in all pillars of its society and institutions. Governance relies on competent and consistent enforcement, backed by strong regulatory and compliance standards that leave as little room as possible for loopholes or misinterpretation. Further, there need not only be people trained in BHR culture and values, but also people with the ability and capacity to enforce.

This baseline assessment follows the trajectory and concepts laid out by the UNGPs. This chapter examines measures to strengthen the area of "governance" as a theme in activating the "Protect, Respect, Remedy" framework of human rights in the UNGPs. Separating governance as its own theme helps demonstrate the direct role it plays in the advancement of sustainable development, which, by extension, includes the safeguarding of human rights by both the State and businesses.

The UNGPs' objective is to enhance standards and practices on BHR in order to achieve tangible results for affected individuals and communities, subsequently contributing to a socially sustainable globalisation (OHCHR, 2011). The principles complement the SDGs as the latter represents the culmination of all strands of the human rights agenda expressed in 17 broad goals, while the former is a guide to operationalising respect for human rights in the business sector. The responsibility of business to respect human rights cuts across many of the SDGs, as business activities have a deep impact on measures for diversity and inclusion (for example, Goals 1, 4, 5, 8, 10), the right to a clean environment (Goals 3, 6, 12, 13, 14, and 15), the right for all people to have access to justice (Goal 16), and rights to life, liberty and dignity (Goals 1, 2, 10, and 16) (OHCHR, n.d.-a).

This chapter proceeds as follows:

I. Governance rights and standards

Malaysia's international and domestic relationship between governance and human rights

Currently, Malaysia does not have a uniform framework governing the relationship between business and human rights. Instead, the obligation of businesses to uphold human rights in their operations comes from a miscellaneous set of laws: international human rights treaties to which Malaysia is a party; domestic legislation such as the Federal Constitution; and regulations imposed by regulatory bodies such as Bursa Malaysia, which only apply to certain sectors or types of companies.

There are international standards which outline best practices related to ESG sustainability matters, corporate governance and BHR. These standards include the following:

- **GRI standards (2022):** Also known as Global Sustainability Reporting standards, the GRI standards consist of disclosure standards on topics ranging from anti-corruption to water, biodiversity to employment, and tax to forced labour, taking into account those relevant to the economic, environmental, and social dimensions. It has three series of standards: (i) Universal Standards, (ii) Sector Standards and (iii) the 33 Topic Standards.

- **ILO standards (n.d.):** These standards comprise legal instruments drafted by ILO constituents (governments, employers, and workers) and consist of two categories: (i) Conventions (or Protocols) and (ii) Recommendations. The first are legally binding treaties that may have or may not have been ratified by States. The second consists of non-legally binding guidelines aimed at complementing the Conventions.

- **International Organisation for Standardisation (ISO) (n.d.):** These standards cover anti-bribery, environmental and energy management, health, food safety, and information technology security.

- **Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016):** The document provides detailed recommendations and a framework for due diligence to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices. It is intended for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas. Its scope is global and applies to all mineral supply chains.

- **OECD Guidelines for Multinational Enterprises (2011):** The guidelines set standards based on recommendations by governments for responsible business conduct across a range of issues such as human rights, labour rights, and the environment.

- **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (1997):** This convention establishes legally binding standards to criminalise the bribery of foreign public officials in international business transactions and provides various related measures to ensure its efficiency. It is the first and only international anti-corruption instrument focused on the "supply side" of the bribery transaction.

- **United Nations Convention Against Corruption (UNCAC) (2003):** The UNCAC is a legal instrument designed to prevent and fight corruption in both the public and private sectors, covering a wide spectrum of society, including the business community. While addressed to States, UNCAC contains certain provisions – that have a direct impact on companies – designed to combat unfair competition, reduce market distortions, and promote integrity.

Outwardly, Malaysia has made commitments to align itself with global initiatives to strengthen human rights. For example, Malaysia has ratified the UNCAC, and as a three-time member of the UNHRC (Ministry of Foreign Affairs [MFA], 2021a), Malaysia also voted in favour of the UNGPs and has voluntarily pledged to improve Malaysia's performance on business-related human rights by developing a NAPBHR (MFA, 2021b).

Given the level of its development, Malaysia's acceptance of international human rights standards could be better. Even though it has ratified core instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), and Convention on the Rights of Persons with Disabilities (CRPD), these ratifications came with significant reservations. It has also not ratified other core human rights instruments such as the ICESCR, International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (UNHRC, 2018). This leaves significant gaps in the human rights framework, which in turn leads to a lack of regulation of these matters in the business sector. These gaps allow businesses a wide margin of discretion to act, leading to potential abuses of human rights particularly against vulnerable groups.

At the domestic level, there is no single standalone law on human rights applicable across the private sector. Malaysian businesses are regulated by a combination of laws and regulations specific to certain subject matters or groups of people. They also do not apply equally to all businesses. Labour rights, women's rights, and indigenous peoples' rights, among others, are provided in different laws affecting the conduct of businesses (Long, 2013). In addition to the general formulations of fundamental liberties in Articles 5 to 13 of the Federal Constitution, elements of these basic rights are found in several Malaysian laws such as the Employment Act 1955 (EA), Aboriginal Peoples Act 1954 (APA), Industrial Relations Act 1967, Environmental

Quality Act 1974 (EQA), Child Act 2001, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) and Persons with Disabilities Act 2008 (PWD Act). Good governance requirements that apply to all registered companies are under the Companies Act 2016 (CA), while the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) deals with corrupt practices.

Initiatives to incorporate good governance and human rights standards into the organisational culture of Malaysian businesses

Existing government and regulatory initiatives to incorporate good governance and human rights further into Malaysian organisational culture include the following:

Companies Commission of Malaysia (Suruhanjaya Syarikat Malaysia [SSM])

Section 253(3) of the CA provides that the annual directors' report, required under section 252, may include a Business Review Report (BRR) as set out in Part II of the Fifth Schedule. The BRR may contain information on matters such as the business's impact on the environment, its employees, the community, and related social issues. A company may also report on its related policies and the effectiveness of those policies. Although the BRR is voluntary, companies are encouraged to submit it as part of their directors' report and attach it with their annual financial statement (SSM, 2017). As of 2019, 19 companies had lodged their BRR with SSM.

SSM's Corporate Integrity System Malaysia published a toolkit aimed to support and assist the implementation of corporate integrity initiatives (SSM, 2016). In addition, SSM launched the Code of Ethics for Company Director and Company Secretary in 2023, which emphasises core principles relating to transparency, integrity, accountability, corporate liability, and sustainability that ought to be observed by directors and secretaries in the performance of their duties.

Sections 2, 51, and 56 of the CA address beneficial ownership (BO) through the submission of annual returns. Enforced from 1 March 2020, SSM's Guideline for the Reporting Framework of Beneficial Ownership of Legal Persons requires companies to identify record BO information in the BO register and report of any changes within 14 days (SSM, 2020).

Government response

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In 2023, SSM launched the Code of Ethics for Company Director, which emphasises the core principles that directors ought to observe in the performance of their duties. One of the core principles relates to sustainability practices, and specifically, paragraph (v) on page 11 of the Code provides that directors must ensure the company's policies are in line with international trends to promote human rights in the corporate environment.

The beneficial reporting framework for companies has been significantly enhanced through the Companies (Amendment) Bill 2023, which was approved in the Dewan Negara on 13 December 2023. The amendments have enhanced the provisions regarding the beneficial ownership framework by providing clarity to the definition of beneficial owner and comprehensive reporting procedures.

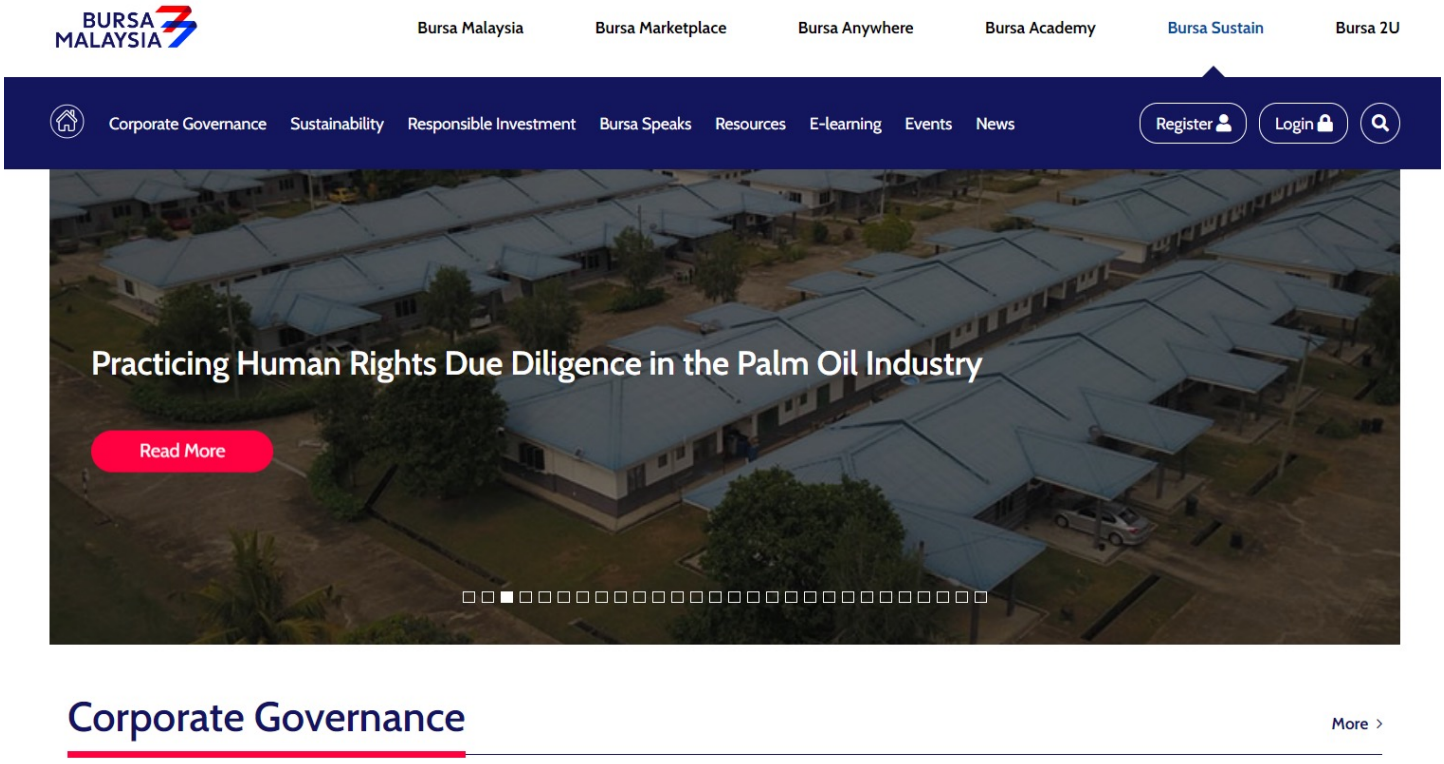


Figure 7: Snapshot of Bursa Sustain portal (Bursa Malaysia).

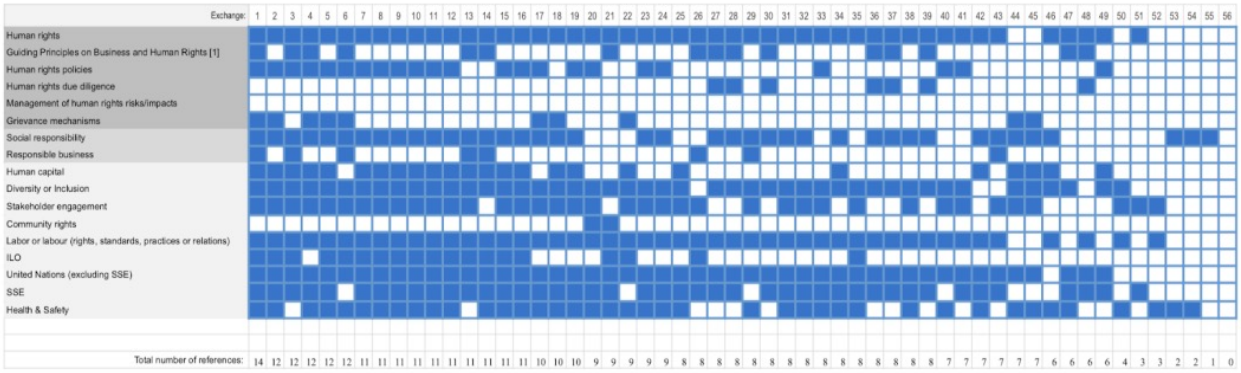
Bursa Malaysia

Bursa Malaysia has imposed mandatory reporting for all public listed companies (PLCs) on ESG and sustainability matters. Bursa launched the Bursa Sustainability Framework in 2015 (Lo, 2018) and in 2021, released the 4th Edition Corporate Governance Guide (Bursa Malaysia, 2022a) which included a section dedicated to corporate governance disclosure and reporting templates. It has been working to increase awareness among listed issuers through initiatives such as the sharing of resources on the Bursa Sustain portal, implementing the Public Listed Companies Transformation (PLCT) programme (Bursa Malaysia, n.d.), and recently, providing ESG advisory support services (The Edge Malaysia, 2022).

In September 2022, Bursa Malaysia enhanced its mandatory sustainability reporting requirements to prescribe a list of common material matters for disclosure by all PLCs on the Main and ACE Market, requiring companies to provide at least three financial years' data for each reported indicator to support their sustainability statements and build confidence in their reports. Material matters include anti-corruption, supply chain management, community/society, diversity, energy management, health and safety, labour practices and standards, data privacy and security, water, waste management, and emissions management.
Bursa Malaysia will also require climate change-related disclosures, which are aligned with the Recommendations of the Task Force on Climate-Related Financial Disclosures from financial year ending (FYE) 31 December 2025 for the Main Market PLCs. ACE Market PLCs must disclose their plan to transition towards a low-carbon economy from FYE 31 December 2026 (Chung, 2022).

In terms of sustainability, Bursa Malaysia's demands appear to be, by far, the most stringent of all regulators to date. Listed companies must publish a sustainability statement guided by Bursa's Sustainability Reporting Guide (Bursa Malaysia, 2022b). While the ESG disclosure requirements are relatively extensive, there are no mandatory requirements for companies to conduct HRDD, or to prevent, mitigate and cease adverse impacts on human rights. Nevertheless, Bursa Malaysia does reference the definition of human rights per the UN International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, and has one of the highest number of references to human rights in a comparison of 56 stock exchanges (Sustainable Stock Exchanges [SSE], 2021).

References to human rights in stock exchanges' ESG disclosure guidance



Key	Exchange	Country
1	Borsa İstanbul	Turkey
2	B3	Brazil
3	Bolsa de Comercio de Santiago	Chile
4	Egyptian Exchange	Egypt
5	Athens Exchange Group	Greece
6	Bursa Malaysia	Malaysia
7	Nasdaq Copenhagen	Denmark
8	Nasdaq Tallinn	Estonia
9	Nasdaq Helsinki	Finland
10	Nasdaq Iceland	Iceland
11	Nasdaq Riga	Latvia
12	Nasdaq Vilnius	Lithuania
13	Luxembourg Stock Exchange	Luxembourg
14	Bolsa de Valores de Lima	Peru
15	Nasdaq Stockholm	Sweden
16	Nasdaq	USA
17	Kazakhstan Stock Exchange	Kazakhstan
18	Nigerian Stock Exchange	Nigeria
19	Colombo Stock Exchange	Sri Lanka
20	Bahrain Bourse	Bahrain
21	Bolsa de Valores de Colombia	Columbia
22	Philippine Stock Exchange	Philippines
23	Abu Dhabi Securities Exchange	UAE
24	Dubai Financial Market	UAE
25	Australian Securities Exchange	Australia
26	Dhaka Stock Exchange	Bangladesh
27	Euronext Brussels	Belgium
28	Euronext Paris	France

Key	Exchange	Country
29	Deutsche Börse	Germany
30	Euronext Dublin	Ireland
31	Borsa Italiana (LSE Group)	Italy
32	Japan Exchange Group	Japan
33	Boursa Kuwait	Kuwait
34	Bolsa Mexicana de Valores	Mexico
35	Bourse de Casablanca	Morocco
36	Euronext Amsterdam	Netherland
37	Euronext Lisbon	Portugal
38	London Stock Exchange	UK
39	Euronext London	UK
40	Bombay Stock Exchange	India
41	Amman Stock Exchange	Jordan
42	New Zealand Stock Exchange	New Zealand
43	Bolsas y Mercados Españoles	Spain
44	Hanoi Stock Exchange	Vietnam
45	Ho Chi Minh Stock Exchange	Vietnam
46	TMX Group Inc.	Canada
47	Bolsa Nacional de Valores	Costa Rica
48	Oslo Børs	Norway
49	Qatar Stock Exchange	Qatar
50	Singapore Exchange	Singapore
51	Botswana Stock Exchange	Botswana
52	Hong Kong Exchanges Limited	China
53	Shenzhen Stock Exchange	China
54	Shanghai Stock Exchange	China
55	Stock Exchange of Thailand	Thailand
56	Indonesia Stock Exchange	Indonesia

Figure 8: Human rights reference in stock exchanges ESG disclosure guidance (SSE 2021).

Securities Commission Malaysia (SC)

PLCs are required by SC's Malaysia Code on Corporate Governance (MCCG) to adopt globally accepted best practices on corporate governance. The MCCG was updated in 2021 and the SC publishes its Corporate Governance Monitor report annually to monitor how the Code is being implemented. In 2021, the Corporate Governance Strategic Priorities (2021-2023) was launched to complement the MCCG (SC, 2021a). The recent 2022 Corporate Governance Monitor Report acknowledged that most companies are adopting best practices recommended by the MCCG, but the quality of disclosures needs improvement as they lack implementation details and reasons for departures from the requirements.

Malaysian Anti-Corruption Commission (MACC)

The Inspection and Consultation Division under the MACC rolled out the initiative to establish an Organisational Anti-Corruption Plan (OACP) in all government bodies, aimed at tackling issues of governance and anti-corruption within organisations (MACC, n.d.). The development of the OACP in the public sector as well as statutory bodies, State-owned enterprises (SOEs), companies limited by guarantee (CLBGs) and the private sector was in response to Initiative 2.1.5 and Initiative 6.2.1 of the National Anti-Corruption Plan (2019-2023) (NACP) (GIACC, 2019).

Prime Minister's Department

Under the Prime Minister's Directive No. 1 of 2018 Series 1 No. 1 of 2018, Government-Linked Companies (GLCs) are to establish an Integrity and Governance Unit to cultivate organisational integrity and serve as the hub for good governance for Malaysian GLCs (MACC, 2019; Prime Minister's Department, 2018a).

Central Bank of Malaysia (Bank Negara Malaysia [BNM])

Specifically on anti-corruption governance, BNM requires reporting institutions in the financial sector, as well as Designated Non-Financial Businesses and Professions and Non-Bank Financial Institutions, to comply with the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 by establishing internal controls, conducting customer due diligence checks, and monitoring transactions (BNM, 2019).

The Joint Committee on Climate Change (JC3), which is co-chaired by BNM and SC, was formed to pursue collaborative actions to build climate resilience within the Malaysian financial sector. Its members comprise senior officials from Bursa Malaysia and financial industry players. The JC3 focuses on developing practical tools for industry players in the areas of risk management, governance and disclosure, product and innovation, capacity building, and data issues and challenges. On disclosures, the Task Force on Climate-related Financial Disclosures (TCFD) Application Guide for Malaysian Financial Institutions was issued in June 2022 to facilitate the adoption of TCFD recommendations by the Malaysian financial industry (JC3, 2022).

Conflict of interest

Part of the fiduciary duties of directors under sections 221 and 222 of the CA include the declaration of any conflicts of interest and to abstain from decisions in which one has competing interests. In addition, BNM, SSM, Bursa Malaysia, and SC all require specific disclosures by company directors to ensure there are no conflicts that may cloud their judgments during the decision-making process. These are seen in the regulators' respective rules, regulations, guidelines, Listing Requirements or corporate governance guides. For example, the MCCG requires directors to provide shareholders with information on director's interests or relationships that may affect their ability to make independent judgments and act in the company's best interests (SC, 2021b).

II. Baseline assessment and findings of governance priority issues

Despite a slew of laws and regulations, challenges to human rights compliance in governance remain.

Priority area 1: Anti-bribery and anti-corruption

The link between corruption, governance, and human rights

Corruption is a major hindrance to sustainable development (UNDP, 2014). Corruption was identified as the most detrimental element contributing to the weakening of institutions (Mijatovic, 2021; OHCHR, 2013; United Nations Office on Drugs and Crime [UNODC], n.d.). It causes a domino effect whereby weakened governance and institutions create an enabling environment for exploitation, followed by corruption spreading to other sectors and manifesting as human rights abuse (U4 Anti-Corruption Resource Centre, n.d.; Barkhouse et al., 2018).

Corruption causes and contributes to human rights abuses by enabling perpetrators to avoid scrutiny and accountability. Law enforcement may be induced to turn a blind eye or actively cover up human rights abuses through evidence suppression, neglect, or refusal to investigate. Corruption may also facilitate illegal or unethical actions that violate human rights. Overall, corruption undermines the rule of law and erodes public trust in institutions, making it harder to promote and protect human rights.

A comparative analysis of levels of corruption across 126 countries against seven universal basic rights (right to life; right to health; right to education; right to women; right to development; freedom of expression and freedom of information; and decision-making and justice rights), illustrate that corruption has an adverse impact – directly or indirectly – on human rights (Barkhouse et. al, 2018; UNHRC, 2013). For example, a causal financial link between corruption and human rights was found in the plundering of state funds by the Universal Basic Education Commission in the Socio-Economic Rights and Accountability Project v. Nigeria case. Between 2006 and 2007, the commission allegedly embezzled public funds amounting to US$351.54 million. Though the commission was acquitted of violating the rights to education and human dignity, the case showed that corruption was not a victimless, purely economic crime (Barkhouse et al., 2018, pp. 6-7). Here, the victims were the children who were denied basic education that the embezzled sum was meant to provide for.

The UN Development Goals Report (2022) states that "businesses around the world face obstacles and unfair competition due to corruption, which adversely impacts the sustainable development of national economies". It was also found that in every region, one in six businesses received bribe requests from public officials. For the Eastern and Southeast Asian region, 30 per cent of businesses are affected (UN, 2022). Given the link between corruption and human rights, the findings recognise that as business actors are at risk of contributing to corruption, this may, in turn, lead to significant risks to human rights protection.

Good governance is necessary for the protection of human rights as it is the first line of defence against any threat to human rights and democracy. Weak governance fosters corruption, which undermines enforcement against human rights abuses and leads to leakages. This hinders the government from providing equitably to the country as envisioned in the SDGs.

International commitments to anti-corruption

While Malaysia has ratified the UNCAC, more urgent efforts are required for effective implementation. The overall picture is that Malaysia has some of the underlying fundamentals in place for a sound anti-corruption framework. However, in a recent review by the Conference of State Parties to the UNCAC, challenges to the domestication of Chapter II (Preventive Measures) and Chapter V (Asset Recovery) were found (UNODC, 2017), which included, among others, the following:

- There is a need for a more systemic approach to reviewing and evaluating legal instruments as they are carried out on an ad hoc basis, and consultations are to be held with relevant stakeholders.
- Steps towards the adoption of rules on political financing to be continued.
- A streamlined procedure to be introduced to provide assistance to countries without a treaty or agreement with Malaysia in order to facilitate cooperation on asset recovery.
- Legal provisions for property to be returned to the requesting State to be adopted in cases where the relevant offence is embezzlement of public funds or the laundering of embezzled public funds.

The review noted, however, that the legal and regulatory framework for preventive measures on money laundering was strong, with supervision from BNM and good coordination with other financial intelligence units.

National commitment to anti-corruption

In 2019, Malaysia adopted the NACP under the purview of the National Centre for Governance, Integrity and Anti-Corruption (GIACC), a government agency established under the Prime Minister's Department. The NACP was a nascent platform to improve the national governance and anti-corruption framework, following a recommendation from the UNCAC review to coordinate overlapping national policies on anti-corruption.

The NACP is significant in two ways: first, it was adopted after inputs from various stakeholders including government agencies, industries, and civil society. Second, while the name suggests that the aim of the plan was to combat corruption, its actual scope is much wider as it addresses all aspects of good governance: political governance, public sector administration, public procurement, legal and judicial frameworks, law enforcement and corporate governance. For example, one of the goals was to require SOEs, CLBGs, and the private sector to obtain ISO37001:2016 Anti-Bribery Management System (ABMS) certification within a prescribed period of time before they could bid for government contracts.

A total of 17 strategic objectives were identified and 115 initiatives outlined in the NACP. As of May 2021, a mid-term review of the NACP revealed that only 29 initiatives were "completed" in the same year as its debut in 2019 and 86 initiatives remain (GIACC, 2021).

Government response

JULY 2023 - JUNE 2024

Under UNCAC, State Parties' compliance with the UNCAC is monitored through the Implementation Review Mechanism. This is carried out through periodic Country Review sessions on State Parties by Accessors from among the UNCAC signatory countries' experts.

Malaysia has gone through two series of reviews:

- 1st Review in 2012 – 2013 for Chapter III (Criminalization and Law Enforcement) and Chapter IV (International Cooperation)
- 2nd Review in 2015 – 2019 for Chapter II (Preventive Measures) and Chapter V (Asset Recovery)

The compliance assessment reports issued by the UNODC as the UNCAC secretariat have recognised many of the best practices in Malaysia found in these review sessions.

A total of 35 best practices in Malaysia were recognised by UNODC; six best practices were recognised under Chapter II, eight in Chapter III, five in Chapter IV, and 16 best practices in Chapter V.

At the time of writing, significant governance aspects of the NACP that have yet to be implemented includes the following:

- Enacting new laws on political financing, public procurement, and freedom of information.
- Strengthening the Whistleblower Protection Act 2010 (WBA).
- Reintroducing the Parliamentary Services Act 1963.
- Amending the MACC Act to insert a new offence for deliberately leaking or wasting government funds by public officials.
- Transforming the Public Complaints Bureau into Ombudsman Malaysia.

Editor's Note

This report notes that a new national strategy, the National Anti-Corruption Strategies (NACS), which was launched by Prime Minister Dato' Seri Anwar Ibrahim on 7 May 2024, serves as an extension of the NACP which ended in 2023. NACS consists of five key strategies: (i) education, (ii) public accountability, (iii) public voice, (iv) enforcement, and (v) incentives. It also includes 60 sub-strategies that were developed through strategic collaborations across various sectors. Ultimately, these strategies aim to bring Malaysia closer to becoming a prosperous and corrupt-free country.

As a means of strengthening current governance and anti-corruption initiatives, the recommendations should be referred to in the expected NAPBHR.

Government response

JULY 2023 - JUNE 2024

Malaysia pledges to continue the momentum in safeguarding the country from corruption risks and enhancing governance and integrity. One of the key reforms in this context was the development of the NACP (2019-2023). The Special Cabinet Committee on Anti-Corruption (JKKMAR), chaired by the Prime Minister on 21 November 2018, agreed on the proposal to develop a five-year plan that is the NACP, which was then launched by the Prime Minister on 29 January 2019.

The NACP – which was the first of its kind to be formulated in the country – is an anti-corruption policy that reflects the people's expectations for a corrupt-free nation that promotes transparency, accountability, and integrity culture in every Malaysian. The strategies in this plan are the result of a series of deliberations and consultations conducted with the public and private sectors, businesses and media communities, NGOs, anti-corruption experts and academicians.

The development of the NACP was based on the strategic need for a main national reference document on anti-corruption strategies, which is in line with Article 5 of the UNCAC and the Kuala Lumpur Statement on Anti-Corruption Strategies in 2013.

The NACP outlined 115 initiatives that were put into action as part of a longer-term vision for a country free of corruption. 29 policy, institutional, and legislative reforms — out of the initial 115 — were implemented and completed at the output level in 2019. An NACP Midterm Review published in 2021 saw 12 new initiatives being introduced to the existing 86 initiatives. Six initiatives were combined (into three initiatives) on the grounds that they would yield the same output and 13 initiatives were formally postponed, bringing the total number of initiatives in the review to 82.

In terms of year-over-year completion, the 29 initiatives mentioned above were completed within a year of the NACP's launch. Up until 31 December 2021, a total of eight additional initiatives were completed (between 2020 and 2021), bringing the overall number of completed initiatives to 37. Another 25 initiatives were completed in 2022, while the last phase of the NACP implementation (which ran until 31 December 2023) saw the completion of an additional 23 initiatives. This represents a 77 per cent completion rate, or the successful execution of 85 out of 111 initiatives since 2019.

By the end of the implementation period of the NACP in 2023, 26 initiatives remained. These will be carried out under NACS.

Further, the government has undertaken steps to enact and develop the related legislation as implementing such laws can only be done after they have been passed in Parliament. For laws to be passed, the government must undertake many steps, processes, and procedures which include appropriate engagements and detailed feasibility analyses. Related legislation already in progress are as follows:

(i) Political financing bill: On 8 September 2023, the Cabinet agreed for the proposed Bill to be scrutinised by the Select Committee.

(ii) Public procurement

(iii) Freedom of Information (FOI): On 14 September 2023, the Special Cabinet Committee on National Governance (JKKTN), chaired by the Prime Minister Dato' Seri Anwar Ibrahim agreed to the enactment of the FOI law and the amendments of the Official Secrets Act (OSA). The government will have to conduct thorough engagements on the parameters and scope of the proposed law before its drafting. The law is expected to be tabled in Parliament in 2024.

(iv) Whistleblower Protection Act 2010: The WBA has undergone extensive engagement sessions with various stakeholders. The amendments will be tabled once the Central Agency has been identified. The Bill is expected to be tabled in 2024.

(v) Parliamentary Services Act (PSA): The PSA had undergone extensive engagement sessions with government agencies, in particular, the Public Service Department (JPA) and MOF. However, further discussions need to be held with both agencies on implementing the PSA as there will be financial and human resource implications.

(vi) The establishment of Ombudsman Malaysia: There have been changes to the recommendation to set up the Ombudsman Malaysia. The recommendation is to expand Ombudsman Malaysia to include several other portfolios beyond the Public Complaints Bureau. The government will need to study further the implementation of Ombudsman Malaysia, including its scope, functions and powers. This will be conducted by a Steering Committee and a Technical Working Committee.

In 2020, the Malaysian Governance Indicators (MGI) was created by GIACC with the support of UNDP. The MGI lists governance indicators to complement the NACP and measure the impact of good governance (GIACC, 2020). The indicators reflect four principles – transparency, accountability, efficiency, and effectiveness – to measure the progress and impact of the NACP's initiatives in six priority areas. The document acknowledges the vital role governance reforms play – the MGI was an important step forward in operationalising the government's political will to curb corruption, and is also reflected in the 12th Malaysia Plan (12MP) as a mechanism to measure the level of good governance in the country.

Government response

JULY 2023 - JUNE 2024

Related goals in the Midterm Review of the 12MP include being in the top 25 countries in the Corruption Perceptions Index (CPI) within 10 years and improving the Open Budget Index score to a minimum of 61 out of a 100 (which indicates adequate disclosure of the budget by international standards).

Despite the strong governmental push in 2018 and the good intentions of law enforcement agencies including the MACC and the police, critical improvements to the national governance framework are still absent. It is imperative for the NACP's targets to be incorporated where possible into the NAPBHR to prevent, mitigate and remedy actual and potential human rights impacts caused by the State and businesses.

Anti-corruption under the MACC

Even the MACC's track record is mixed. In 2022, the commission arrested 909 individuals in relation to corruption from the public and private sectors. This was more than the 851 individuals arrested in 2021, but a decrease from the 998 arrested in 2020. In Transparency International's CPI 2021, Malaysia dropped five places to number 62 on the list.

In 2020, section 17A of the MACC Act 2009 came into force. The section imposes corporate criminal liability and personal criminal liability on directors if a corrupt act was committed for the advantage of the commercial enterprise. As the provision is essentially a presumptive law, it functions as a preventive mechanism; and companies are tasked to operationalise sufficient mechanisms to prevent its employees, agents, or affiliated parties from engaging in acts of corruption on its behalf. The provision has caused companies to take more seriously the requirements to establish minimally an anti-bribery and anti-corruption policy. At the time of writing, there are only two known prosecutions under section 17A. It is too early to evaluate the efficacy of this provision as a deterrence.

Government response

JULY 2023 - JUNE 2024

Malaysia is ranked 61 in the CPI 2022 released by Transparency International (TI), out of a total of 180 countries assessed (from 62nd place in 2021). However, Malaysia's score in the CPI 2022 dropped one point from the previous year, from 48 points in 2021 to 47 points in 2022 (see Note below).

Malaysia's score recorded a shift of six points accumulatively over the past three years, starting in 2020 until the latest recorded ranking. In the past seven years, Malaysia recorded the highest score in 2019 with 53 points, which placed Malaysia in its best position so far at 51.

It should be noted that the CPI score is collected based on several surveys used by TI, where, in contributing to Malaysia's score, as many as nine survey data sources are used:

- Bertelsmann Stiftung Transformation Index
- Economist Intelligence Unit Country Risk Ratings
- Global Insight Country Risk Ratings
- IMD World Competitiveness Yearbook
- Political & Economic Risk Consultancy (PERC) Asian Intelligence
- Political Risk Services (PRS) International Country Risk Guide
- World Economic Forum Executive Opinion Survey
- World Justice Project Rule of Law Index Expert Survey
- Varieties of Democracy (V- Dem) Project

The surveys do not specifically address corruption, instead focus on aspects of political stability, economic strength, democracy, and government effectiveness.

In the Half Term Review (KSP) of the 12MP, the government also accepted the CPI as a basis for measuring the good governance of a country and has set a target of improving Malaysia's position to the 25th spot within 10 years. If this target is made into a Key Performance Index (KPI) at all levels of ministries, departments and agencies on a "shared responsibility" basis, it is not impossible that Malaysia can achieve a significantly improved CPI position.

For this purpose, the government developed a national governance index, the Malaysian Governance Index (MGI), which is "evidence and outcome-based" to measure the country's governance. In addition, the MACC is also working on a comprehensive study (Malaysian Corruption Survey, also known as "MaCoS") based on a study by the UNODC which emphasises the measurement of corruption experience versus perception by utilising primary data and administrative data.

Experience and evidence-based research is able to complement the CPI index study, which is based on perception, in order to provide a clearer, more accurate and comprehensive picture of the level and factors of corruption in Malaysia.

Further, section 17A of the MACC Act was passed in Parliament in 2018 and was given a grace period of two years as a preparatory period until it came into effect on 1 June 2020. The development of the corporate liability provision under section 17A actually takes into account a provision on the same under section 7 of the United Kingdom (UK) Bribery Act 2010.

UK legislation also took almost seven years to initiate the first charge under the corporate liability offence, which was practically implemented by targeting large-scale cases, particularly those involving multi-jurisdictions and cross-border investigations. Based on data reported by the UK Ministry of Justice, another 12 cases have been decided to go through the Deferred Prosecution Agreement (DPA) process, a mechanism that has yet to be introduced in the legal system in Malaysia.

For the status of high-profile investigation cases or those of public interest, the MACC has already created a "Case Timeline" in the MACC official portal (www.sprm.gov.my) for the purpose of providing accurate official information to the public.

Note: *In the latest 2023 report, Malaysia's score increased by three points to 50 from 47 in 2022, ranking the country in the 57th position.*

Linked to Malaysia's challenges in effectively tackling corruption are significant constraints placed on the public's ability to freely access information pertaining to the government and businesses. This is explored in the next section.

Priority area 2: Access to information, and personal data privacy and security

The right to freedom of speech and expression under the Constitution is to be interpreted liberally and any restrictions thereto must be justified as being strictly necessary and proportionate to meet the requirements of public order and national security. Access to information is part of the right to expression. While the right to expression is enshrined in Article 10 of the Constitution, it has been diluted over the years through constitutional amendments and little has changed since.

The OSA is used to classify all government documents at federal and state levels as secret by default. Even though the OSA permits ministers to declassify such documents, the power is seldom used. Coupled with other restrictive laws such as the Sedition Act 1948, Communications and Multimedia Act 1998 (CMA), and the Printing Presses and Publications Act 1984, Malaysia does not have a legal environment that is conducive to the freedom of information.

The pervasive difficulty in obtaining important government information also influences how companies manage their information. For instance, companies treat all business contracts with the government as private and confidential, and not to be divulged. They resist the call to release information on public interest such as how highway toll rates and water tariffs are calculated, even though in principle the people are entitled to have such information because it concerns them.

After the PH coalition formed the government in May 2018, there were serious efforts to introduce a new freedom of information law. The NACP recommends the introduction of legislation related to freedom of information, and the government undertook a series of engagement sessions with stakeholders to examine the feasibility and appropriateness of such a measure. As an outcome of this, the government found that other laws had to be amended for this particular legislation to be effective. At the time of writing, it is understood that the government is still keen on enacting the law which will also see the OSA revised.

Government response

JULY 2023 - JUNE 2024

According to the NACP, the milestone for an FOI legislation is for the government to conduct a study on the viability of enacting the law. Extensive engagement sessions were conducted up until 2022, with a total of 19 engagements sessions with multistakeholders groups. With this, the indicator in the NACP has been met.

In 2023, the government agreed to enact an FOI legislation for Malaysia and to amend the OSA accordingly. The government will once again conduct extensive engagements with stakeholders on the scope and parameters of the law before the law is tabled in 2024.

Where government data is made available, that data is often not disaggregated. Malaysia's open data policy, administered by the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU) – now the National Digital Department (Jabatan Digital Negara [JDN]) – aims to enable data to be open and shared more widely, improve the transparency of government services, and provide a platform for people to obtain information from official government sources while sharing their feedback on government services (MAMPU, n.d.). Although there are more than 12,000 data sets on the open data portal (https://www.data.gov.my/), they do not contain disaggregated data. This lack of granularity is unhelpful for detailed assessments or decision-making based on said data.

There was a positive development in January 2023. The Department of Statistics Malaysia (DOSM) launched an open data platform called OpenDOSM Next Gen. The platform aims to provide accurate data for public use on matters of the economy, financial sector, national accounts, and social statistics. All data sets accessible are also available for download as machine-readable raw data, tables, or charts. The portal has significant data related to labour, but needs more information on the environment and other social statistics for it to be more useful on human rights matters. For example, data on forest cover, and projects affecting local communities, should be included.

While the open data and DOSM data sets are positive for overall governance and accountability, there has been no systematic review of the taxonomy of specific data required to support human rights protection in Malaysia. Critical data directly related to human rights issues should be identified for this to be centrally collected and distributed.

Some state governments, such as in Penang and Selangor, have their own freedom of information enactments. However, they only apply to documents recorded or created by state government agencies. There are also numerous exceptions for the State to deny applications for access. For example, if disclosure would prejudice the formulation or implementation of state policy, undermine the administration of the state government, give rise to an actionable breach of confidence by a third party, or prejudice the commercial or financial interests of a third party, then the application may be denied. Seeking information on the terms of commercial contracts between the State and businesses or on planning development details is routinely denied on these grounds. Generally, government officers tend to err on the side of caution in releasing such information.

The lack of free access to information makes it difficult to ensure that businesses are implementing relevant human rights standards in their operations. There is no mechanism to compel businesses to disclose their human rights compliance in their daily operations, even when cases are publicly reported in the media. Non-State grievance mechanisms to enable engagements with human rights defenders (HRDs) and NGOs are also limited.

Access to procedural information and criteria

Linked to the issue of forced labour, limited information access is also detrimental to companies. We note from the focus group discussions with civil society groups working on migration that migrant workers are vulnerable to exploitation and abuse when information on their recruitment process, their rights, and channels to make complaints, is not shared with them or their employers. With limited to no information provided, companies are at times painted in a bad light if there are allegations of forced labour made against them. This is one area where clear and precise procedural information is necessary to curb corruption and abuse.

Employers can no longer deny responsibility for human rights abuses that occur in sourcing migrant labour through recruitment agents. There is a need for due diligence

on third parties that supply workers or goods. This requirement can be facilitated by government standards for openness in arrangements concerning migrant worker recruitment. The lack of transparency can lead to bribery, misrepresentation by recruitment agents and hold migrant workers to debt bondage. Failure by the government to require transparency on migrant labour recruitment could further expose companies to the suspicion of covering up human rights abuses or the inadvertent employment of trafficked labour. Here, bilateral agreements between governments on recruitment should be made public, as well as the criteria for the selection of approved recruitment agents.

Personal data privacy and security

Privacy is a fundamental human right and recognised by the Malaysian courts. Article 12 of the UDHR defines privacy as the right to protection from arbitrary attacks and interference with one's private life, family, home, correspondence, and reputation. Related to the complaint about limited access to information, the government and businesses have not adequately protected personal data privacy.

Malaysia has two data classification regimes. For the private and commercial sector, the processing of personal data in commercial transactions is governed by the Personal Data Protection Act 2010 (PDPA). The public sector is not governed by this Act. The Act imposes obligations on private companies to secure personal data that it collects and processes. Data management should be in line with the seven principles of data protection under the PDPA, namely the General Principle, Notice and Choice Principle, Disclosure Principle, Security Principle, Retention Principle, Data Integrity Principle, and Access Principle.

In the event of data breaches, section 5(2) of the PDPA provides for a fine of up to RM300,000 and/or imprisonment of up to two years (PDPA, 2010). More stringent penalties are also available for specific offences and classes of data users.

Data classification for the government is based on the OSA. The Malaysian Public Sector Management of Information & Communications Technology Malaysia Digital Economy Blueprint Security Handbook states that government information is classified into four categories: top-secret, secret, confidential and restricted (MAMPU, 2002). With the adoption of cloud technology, a fifth category of "public" was created. The introduction of guidelines such as the Guidelines for the Management of Information Security through Cloud Computing in the Public Sector identify the respective security practices and system requirements for each classification category (Prime Minister's Department, 2021).

Unfortunately, data breaches have been more regular in recent years, such as that of personal data from telecommunications companies and financial institutions being leaked and subsequently sold online. This exposes people to unsolicited marketing, fraud and malicious software. On 30 December 2022, the scale of such data leaks was demonstrated when private information of 13 million Malaysians, allegedly obtained from two companies and a statutory body, was posted online (Bernama, 2022a).

Concerns have also been raised regarding the State's protection of private information under its care. In September 2021, it was alleged that the personal information of four million Malaysians stored by the National Registration Department (Jabatan Pendaftaran Negara [JPN]) had been put up for sale online (MalaysiaNow, 2021). Close to a year later, there was a data leak involving the information of over 22 million Malaysians. Although the leak was not from JPN (Malay Mail, 2022), this is evidently still a problem that requires urgent action. There were also cases of private data not being secured, such as that involving the Public-Private COVID-19 Industrial Immunisation Programme under the Ministry of International Trade and Industry (Boo, 2022).

Cybersecurity crimes remain high in Malaysia. By 2021, over 10,000 incidents were recorded in the country (MyCERT, n.d.). Even then, this figure may not be accurate due to under-reporting, or because parties reached amicable resolutions to the incidents.

Malaysia has tried to keep up with technological developments. Its efforts are highlighted in policies such as the Malaysia Digital Economy Blueprint, National Cyber Security Strategy 2020-2024, National Policy on Science, Technology and Innovation 2021-2030, and 10-10 Malaysian Science, Technology, Innovation and Economy Framework (Farlina Said et al, 2022). These outcome documents provide guidelines on how data should be treated and protected as a cybersecurity priority. Indirectly, data privacy is seen through a human rights lens.

Given the complexity of the digital space, there are

various enforcement agencies and regulators responsible for different types of data usage. BNM, for example, oversees the various payment systems infrastructure for the efficiency and security of financial systems. In the economic sector, various ministries oversee business and investment activities related to digitisation and automation. MYDIGITAL Corporation is also in charge of addressing activities related to strengthening connectivity, digital tool adoption and data-related issues (Farlina Said et al., 2022)

Although the Malaysian Communications and Multimedia Commission (MCMC) is empowered to investigate and prosecute for offences listed in the CMA, it does not have the power to investigate data breaches. However, it assists the Department of Personal Data Protection in their investigations of data leaks. Although sections 211 and 233 of the CMA are broad enough to target personal data abuses by commercial entities that sell or market their products and services indiscriminately through the use of data obtained legitimately or otherwise, the provisions have also been used to curb freedom of speech and expression. Prosecutors have filed criminal cases against ordinary citizens, media personnel and HRDs voicing legitimate concerns and been successful in the courts to punish them with penal sanctions.

The growing digital economy has resulted in gaps in enforcement. Challenges related to data governance and cybersecurity need to be addressed as Malaysia aims to boost its digitisation and automation agenda in the coming years. Data management and treatment guidelines by government agencies should also be updated to guard against data leaks. In essence, the people's digital rights space requires important enhancements that allow for better protection.

Government response

JULY 2023 - JUNE 2024

The Ministry of Communications and Digital (KKD) will present amendments to the PDPA in Parliament in March 2024. This amendment is the first to be made after the law has been in force for a decade, since 15 November 2013.

The proposed amendments have taken into account input and views from various stakeholders obtained by the Office of the Personal Data Protection Commissioner (PDP) through the implementation of intensive engagement sessions. Until 7 November 2023, KKD has carried out a total of 29 engagement sessions with 379 stakeholders consisting of the public sector, private sector, regulatory bodies, industry players, associations representing industry players, local authorities (PBT), and other interested parties.

This is in accordance with the wishes and recommendations of the Minister of Communications and Digital, Fahmi Fadzil, who would like to see the amendments implemented to ensure that it remains relevant, and is in line with the development of technology and the digital economy as well as privacy legislation at the international level.

Based on the transactions that have been carried out, and in an effort to support the NAPBHR, the essence of the amendments includes:

(i) requiring Data Users to report data leakage incidents to the PDP within 72 hours;
(ii) Data Users and Data Processors are responsible for appointing a Data Protection Officer (DPO) who is responsible for ensuring compliance with the PDPA;
(iii) placing responsibility directly on the Data Processor under the Security Principle; and
(iv) increasing the value of the penalty for violations of the Personal Data Protection Principle.

KKD, through the PDP, is committed to continue strengthening the protection of personal data through the improvement of policies and acts, as well as aspects of enforcement, especially in dealing with issues of personal data leakage and misuse of personal data. In addition, advocacy efforts are also actively and regularly conducted to increase the awareness of data users and individuals on the importance of protecting personal data.

Priority area 3: Procurement, investment and tax

Governance and human rights in procurement

There are two relevant considerations in procurement where BHR is concerned: first, the process should be well-governed, with measures for transparency and accountability to ensure that public funds are used productively and not siphoned through corruption; second, the process should be cognisant of adverse human rights impacts, from the pre-award stage through to implementation.

On the requirement for good governance and accountability, Malaysia still has many gaps in its procurement procedures. The NACP aimed for a new law on procurement to be in place by 2025, and Prime Minister Dato' Seri Anwar Ibrahim renewed this commitment in his 2023 Budget speech (Ministry of Finance [MOF], 2023a).

Government response

JULY 2023 - JUNE 2024

Government procurement is carried out based on good governance practices by complying with the principles of government procurement, which are public accountability, transparency, best value for money, open and fair competition, and fair dealing. The government always reviews current issues, and updates regulations related to government procurement to remain relevant and in line with current government policies. Currently, the government is taking the initiative to institutionalise procurement procedures through legislation.

The government announced, through the 2024 Budget speech, the presentation of a Government Procurement Bill in 2024 to ensure that the implementation of government procurement is managed based on a good governance framework.

The Bill aims to strengthen the implemention of government procurement based on the principles above, and aligns with best practices to prevent abuse of power and malpractice.

While there is a requirement for disclosure through the MyProcurement portal (PK.1.14), the level required is limited to organisational and administrative matters and at present, does not include human rights concerns.

Open tender is the default method for the procurement of goods and services with a value of more than RM500,000. In certain circumstances however, the procuring authorities are allowed to directly negotiate the appointment of a particular supplier or contractor without competitive bidding. This process lacks transparency. While MOF has issued a circular on direct negotiations with provisions to ensure value for money, it is inadequate (Sri Murniati & Danial Ariff, 2020). Section 6(1) of the Financial Procedure Act 1957 gives the Minister full discretion over all procedures related to government payments, which includes waiving the requirements for competitive bidding. Former Finance Minister Tengku Zafrul Abdul Aziz has said that there is nothing wrong with direct negotiations for projects given the wide powers under the section (Bernama, 2020).

Even large-scale projects have been contracted by direct negotiations. This increases the risk of wastage due to grossly inflated contract prices and poorly managed enterprises. The approval of RM1.36 billion as an advance payment to procure six littoral combatant ships for the Royal Malaysian Navy, under the Ministry of Defence, for example, went beyond what was permitted under Treasury Circular No. 5/2007 (Public Accounts Committee, 2022).

Malaysia is not a party to major international governance and transparency initiatives such as the Open Government Initiative, Extracting Industry Transparency Initiative, or Open Contracting Partnership. Based on a study conducted by the Construction Sector Transparency Initiative (CoST) (2017, p.53) the current law only requires disclosure of three data points out of the 40 CoST Infrastructure Data Standard, amounting to 7.5 per cent of the required disclosure under international best practices. This problem is also seen in the Government Defence Integrity Index which assesses transparency in the government's defence procurement. Malaysia is categorised as "high risk", indicating extreme susceptibility to corruption (Transparency International Defence and Security, 2020).

Considerations of human rights impact in procurement

Currently, the government's procurement process does not consider adverse human rights impact as a criterion for decision-making. Consequently, there are no human rights standards that a company or project must meet beyond

what is generally required under Malaysian law.

In addition, there is also no independent and systematic review procedure to blacklist companies with poor human rights records from bidding. The main elements assessed in the tender selection phase are the operational capacities and expertise of the tenderer, and the proposed budget. There is no compulsory due diligence to check the human rights track records of selected bidders. In 2022, MOF clarified the reasons for administrative actions that will be taken against bidders for non-compliance, including de-registration or suspension. The relevant misdemeanours include the failure to provide documents or comply with the tender process, conviction for bribery, cheating or breach of trust, or failure to properly implement the tendered project (MOF, 2022). Human rights do not feature.

Further, in deciding whether to proceed with large-scale infrastructure projects implemented by the private sector through public-private partnerships, there remains insufficient safeguards to protect local communities from the harmful human rights impacts of such projects. There have been numerous cases, for example, of indigenous groups being displaced and having to seek legal redress through lengthy and resource-sapping litigation via the courts. In comparison, countries such as the United States of America (US) and Norway maintain lists of companies that are under observation or blacklisted as a result of implementing projects that have negatively impacted human rights. This is to put pressure on potential bidders to comply with labour and environmental, as well as human rights, standards. Human Rights Due Diligence (HRDD) should therefore be a mandatory consideration when enacting the proposed procurement law.

The role of SOEs and GLCs should also be considered when discussing the question of transparency and accountability in procurement and human rights as a great deal of procurement activities depend upon these entities carrying out economic functions on behalf of the government.

Government response

JULY 2023 - JUNE 2024

The approval of an advance payment for littoral combatant ships for the Royal Malaysian Navy was carried out properly as a special exemption from current regulations, approved by MOF following a formal request by the Ministry of Defence. There is no evidence of a violation of government procurement rules given that due diligence was carried out, based on information provided by the Ministry of Defence and reported in formal memorandums throughout the process of said approvals.

Among the factors considered during the approval process were the company's status and qualifications, as well as its previous experience and accomplishment in reviving, completing and delivering another, separate federal megaproject. The approval also considered the project's overall value and the potential for significant early-stage execution costs.

To improve the level of governance in government procurement, MOF together with MACC agreed to establish Integrity Pacts, where all parties, including bidders, involved in government procurement matters must agree to, and sign, the Pact. The positive implication of this measure is that all parties involved understand the adverse effects on integrity, governance and the economy if they were to participate in acts of corruption.

Fiscal policy

The government's budgeting process does not fully account for human rights under the UNGPs, but does consider the SDGs. The adoption of the 2030 Agenda incorporates the SDGs into the 12MP; since 2021, the federal budget has allocated funds to meet the SDGs. As listed in the Estimated Federal Expenditure 2022, the top three SDGs by allocation were Goal 4 (quality education, RM75.5 billion), Goal 16 (peace, justice and strong institutions, RM64.5 billion), and Goal 3 (good health and well-being, RM37.7 billion) (MOF, 2021). Cash transfers are also made to vulnerable groups annually, and such financial assistance has expanded quite significantly since the COVID-19 pandemic.

Efforts to have gender-responsive budgeting began from as early as 2005 (Ministry of Women, Family and Community Development, 2005). While some ad hoc women-specific budget initiatives have been introduced since then, the federal government in April 2023 required all ministries and agencies to provide for gender-disaggregated data towards gender-responsive budgeting (MOF, 2023b). This is a significant advancement.

Policy formulation for the SDGs also takes place through the All-Party Parliamentary Group Malaysia on SDGs (APPG-SDG). The APPG-SDG was formed in October 2019 and is a platform for lawmakers, civil society and experts to discuss, conduct research, and propose policy recommendations in furtherance of the SDGs in Malaysia. It also aims to track the implementation of the SDGs related to economic, social, and environmental concerns in parliamentary constituencies. For instance, in 2022, the APPG-SDG proposed the establishment of the Climate Change Commission as an independent oversight body to regulate matters related to climate change in the country. MOF allocates some funding for the group to conduct research and community projects related to the SDGs. In the Revised Budget 2023, the government allocated RM30 million to increase activities that support the SDGs, including RM10 million to kickstart community farm programmes at the parliamentary level to promote food security.

However, there are insufficient government funding sources or systematic incentive structures for companies to incorporate human rights elements in their operations. This, in particular, affects SMEs that lack the resources to implement human rights frameworks, which consequently disadvantages them when competing against bigger companies such as multinational corporations (MNCs) with elevated human rights compliance.

While the government announced support for SMEs in Budget 2023, such as the RM1 billion allocation for BNM to fund SMEs embracing sustainable and low-carbon practices in their operations, the adoption rate needs to be carefully monitored. From the focus group discussions, Malaysian SMEs do not factor in human rights as a consideration in their operations unless they are required to do so by law, or they intend to join the supply chains of MNCs.

Government response

JULY 2023 - JUNE 2024

Under the Malaysian Investment Development Authority (MIDA), there are grants and incentives to encourage companies to increase productivity through the use of automation, namely the Smart Automation Grant (SAG), MADANI Smart Automation Grant (SAG), Industry4WRD Intervention Fund and Automation Capital Allowance. Automation can reduce the rate or type of 3D work (Dirty, Dangerous and Difficult) while improving the quality of the workplace. The adoption of automation will reduce the dependence on manual or trade workers, generally dominated by migrant workers who are often vulnerable to exploitation.

Currently, there is a Green Technology Tax Incentive under MIDA that all companies, including SMEs, can apply for, such as the Green Investment Tax Allowance (GITA) and Green Income Tax Exemption (GITE). The Green Technology Tax Promotion period has been extended until 2026 through the 2024 Budget. In an effort to strengthen the electric vehicle ecosystem, the government also provides tax incentives for companies that manufacture components for hybrid and electric vehicles and electric vehicle charging equipment.

Further, recent trade agreements such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) include clauses that support labour rights. The Ministry of Inverstment, Trade and Industry (MITI) is utilising available limited resources to monitor and evaluate Malaysia's implementation of each Free Trade Agreement (FTA). Aside from assessing the trade rules and regulations set in the FTAs, MITI also monitors Malaysia's conformance with Non-Trade Policy Objectives (NTPOs), including on labour and environmental standards. This is jointly undertaken with the respective line ministries and agencies.

Trade and investment

Malaysia has been a member of the World Trade Organization (WTO) since 1995 and is a party to numerous bilateral and multilateral FTAs, which differ in commitments and areas of collaboration and cooperation. Some of the agreements include the ASEAN Trade in Goods Agreement, Regional Comprehensive Economic Partnership, and CPTPP.

Malaysia does not use any BHR framework when negotiating such agreements, but documents such as the Shared Prosperity Vision and the Malaysia Plans provide relevant guidelines (CPTPP, 2018; ILO, 1998; Ministry of Economic Affairs, 2019; Prime Minister's Department, 2015; Regional Comprehensive Economic Partnership, 2022). While human rights considerations are not expressly mentioned, they appear in different forms through the country's economic, environmental, labour, and social indicators and targets.

Multilateral FTAs with high governance and human rights standards are external drivers for the government to align local laws with international standards. For example, to ratify the CPTPP, Malaysia had to first revise its domestic employment laws to comply with the principles of the ILO Declaration on Fundamental Principles and Rights at Work 1998. The declaration is driven by ILO's eight conventions encompassing freedom of association, right to collective bargaining, elimination of all forms of discrimination, and forced, compulsory and child labour (ILO, 1998).

Apart from labour-related issues, consumer rights protection is seen in the Sanitary and Phytosanitary Measures, Capacity Building, and Transparency and Anti-Corruption chapters in existing FTAs such as in the ASEAN Free Trade Area Agreement and CPTPP (ASEAN Trade in Goods Agreement, 2010; CPTPP, 2018).

The competition chapters in the CPTPP also include clauses on how to govern SOEs and GLCs. Governance of SOEs is vital to promote transparency while eliminating leakages linked to government procurement activities. It also aims to create a healthier and competitive marketplace.

Even though Malaysia has ratified the aforementioned FTAs, information and guidelines on how to implement the resulting commitments are lacking, including among government agencies and businesses. In alignment with government guidelines, it is essential to promote increased resource allocation to monitor and evaluate rights and adherence to governance standards. To fulfil Malaysia's obligations, both the public and private sectors require enhanced guidance and access to the relevant information (Prime Minister's Department, 2018b).

The socialisation of the human rights standards from the ratified FTAs into domestic policies remains limited, creating negligible momentum to advance human rights efforts in Malaysia. Even when adopted, rights practices are not accompanied by the support and guidance needed to help businesses implement them.

Tax

Human rights activities are not eligible for tax exemption as a distinct category. Companies seeking to contribute to human rights must instead seek tax exempt status under other categories such as social work, charity, or education. Approval for tax exemption is not easy to obtain. There must be a track record of relevant work that must be approved by the Minister of Finance or Director-General of the Inland Revenue Board of Malaysia (IRBM). Further, NGOs are rarely allowed to register as societies doing human rights work. Consequently, there is no financial incentive for companies to respect or operationalise human rights in their operations.

The current tax reforms in the country have been focused on broadening the tax base by having a more efficient tax collection mechanism to minimise leakages. There is little to no attention on incentivising companies to protect human rights as this would run counter to the aim of increasing tax revenue.

In this vein, the government has committed to dealing with tax evasion. Modern businesses artificially shift their profits to low-tax jurisdictions, exploiting gaps and mismatches in different countries' tax rules to avoid paying tax. This problem is exacerbated by the rise of the digital economy, as digital companies and "nomads" can do business in any country without having a physical presence there. These tax avoidance techniques, otherwise known as Base Erosion and Profit Shifting (BEPS), disproportionately impact developing countries such as Malaysia that depend on corporate taxation to fund government services.

To combat BEPS techniques, Malaysia has signalled its intention to adopt one of the international policy solutions proposed by the OECD Two-Pillar Solution, namely, to apply a global minimum tax to MNCs (Hogan, 2021; OECD 2021). A 15 per cent global minimum tax rate is recommended.

The Malaysian government has announced that it would implement the global minimum tax rate in its Budget 2023 released on 24 February 2023 (MOF, 2023b).

At a broader level, IRBM and Bursa Malaysia have introduced the Tax Corporate Governance Framework (TCGF) and PLCT programme respectively to improve corporate governance, and ensure greater accountability in the tax system. Both lay out principles associated with efficient tax governance, and their application in an organisation. As a start, they are good practice guides and adoption is voluntary (Bursa Malaysia, 2022c, 2022d; IRBM, 2022; Lum, 2022). These initiatives are part of regulators' efforts to strengthen tax governance as a subset of corporate governance. A strong tax governance framework can cultivate stakeholder confidence that the organisation is reporting and paying the right amount of tax.

In theory, a wider taxation net increases the government's funds and resources to support human rights efforts. It is one way of redistributing profits generated by corporations operating in Malaysia to the country's poorer and more vulnerable segments of society. Tax incentives should also work to encourage companies to promote and protect human rights. However, it is also necessary to close tax loopholes and introduce specific fiscal policy to invest in protecting and expanding human rights. While Malaysia has specific allocations for the SDGs and there are ongoing efforts to institutionalise them in policy through the APPG-SDG, more needs to be done by the government to direct the tax collected specifically for human rights initiatives.

Priority area 4: Diversity, equity, and inclusion (DEI)

The principle of non-discrimination and equality is the foundation of diversity. International human rights standards state that no one should be discriminated against based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 8(1) of Malaysia's Federal Constitution also states that all persons are equal before the law and entitled to the equal protection of the law.

Diversity, equity, and inclusion (DEI), as a topic for action, was incorporated in global sustainability measures as a way to achieve gender equality and reduce inequalities. The SDGs, grounded in human rights principles, prescribed for both targets to be met by State and non-State actors. Consequently, DEI is not only about prohibiting discrimination, but also designing equitable policies and increasing the economic participation of minority or disadvantaged groups.

CEDAW and gender equality at the workplace

CEDAW calls on States to take steps to eliminate gender discrimination both in the public and private sectors. Malaysia acceded to CEDAW in 1995 but does not have a standalone gender equality or anti-discrimination law that domesticates our treaty obligations. The development of such a law is still being studied.

Revisions to the law to incorporate components of Malaysia's CEDAW obligations have been made on a piecemeal basis. Most recently, an amendment to the EA inserted a specific section 69F on discrimination in employment. The Director General of Labour is now empowered to inquire into, and decide, any dispute between an employee and his or her employer on any matter relating to discrimination in employment. The provision came into force on 1 January 2023.

There are other issues faced by women at the workplace that have yet to be addressed. The Anti-Sexual Harassment Act 2022 does not place a duty of care on companies concerning employees who experience workplace victimisation, thereby exempting employers from vicarious liability. Further, the 1999 Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace by the MOHR is a non-binding document that cannot be enforced by victims in the courts.

In terms of financial support, the Malaysian government has tried to be inclusive towards women in the workforce by providing aid. Budget 2021, for example, provided for a microcredit financing programme to empower women entrepreneurs. In Budget 2023, the Ismail Sabri administration announced an income tax exemption for women returning to the workforce, but this was not adopted in the Anwar Ibrahim administration's revised budget. Instead, it was replaced by a RM290 million allocation as grants – equalling 80 per cent of the insured employees' salaries – aimed at supporting women's reintegration into the workforce after extended maternity or parental leave. These were among the initiatives to mainstream women's rights in the employment sphere.

DEI for PLCs

To the credit of Malaysia's regulators, there has been a push for greater diversity and inclusion in the corporate workplace. Bursa Malaysia, in its Listing Requirements, mandates that at least one woman must serve on the board. This requirement has been in effect since 1 September 2022 for PLCs with a market capitalisation of RM2 billion, and from 1 June 2023, it applies to all remaining companies. Additionally, PLCs are obliged to disclose diversity policies encompassing gender and age for their board and workforce in their annual reports, through the enhanced Sustainability Statement and the statement about the activities of the nominating committee (Bursa Malaysia, 2022e).

Nonetheless, there are no established benchmarks or targets for achieving diversity and inclusivity concerning aspects such as age, representation of ethnic minorities, indigenous communities, and individuals with disabilities in the workforce. This absence of specific targets has resulted in companies not adequately addressing these critical dimensions of diversity. Without mandatory indicators and goals, companies are generally reluctant to make commitments to enhance the representation of marginalised communities. Moreover, there are no requirements to formulate or adopt comprehensive DEI policies and practices. Thus, significant DEI gaps still persist.

Percentage of women on the boards of PLCs has increased over the years (as at 1 March 2023)

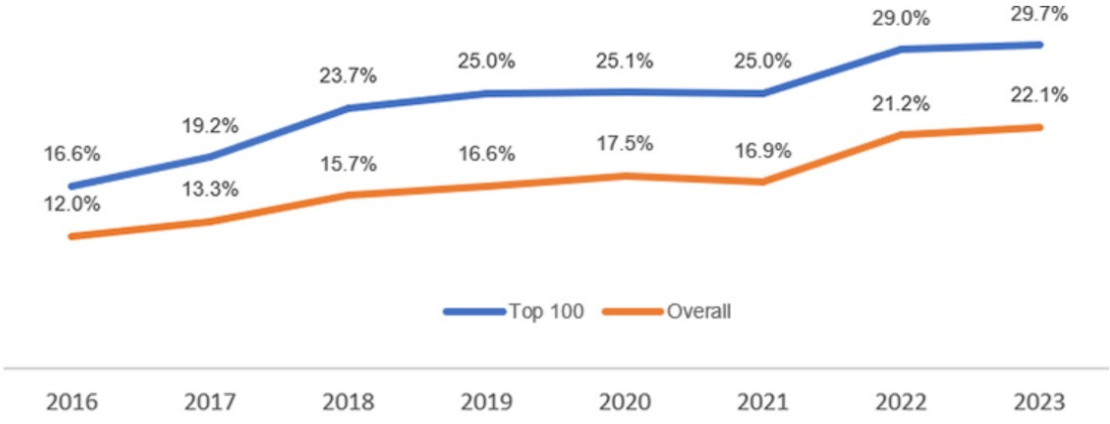


Figure 9: Women participation on boards, SC (2023)

PLCs are encouraged to strive for a minimum of 30 per cent female representation at the boardroom level, as outlined in the MCCG. The MCCG, as of 2021, also provided guidance to assess women's participation in decision-making roles and establish gender diversity policies (SC, 2021b). Reporting requirements include providing data on the gender and age distribution of employees across various categories and the composition of directors. While Malaysian companies did not meet the SC's target of achieving a 30 per cent representation of women on boards by the end of 2022, the percentage has steadily increased, reaching 29.7 per cent for the top 100 PLCs in Malaysia as of March 2023.

It is worth noting that non-listed companies, including large corporations, are not subject to similar reporting requirements as their listed counterparts. While the BRR initiative under the CA represents a positive initial step, its voluntary nature has not yet driven meaningful compliance among companies. The competitive landscape and dynamics of SMEs and large unlisted firms differ from those of PLCs, which have to prioritise adherence to the SC's guidelines as a means to establish themselves as industry leaders. Consequently, the voluntary measures introduced by SSM are less likely to succeed in fostering a robust culture of human rights respect within unlisted companies.

Government response

JULY 2023 - JUNE 2024

The overarching policy requiring companies to include a BRR aims to encourage non-financial disclosures such as business' impact on the environment, its employees, the community, related social issues, and the effectiveness of their policies in these areas.

At the same time, the policy intent of the BRR initiative is to ensure that companies are not overly burdened by reporting requirements, bearing in mind that the CA is applicable to all companies irrespective of size. In addition, while the BRR may have (direct or indirect) positive effects on the delivery and protection of rights, it was not introduced with the explicit function to measure human rights culture in companies.

Generally, the CA does not determine the administrative and operational processes of companies, such as setting the gender composition, ethnic representation, and age of directors. The CA provides the general requirement at minimum for directorships, and the qualifications required to act as directors. Setting specific requirements on gender, ethnic representation, and age may impede the overall objective of the CA to promote ease of doing business.

Entrenching a new corporate culture through DEI

DEI has typically been implemented through industry-driven sustainability practices. For PLCs, this takes the form of reporting on their DEI policies and implementation. The company reports on its DEI commitment in its hiring, human resource management, and remuneration. Affirmative hiring policies for specific categories of vulnerable groups such as persons with disabilities (PWDs), indigenous peoples (IPs) or local communities may also be in place.

The reports may contain disaggregated information such as age, gender, ethnicity, religion, disability, compensation, benefits, language, and socioeconomic background. Mean and median wages may also reported to track the gap between the highest and the lowest earners. It provides stakeholders insight into the balance of representation in the company.

However, reporting alone on DEI is not sufficient. The impact must be felt. DEI must also be seen through a human rights framework and not viewed merely as a token exercise to meet regulatory obligations. DEI must be considered within the broader BHR context, where a business's shortcomings in this area are regarded as a matter of concern and subject to potential corrective actions and consequences. Material assessments on how DEI challenges manifest themselves in the workplace and impact operations, the risks, and safeguards that are to be put in place to prevent and mitigate these risks, are encouraged. Whistleblower protection and a redress mechanism should also be established.

Moreover, capacity building and training on gender-based violence, gender diversity and inclusivity have not been institutionalised as part of corporate culture. Training modules for companies in Malaysia have yet to be standardised. In this regard, the regulators can assist to operationalise BHR training, and provide guidance on HRDD that includes DEI assessments.

Inclusion of minority groups and discrimination prohibition

The Hays Diversity and Inclusion Report for 2019/2020 revealed that in Malaysia, discrimination based on ethnicity is a concerning issue. Only 54 per cent of employees believed they were fairly compensated regardless of their ethnicity, marking the lowest score among the five Asian countries surveyed, which included China, Hong Kong, Japan, and Singapore (Hays, 2019).

Hiring discrimination still exists across different sectors. Malaysia has been reluctant to enact a comprehensive anti-discrimination law. On paper, the PWD Act bans conduct that exclude PWDs from employment due to their condition, but the law is ineffective. Victims cannot sue to enforce the Act as its terms are couched in aspirational language.

The indigenous population (masyarakat pribumi) of Malaysia, as defined by the Federal Constitution, are the aboriginal peoples of Peninsular Malaysia (Orang Asli Semenanjung Malaysia) and the natives of Sabah and Sarawak (Anak Negeri Sabah and Anak Negeri Sarawak). A significant number of IPs rely on forests for food and livelihoods, selling forest produce and agricultural surplus. Over the years, accelerated economic growth driving the expansion of the local agriculture and mining industries has

led to mass deforestation and the dispossession of the land and resource base necessary for traditional subsistence strategies among indigenous peoples. Many of these communities have since shifted their livelihoods to include wage labour, often in the agriculture and mining sectors (Gomes, 2004). Decades of exclusion from the mainstream of society and forced displacement from their ancestral lands and homes have also contributed to their poverty relative to other non-indigenous communities.

The indigenous communities' skill and conventional education levels hinder their participation in modern urban sectors or jobs that provide higher economic returns (UNDP, 2013). For instance, the dropout rates of Orang Asli students from primary to secondary school was 23.3 per cent in 2018, seven times higher than the national average (IDEAS, 2020a). Poor access to education and decent work have led many indigenous peoples to be caught in a vicious cycle of poverty. This is evidenced by the high incidence of poverty among the Orang Asli at 76.9 per cent, with 35.2 per cent falling in the hardcore poverty category, as compared to the 5.6 per cent national poverty rate (DOSM, 2010).

Government response

JULY 2023 - JUNE 2024

Indigenous peoples in Malaysia as a whole are known as Masyarakat Pribumi, which comprises Orang Asli Semenanjung Malaysia, Anak Negeri Sabah, and Anak Negeri Sarawak.

In section 4 of the Access to Biological Resources and Benefit Sharing Act 2017, the interpretation of "indigenous community" means a group of persons comprising of Orang Asli Semenanjung Malaysia, Anak Negeri Sabah, and Anak Negeri Sarawak.

Issues concerning the Orang Asli Semenanjung Malaysia fall under the purview of the Ministry of Rural and Regional Development and Jabatan Kemajuan Orang Asli (JAKOA). Further, the community is governed by the Federal Constitution and the Aboriginal Peoples Act 1954. Among relevant action plans that include support for Orang Asli Semenanjung Malaysia is the 12MP.

Given these urgent concerns, the interests of IPs are far removed from the business sector, and at minimum, companies should act in line with DEI efforts to promote human resource development among indigenous peoples as well as to protect their right to decent work. There should also be an obligation on businesses to ensure that their operations do not cause harm to indigenous groups and their livelihoods.

Priority area 5: Enforcement of business-related human rights standards in governance

The problem of defining human rights for enforcement

One fundamental issue is the absence of a comprehensive legal definition of human rights and their associated core components in Malaysia. Currently, the application of human rights in the judicial system primarily relies on precedent and common law, rather than a well-defined statutory framework that sets clear standards for human rights. This is a huge challenge for victims of human rights abuses. Section 4(4) of the Human Rights Commission of Malaysia Act 1999 (SUHAKAM Act) merely states that "regard" can be had for the UDHR only if it is not inconsistent with the Federal Constitution. The Constitution, in turn, does not adopt the language of human rights, but litigants attempt to fit their cases – like a jigsaw piece – into clauses that protect "fundamental liberties" in Part II of the law. Judicial interpretation varies from judge to judge. Where a judge appears to lean towards judicial activism, they would read the fundamental liberties consistent with international human rights norms. Other judges who favour a plain or literal reading of the law may decide otherwise.

The lack of a common definition also allows the government to imbue human rights standards in Malaysia that are lower than global standards. For example, civil society critiqued the 2018 NHRAP for favouring the Cairo Declaration on Human Rights in Islam 1990, over the UDHR, as its guiding document. The government is currently reviewing the 2018 NHRAP.

Government response

JULY 2023 - JUNE 2024

Since the launch of the NHRAP document till present, the government has taken initiatives to implement and enforce the recommendations in the action plan, including following up with the relevant agencies. Currently, the government is in the midst of reviewing the NHRAP.

Specific rights backed by enforcement need to be encoded in the legal framework. This includes enacting a new gender equality law to domesticate Malaysia's CEDAW obligations, and entrenching the full range of rights under the CRC and CRPD in the CA and PWD Act, respectively. All of these rights should be made justiciable in the Malaysian courts where victims can seek effective and enforceable remedies against their human rights violators.

Lack of centralised oversight and mainstreaming of human rights in the public sector

The government has struggled to urgently mainstream human rights within its ministries and organisations. Human rights was once seen as a foreign affairs matter and was housed in the MFA until 2019 when the government placed it under the portfolio of BHEUU. The development indicates a shift from political signalling on multilateral platforms, to enacting and implementing domestic reforms that are needed to move human rights forwards nationally.

This is a positive step given the implementation gaps discussed in this report. However, as BHEUU is not a full-fledged ministry but an agency under the Prime Minister's Department, it will have staff and resource constraints to pursue such necessary reforms. This is unlike in countries like Thailand and Indonesia where human rights is housed under their respective ministries handling law, human rights and justice. It is high time that Malaysia establishes a centralised coordinator with the capacity to address human rights and integrate them effectively into various aspects of public governance.

Lack of a common driver in setting private sector standards on human rights

The absence of a unified driving force to establish human rights standards within the private sector is evident. When it comes to governance-related matters concerning business, the influence of human rights is more pronounced in the context of ESG standards, which are being shaped primarily by regulatory bodies such as Bursa Malaysia and BNM, rather than by domestic State agencies focusing on human rights.

ESG standards are becoming institutionalised through mandatory reporting requirements for PLCs, and human rights, while a crucial component, remains subsumed within the broader framework of ESG reporting. PLCs are granted a degree of flexibility in determining how they report on their sustainability practices, guided by the Sustainability Reporting Guide (3rd edition) and toolkits from Bursa Malaysia. As there is no universally accepted domestic ESG or human rights standard for the private sector in Malaysia, PLCs often resort to guidance provided by international bodies like the OECD or ILO.

Government response

JULY 2023 - JUNE 2024

MITI has developed a National Environmental, Social, and Industrial Governance (i-ESG) Framework to accelerate the transition towards sustainable practices in the manufacturing sector. This framework will be the basis and guide for manufacturing companies, especially local companies, that want to move towards sustainable practices.

Further, in response to these statements, Malaysia External Trade Development Corporation (MATRADE), as the National Trade Promotion Agency, has embarked on a few programmes to create awareness and instil the importance of sustainability practices among Malaysian exporters, including large corporations and SMEs. These programmes are organised in collaboration with businesses and Ministries, government agencies, chambers of commerce, and trade associations, whose members are key players in the export supply chain. MATRADE initiated the Green Export Supply Chain Initiative (GxCSI), Government Sustainability Engagement Programme (GSEP), and Sustainability Action Values for Exporters (S.A.V.E.) training programmes.

These initiatives will create awareness among Malaysian exporters and help enhance the export ecosystem by aligning business regulations to comply with ESG requirements. They will also assist in preparing Malaysian exporters for their sustainability journey as required by their buyers, which include MNCs in Malaysia and foreign buyers, to safeguard their current exports and explore emerging green market opportunities.

For some sustainability topics such as labour, the environment, and health and safety that have clear local laws and a specific enforcement agency, ESG reporting is more uniform, and consistency is expected. For instance, the Department of Labour acts under the EA, Department of Environment (DOE) takes legal action against offenders for violations of the Environment Quality Act 1974 (EQA), and the Department of Occupational Safety and Health pursues violators under the Occupational Safety and Health Act 1994. The said laws have set standards. However, in other areas, human rights can mean different things to different enterprises.

As such, there is a need for certainty and clarity. This is vital because companies face the potential loss of clients to competitors with less rigorous standards in these areas. This feedback received was consistently shared by large companies and MNCs across various sectors, encompassing both services and manufacturing, and extending beyond the banking industry. Hence, well-defined and universally applied Malaysian standards for sustainability and human rights are imperative to foster consistent adoption by businesses.

The following two case studies examine the practices of two institutions: CIMB, a Malaysia-based financial institution; and ASEA Brown Boveri Ltd. (ABB), a Swiss multinational operating in Malaysia. We examined the drivers that pushed or influenced them to act in relation to ESG and governance-related human rights matters. Information was collated from focus group discussions with representatives of the companies.

Case Study 1
Company in focus: CIMB Group Holdings Bhd. (CIMB)

Internal guidelines and policies on human rights at CIMB are aligned with globally recognised best practices and recommendations (CIMB Group, 2022d). Its human rights policy reflects a public commitment to uphold international standards, including the International Bill of Human Rights, UNGPs, and ILO Declaration on Fundamental Principles and Rights at Work. This commitment is reinforced by CIMB's adherence to the CIMB Sustainability Principles (CIMB Group, 2022a).

CIMB's corporate governance follows the policies and standards established by regulatory bodies such as BNM, SC and Bursa Malaysia. CIMB also participates in the JC3 that aims to enhance climate resilience in the financial sector and promote sustainable financing.

Further, CIMB goes beyond Malaysia's legal obligations to follow international best practices, including conducting a rigorous due diligence and risk assessment process for potential clients. As a member of the Net Zero Banking Alliance, CIMB is the first Malaysian bank to establish mid-term carbon targets for its coal and cement portfolios. It is also one of two Malaysian signatories to the UN Principles for Responsible Banking, which is a sustainability framework for the financial sector. CIMB's sustainability framework sets minimum criteria for client sustainability, exclusions, and limits the bank's exposure to specific sectors.

CIMB maintains a strict zero-tolerance stance against bribery and corruption (CIMB Group Holdings, 2022b; 2022c; 2022d; 2022e). For high-risk clients, such as Politically Exposed Persons (PEP), CIMB enforces annual due diligence and heightened oversight measures. The bank screens clients against international security watchlists and requires senior management authorisation for PEP customers to ensure robust risk management in this area.

The driving force behind CIMB's compliance efforts is, in part, external pressure. The bank positions itself as a regional and global leader, and when international peers and investors set industry standards in sustainability and governance, there is an expectation for CIMB to follow suit. Thus, even in the absence of enforceable national obligations, CIMB aims to meet higher global standards such as by implementing stricter due diligence procedures in climate financing.

International benchmarks and peer industry standards can be strong drivers for human rights. Recently, CIMB was ranked fourth out of 155 leading global banks in the World Benchmarking Alliance's 2022 Financial System Benchmark (FMT Business, 2022). It is also one of the six Malaysian banks scored in the Sustainable Banking Assessment (SUSBA) conducted by the World Wide Fund for Nature (WWF).

Case Study 2

Company in focus: ASEA Brown Boveri Ltd. (ABB)

ABB is subject to a wide range of legal and social requirements across the jurisdictions in which it conducts its operations. It is committed to adhering to international agreements and standards, including the UDHR, UNGPs, OECD Guidelines for Multinational Enterprises, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and ILO's labour standards (ABB Ltd, 2022a; 2022b). Additionally, ABB complies with national laws, such as UK's Modern Slavery Act 2015, US' consumer protection laws, Switzerland's child labour regulations, and corporate governance rules enforced by the bourses in Switzerland and New York.

To ensure that its suppliers in Malaysia and other countries meet these legal requirements, ABB has implemented several measures including requiring them to adhere to ABB's Supplier Code of Conduct. ABB also has a Sustainable Supply Base Management (SSBM) system, enabling a risk-based monitoring of supplier compliance with their ESG requirements (ABB Ltd, 2022c). Given the vast scope of its supply chain, ABB conducts monitoring according to the risks each supplier poses to it, with the goal of covering 80 per cent of its supply spend through the SSBM system by 2030.

These due diligence practices exceed those under Malaysian law. ABB also has to adhere to higher standards of the EU and US, applying these elevated standards across its entire supply chain.

ABB prioritises transparency by providing various channels for whistleblowers to report misconduct, including a web portal and telephone access. Further, ABB has implemented no-retaliation policies to ensure that its employees can raise concerns without the fear of reprisals.

The ABB case study highlights the potential role of MNCs in promoting international best practices within local contexts, even when there are no corresponding domestic legal requirements. However, it also underscores the challenges that companies face in determining the appropriate compliance standards to adopt and whether it is justified to assume a competitive disadvantage compared to firms that do not comply. This situation is less than ideal compared to having enforceable Malaysian standards that align with international human rights norms.

Increasingly, standards imposed by foreign jurisdictions are also being incorporated into local contexts. This is evident when MNCs require their Malaysian suppliers to adhere to stringent supply chain standards. ABB's Malaysian partners and suppliers seeking membership in the Swiss Malaysian Chamber of Commerce must conform to European and Swiss legal framework requirements.

Federal and state alignment on human rights, including the alignment between Peninsular Malaysia with Sabah and Sarawak

Malaysia is structured as a federation, with a highly centralised federal government controlling most policy matters, while the 13 state governments have limited autonomy as outlined in the Ninth Schedule of the Federal Constitution. For example, the federal government controls policy matters related to corporations, education, healthcare, anti-corruption enforcement, economic affairs, and agriculture, relegating only local government, Islamic affairs, and some basic public services to the state (and by extension, local) governments. Human rights, though not mentioned explicitly, is considered a federal matter.

A concurrent list also exists under which federal and state governments control certain policy areas, including social welfare, town and country planning, drainage and irrigation, and public health and water services. In addition, Sabah and Sarawak in East Malaysia have additional powers that states in Peninsular Malaysia do not, such as over matters concerning personal and native laws, ports, harbours, charities, charitable trusts, and immigration. Consequently, this situation has sometimes led to significant challenges when implementing specific laws and policies, particularly when state governments lack the requisite authority or when there are differing priorities between state and federal authorities.

In practice, numerous state agencies receive federal funding for infrastructure development projects they oversee and implement at the state level. Importantly, state-level capacity and financial resources are often limited, consequently resulting in challenges when enforcing federal-level policies and tracking the distribution of funds by state governments. This situation creates an oversight gap, potentially leading to corruption that adversely affects communities, particularly those in rural areas. In some cases, development benefits that should empower communities do not reach them. The corruption case involving the Sabah Water Department was cited during our consultations as an example. The lack of effective oversight from federal and state governments over state development projects allowed a significant misappropriation of funds meant to provide water to remote communities (The Vibes, 2023). To improve these practices, committees have been set up to examine this relationship between the federal and Borneo states' governments, and make recommendations consistent with the Malaysia Agreement 1963.

Government response

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The relationship between the states of Sabah and Sarawak and the Federal Government is subject to the Malaysia Agreement of 1963.

The government has set up committees to examine matters concerning the relationship between the federal and state authorities. The "effective oversight" issue is subject to the committees' decisions, and negotiations between the Federal Government and the states of Sabah and Sarawak.

Regarding the alignment of laws for human rights, there is also particular concern about Sabah and Sarawak, which have distinct legal contexts from Peninsular Malaysia. Any advances to improve human rights through legal reform must also occur in East Malaysia, and political will should be aligned at both the federal and state levels to safeguard human rights. The NAPBHR needs to account for the expected roles of state governments. Without this consideration, federal governance laws and policies may not fully translate into action in the states.

Malaysia's governmental structure can create tensions between federal and state-level agencies, and between agencies in Peninsular and East Malaysia, thus hindering the effective implementation and enforcement of laws and policies. Anti-bribery and corruption matters fall under federal jurisdiction; therefore, more work must be done to have state agencies fully on board the governance agenda. Improved collaboration and coordination between federal and state authorities are also required, emphasising the empowerment of state governments to craft initiatives that align with their situational needs and conditions.

Overlapping federal-ministerial jurisdiction and reactive enforcement

Human rights-related corporate governance faces the challenge of institutional misalignment preventing effective enforcement. Enforcement is assigned to civil servants, but frequent changes to their roles and policy directions can cause them to spend more time on bureaucracy instead.

We take the example of environmental governance. Since 2018, Malaysia has had three administration changes and four prime ministers. Every change in the premiership invariably brings about a change in the configuration of each ministerial portfolio. When Tun Mahathir Mohamad came into power in 2018, the Ministry of Energy, Science, Technology, Environment and Climate Change (Kementerian Tenaga, Sains, Teknologi, Alam Sekitar dan Perubahan Iklim [MESTECC]) was established.

In 2020, the environment and climate change portfolios under MESTECC, and the water portfolio under the Ministry of Water, Land and Natural Resources (Kementarian Air, Tanah dan Sumber Asli [KATS]) were merged under the purview of the Ministry of Environment and Water (Kementerian Alam Sekitar dan Air [KASA]). Subsequently in 2022 when Dato' Seri Anwar Ibrahim became the Prime Minister, he formed the NRECC that combined natural resources, the environment, climate change, energy and water under a single ministry. Nik Nazmi Nik Ahmad led NRECC with the mandate to address Malaysia's environmental and climate-related challenges while also overseeing natural resource management.

The diagram below illustrates the jurisdictional shifts in environmental governance between 2004 and 2022.

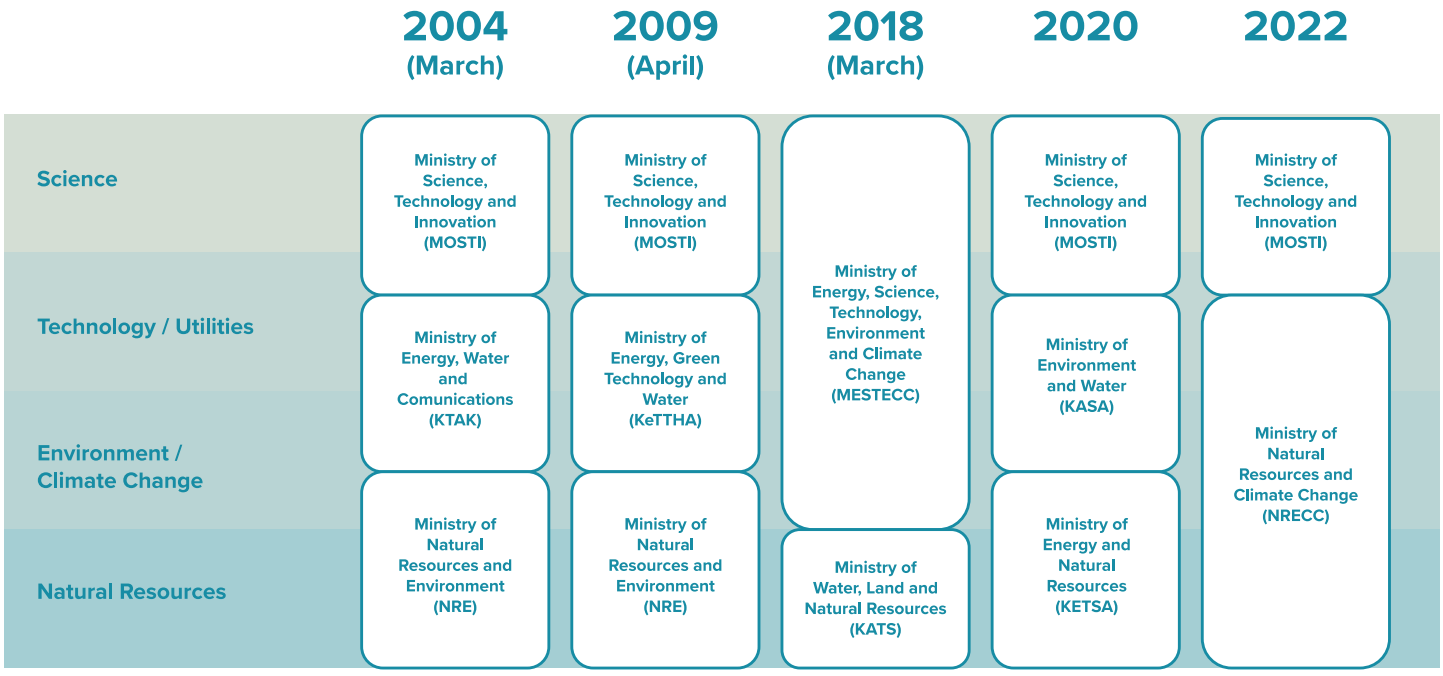

Figure 10: Overlapping jurisdictions on environmental governance. Source: Edmund Bon Tai Soon and Umavathni Vathanaganthan.

The challenges in environmental governance due to political-administrative changes have slowed down progress. Although it has been some time since the latest change in administration, there remains some confusion over the various environment-related responsibilities and agency reporting lines. Stakeholders are also unclear which ministry to refer to for particular issues, given the many shifts that have occurred.

Another example is the recruitment and management of migrant workers. There has been a persistent jurisdictional overlap between the Ministry of Home Affairs (MOHA) and MOHR. The division of power between the two ministries to issue permits for migrant workers, set worker quotas, and enforce labour rights is not clearly defined (Pathma Subramaniam, 2022).

The move by the then Minister of Human Resources Sivakumar Varatharaju to have a one-stop centre for the recruitment of migrant workers under MOHA while the one-channel system to recruit domestic workers under the MOHR upset business associations. There was significant pushback from groups representing sectors heavily dependent on migrant workers, such as manufacturers and real estate developers (Mohamad Danial Ab Khalil, 2022; Bernama, 2022b; Asila Jalil, 2022). This further creates uncertainty about the effective protection of migrant workers' rights when different standards are applied by the ministries across the stages of recruitment and employment.

Already, labour rights groups have noted that labour law enforcement is reactive instead of proactive, particularly when cases are publicised in the media. In late 2020, the government announced that it would enforce new worker housing rules only after Malaysia saw major outbreaks of COVID-19 as a result of cramped and unhygienic dormitories occupied by migrant workers. It may not have done so otherwise. It should be noted that the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990, which extended employee housing standards that initially applied only to mine and plantation employers to all workers, was passed into law in July 2019 and took effect on 1 September 2020 (Peter, 2020; UNDP, 2021).

Another institutional barrier observed is the lack of independence even in dedicated law enforcement agencies, such as the MACC. For example, as appointments at the Commission are decided by the Prime Minister, its integrity has been called into question whenever it acts against politicians and former government leaders seen as political rivals to the ruling government. Any good work continues to be undermined when, whether by coincidence or design, corruption charges are laid against former government leaders after they fall from power (Free Malaysia Today, 2022).

Because of this, there is a pressing need to establish a dedicated parliamentary committee responsible for overseeing the Commission. This committee could also serve as an independent mechanism for appointing the MACC Chief Commissioner (GIACC, 2019).

Corporate law is not currently designed to address human rights abuses

Businesses seek to earn a profit and act towards this end by ensuring low costs and high productivity. To regulate this, company law provides rules, measures, and remedies to ensure business participants can benefit from the enterprise. For example, the fiduciary duties that directors owe to the company and shareholders.

Section 213 of the CA imposes a duty on directors to exercise reasonable care, skill and diligence, as well as to act in the best interests of the company, but it does not specifically mention that the duty includes respect for human rights. In fact, the "business judgement rule" under section 214 insulates a director from personal liability for any decision made properly and in good faith. For example, a director who supports his or her company's acquisition of ancestral indigenous land to build a factory for profit would not have failed any duty of care, even if this decision adversely affects the indigenous community. With the exception of requirements of sustainability measures, directors and shareholders have no legal obligation to ensure the company's operations do not harm human rights.

Without human rights-aligned policies in businesses, directors are likely to only adopt best practices on good faith and at minimum, or due to external pressures. Some companies said they felt compelled to commit to ESG goals after being asked about their competitors' policies in this area.

Government response

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Section 220 of the CA already recognises the duties of directors under other written laws. SSM is of the view that specific directors' duties such as respecting human rights must be provided under a separate legislation.

To provide greater clarity and accuracy, section 220 of the CA provides as follows:

"Directors' duties under section 214 to 219 shall be additional to and not in derogation of any other written law relating to the duty or liability of directors of a company".

Access to justice and weaknesses in current grievance mechanisms

Principle 25 of the UNGPs calls on States to take appropriate measures through judicial, administrative, legislative, and other means, to facilitate access to effective remedies against business-related human rights abuses. In Malaysia, access to justice is guaranteed by Article 8 of the Federal Constitution which recognises this as a fundamental right of all persons irrespective of nationality.

While any person may file a case in Malaysia's courts, there are impediments when it comes to asserting human rights claims against corporations. The country's legal framework does not currently meet international human rights standards that enable civil action with human rights as a specific legal claim against companies that have abused human rights or negatively impacted the environment.

Provisions in our domestic law for civil compensation to be paid for breaches of human rights by business enterprises are absent. Seeking judicial redress is an option (Long, 2013) for complainants but the financial costs can be a barrier. While some legal aid is available from the Bar Council's legal aid centres or the government's Legal Aid Department and National Legal Aid Foundation for certain types of cases, this does not change the fact that Malaysian court processes can be lengthy, cumbersome, and expensive (SUHAKAM, 2005).

Finally, there are invisible barriers that exist particularly for marginalised and poorer segments of society including lack of access, inability to afford lawyers and costs to take court action. Worse, there are times when Malaysian law excludes certain groups from having the legal standing to bring cases due to their nationality, immigration or other status, such as if they are undocumented. Focus group discussions in Sabah and Sarawak also highlighted that legal aid in remote and rural areas is non-existent, and complainants must bear the added burden of income loss to travel to the nearest town to access such services.

Another common example is seen in land disputes involving the State, businesses, and the indigenous communities. Often, when native land is acquired for development, compensation is either inadequate or not paid at all. Because of their financial standing, indigenous communities must often rely on pro bono counsel to take up their cases. In court, they have the onerous burden of proving that their ancestors first occupied the land centuries ago. There is no presumption of occupation in their favour and it is extremely difficult for them to prove ancestral land occupation through documented evidence. No land titles or computers existed then.

Court litigation can also take a long time – upwards of three years – as land matters can be appealed twice to the appellate courts. In the landmark case of Sagong Tasi & Ors v. Kerajaan Negeri Selangor, the incident of eviction of the Temuan plaintiffs occurred in 1995 and the judgment at the first instance of trial was achieved in 2002. The case was only laid to rest when the state government of Selangor withdrew its appeal at the Federal Court in 2009 – 14 years after the land had been lost. The State must break down these barriers and improve access to justice.

Due to the legal limitations, victims of human rights violations by businesses may not be able to obtain the remedies sought until there is a clear domestic law providing for human rights as a cause of action (Malaysian Bar, 2007). Some attempts include strengthening of the CA, introducing the Sexual Offences Against Children Act 2017 (New Straits Times, 2018) and amending the employment and anti-trafficking in persons laws (Lee &

Pereira, 2023, pp. 29-30).

Malaysia has several non-judicial avenues to report business-related human rights abuses. These include SUHAKAM, the Royal Malaysia Police, and the Public Complaints Bureau. Save for SUHAKAM, these have been ineffective for victims seeking justice as they are not human rights-based mechanisms and do not consider complaints from a human rights perspective.

SUHAKAM

SUHAKAM is recognised as an independent national human rights institution. Its establishment was the result of, among others, increased scrutiny over Malaysia's track record on human rights (Renshaw et al., 2011; SUHAKAM, 2022). It was established by the SUHAKAM Act and signalled the Malaysian government's acknowledgement of human rights to be both "universal and indivisible" (SUHAKAM, 2021, p. 8). The promotion of human rights along with the authority to monitor, investigate and prevent human rights abuse is entrusted to SUHAKAM. This includes the power to advise the government and the relevant authorities on new legislation or policy, and to suggest remedies for affected parties and complainants (OHCHR, n.d.-b; SUHAKAM, 2021).

While SUHAKAM receives complaints related to BHR violations, it lacks any power to enforce its recommendations. In practice, SUHAKAM has conducted mediation sessions between complainants and respondents. The Commission heavily relies on enforcement agencies to ensure that its recommendations are carried out. This creates significant opportunities for loopholes to be exploited by the State and businesses, especially if the law enforcement agencies do not act upon cases.

Public Ombudsman

While Malaysia has considered establishing a Public Ombudsman under the NACP, this has been delayed due to the political climate (Center to Combat Corruption and Cronyism [C4 Center], 2022). Having an independent, national ombudsman system would significantly improve the ability of citizens to submit complaints and lodge reports not only on governance matters but also on business-related human rights violations.

Protecting whistleblowers

Malaysia has the WBA that is still rarely used due to its narrow coverage and weak protection of whistleblowers. It also does not expressly protect whistleblowers for business-related human rights abuses. From 2011 to 2021, MACC data showed there were 401 total applications for whistleblower protection, of which 362 were granted protection and 39 revoked due to offences committed (Farizal Muzaffar Hafiz Abdul Wahab, 2021). While the Act ostensibly protects whistleblowers exposing corruption and abuse of power, protection for the whistleblower is lost once the information is revealed to the public. Whistleblowers are thus prohibited from disclosing the information to the media (C4 Center, 2020). Protection is also not granted to those who disclose documents classified under the OSA. In fact, the reverse is sometimes true: that the OSA may be used against whistleblowers.

Prosecutions under the WBA also do not inspire confidence. In 2020, the Deputy Director of Education Malaysia Global Services became the first person to be charged under the law for wrongfully terminating an employee who had exposed his misconduct to the MACC. However, he was acquitted in 2022 as the prosecution was unable to prove a prima facie case against him. The fate of the whistleblower in that case is unknown.

Given the loopholes and absence of guarantees for their safety and protection, whistleblowers have no motivation to report misconduct in their organisations. The 2020 and 2021 Progress Report on the NACP by the GIACC recommended that the WBA should be strengthened. Between 2020 to 2022, the government took the initiative to expedite the amendments which included establishing a working group on the WBA to examine suggestions, and prepare the amendment framework. The discussions focused on the definition of "inappropriate conduct," internal grievance mechanisms, a centralised grievance

management system, and the revocation of whistleblower protection (GIACC, 2022). The amendments were scheduled to be finalised by the end of 2022, but there has been no indication when it will be tabled.

Government response

JULY 2023 - JUNE 2024

The amendments were confirmed in 2022, taking into consideration the engagements carried out with various stakeholders. The amendments have been deliberated by BHEUU and the Attorney General's Chambers, and the Bill will be tabled in 2024 once there is a decision on the Central Agency for Whistleblower's Protection, and other related technical issues currently being finalised.

Strategic Lawsuit Against Public Participation (SLAPP) cases

SLAPP is a "form of action commonly used by businesses to intimidate or silence their critics" (Umavathni Vathanaganthan, 2022). Suits are filed to stop HRDs and civil society groups from protesting against business actions that impact human rights. Malaysia has not defined in statute law what constitutes a SLAPP case. As such, no institutional mechanisms are in place to protect HRDs who face such litigation.

SLAPPs are characterised by the exhaustion of the defendants' resources through the legal proceedings taken against them. As the goal of the plaintiffs is not to win the case but to silence critics, SLAPPs undermine the right to freedom of expression by attempting to conceal human rights concerns raised and stop affected persons from pursuing their remedies.

Private businesses, government officials, politicians or employers accused of committing human rights violations would file civil suits in slander, libel, and malicious falsehood against affected communities, victims, survivors, civil society groups, journalists, and media outlets. At times, police reports for criminal defamation will also be filed. In civil cases, legal defences are found in Malaysia's Defamation Act 1957, but they are narrow and must be updated. These defences include fair comment and qualified privilege in defamation (Business and Human Rights Resource Centre [BHRRC], 2020a).

SLAPPs include State harassment against HRDs. They are typically done using criminal laws such as section 233 of the CMA (making annoying and abusive statements online), section 4 of the SA (inciting seditious tendencies), and section 499 of the Penal Code (criminal defamation). Police or law enforcement agencies will open an investigation file, call witnesses in for questioning, arrest the suspect, and charge him or her in court.

SLAPPs expose the power asymmetry between the litigants. Often, plaintiffs are in positions of power (such as heads of enforcement bodies) while defendants are commonly NGOs, community leaders, and residents (such as in Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee). Although the courts have on occasion found in favour of the defendants (Malay Mail, 2019), the power imbalance still creates a chilling effect for HRDs.

The increase in the use of SLAPPs in our region is also a cause for concern (BHRRC, 2020b). While freedom of speech and expression may be restricted on limited grounds, and individuals and companies are free to vindicate their reputations in the courts, litigation should not be the default option to engagement. In the interests of better corporate governance on human rights matters, the State and businesses must start considering how best to handle complaints that come their way without resorting to SLAPP litigation. One pathway is to increase the use of non-State grievance mechanisms emphasising engagement and mediation between the parties.

III. What should the Malaysian NAPBHR contain?

In this section, we make key recommendations for the NAPBHR to address. We have segmented our proposals into the three pillars of the UNGPs as follows. They are not exhaustive.

Pillar 1: State duty to protect human rights

The State should take the following measures:

1. Establish a new Ministry of Human Rights and Justice (MHRJ) to mainstream matters related to law, human rights and access to justice.

2. Enact a new, specific law on human rights (such as a Human Rights Act or BHR Act) to make human rights justiciable, reflect the government's commitment to human rights, prevent business-related human rights abuses, and provide survivors and victims better access to grievance mechanisms for effective remedies.

a. The new law should also make it mandatory for companies to conduct HRDD, take actions to prevent, mitigate and cease adverse impacts on human rights, provide remediation for survivors and victims of human rights abuses, and report on the same. Additionally, the reports should be audited and assured by independent experts and verified by civil society organisations (CSOs). The UNGPs Reporting Framework (Shift and Mazars LLP, 2015) as well as the World Benchmarking Alliance's Corporate Human Rights Benchmark could be used as guidance.

b. Aligned with the intention of the new law, regulators such as Bursa Malaysia, BNM, SC and SSM should augment their rules and regulations on ESG sustainability to implement enhanced reporting requirements on matters such as anti-bribery and anti-corruption, access to information, and personal data privacy and security, procurement, investment and tax, and DEI. Reports should be audited and assured, and released for verification. These requirements can be applied to companies in a phased approach according to business size, sector and revenue generated.

3. Ratify all international human rights treaties including the ICCPR, ICESCR, and ILO conventions without reservations.

4. Withdraw existing reservations to CEDAW, CRC, CRPD, UNCAC and the UN Convention Against Transnational Organized Crime (UNTOC), and fully implement in domestic law the human rights protections required under these treaties.

5. Adopt the remaining optional protocols to CEDAW, CRC, CRPD and UNTOC.

6. Review and revise, update or repeal (as applicable) domestic laws that impede human rights protection including the OSA, SA, CMA, Penal Code, Defamation Act, and the Printing Presses and Publications Act.

7. Enact a new Gender Equality Act to prohibit gender and sex discrimination in both the public and private sectors, promote gender equality, establish new institutions towards fulfilling gender equality, and enhance gender-sensitive budgeting to mainstream the gender dimension in all stages of the government's budget cycle.

Government response

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The sustainability reporting framework under Bursa Malaysia's Listing Requirements, which was recently enhanced in 2022, requires disclosure of common material sustainability matters and how these matters are managed (see Paragraph 6.2(c) of Practice Note 9 of the Main Market Listing Requirements and Guidance Note 11 of the ACE Market Listing Requirements).

In this regard, anti-corruption, diversity and data privacy and security have been included among the material common sustainability matters that must be disclosed in the Sustainability Statement (see Annexure PN9-A of the Main Market Listing Requirements and Annexure GN11-A of the ACE Market Listing Requirements).

It is also a requirement for PLCs to disclose whether the Sustainability Statement is subjected to an internal review by its internal auditor or independent assurance performed in accordance with recognised assurance standards (see Paragraph 6.2(e) of Practice Note 9 of the Main Market Listing Requirements and Guidance Note 11 of the ACE Listing Requirements).

8. Enact an Anti-Discrimination Act to prohibit racial and religious discrimination in both the public and private sectors, including addressing actions and speech that incite racial or religious hatred.

On anti-bribery and anti-corruption

9. Increase efforts to improve Malaysia's ranking on Transparency International's CPI.

10. Improve the implementation of UNCAC in its main areas, including taking preventative measures, strengthening criminalisation and law enforcement efforts, and fostering international cooperation and asset recovery.

11. Expedite the implementation of measures to make the MACC more independent by placing it under Parliament instead of the Executive, ensuring security of tenure and an independent appointment mechanism for its Chief Commissioner, and establishing an Anti-Corruption Service Commission.

Government response

JULY 2023 - JUNE 2024

The CPI, released by TI, measures the perception of the level of corruption involving the public sector. Thus, MACC is of the view that strengthening the governance, transparency, integrity and accountability of government agencies to ensure the implementation and delivery of public services free from opportunities for corruption should be emphasised. Continuous efforts to fight corruption and abuse of power need to be carried out comprehensively involving all parties and as a whole government, and not placed solely on the shoulders of MACC.

In the Half Term Review (KSP) of the 12MP, the government also accepted the CPI as a basis for measuring the good governance of a country, and has set a target of improving Malaysia's position to 25 within 10 years.

Working in this direction, MACC established a Special Team to increase Malaysia's CPI rank to carry out the coordination of initiatives at the national level involving various stakeholders.

The proposal to place MACC under the supervision of Parliament requires further research and a comprehensive study so that it is in line with, and does not contradict, the concept of separation of legislative and executive powers in the national administrative system. MACC as an executive implementing body needs to be seen as independent in order to be able to perform its functions transparently, without being influenced by any party.

In general, MACC is the only enforcement agency in Malaysia that is monitored by five independent monitoring bodies, as part of a check and balance mechanism against MACC's progress in fulfiling its functions and roles. The Special Committee on Corruption (JKMR), the Anti-Corruption Advisory Board (LPPR) and the Complaints Committee (JKA) were created in accordance with sections 13, 14 and 15 of the MACC Act. Meanwhile, the establishment of the Operational Evaluation Panel (PPO) and the Consultation and Prevention of Corruption Panel (PPPR) were done administratively.

These independent bodies are composed of members representing the public, consisting of former senior government officials, politicians (government and opposition), professionals from the corporate sector, academics, lawyers and other respected individuals.

The MACC empowerment proposal has also been highlighted in the NACP under initiative 5.3.2. The NACP is intended to continue under the NACS with some improvements.

The initial proposal to empower the MACC through improving the appointment process of the Chief Commissioner, and the establishment of the Anti-Corruption Service Commission, by amendments to the Federal Constitution has already been raised by the MACC for the consideration of the Cabinet. This was done through the Special Cabinet Committee on Anti-Corruption (JKKMAR) in January and September 2020, which then agreed to the proposal in principle subject to further comprehensive studies.

An additional study has been initiated by MACC with several stakeholders since 2020 and was subsequently presented to the former Director General of Public Services, the Department of Public Services and the Attorney General's Chambers through the MACC's Legal and Prosecution Division in 2022. This process is still ongoing and the proposal is being refined by interested parties before it can be finalised.

On access to information, and personal data privacy and security

12. Expedite the enactment of a federal-level Freedom of Information Act, and initiate the same at the state level in states where such a law does not exist.

13. Ensure that government officials receive adequate training and capacity building once the Freedom of Information Act is enacted, particularly to operationalise a Freedom of Information Commission established under the Act.

14. Adopt international open data standards based on principles set forth in the International Open Data Charter (n.d.).

15. Introduce data management and treatment guidelines for government agencies to prevent data leaks. Data managed by the government should take a data residency approach, where the department opting for cloud computing should know the source of origin of the cloud services. Civil servants must be trained to understand data flows and residency processes to ensure that strategic data and all information are adequately protected and cannot be accessed by international partners.

16. Establish clear guidelines for the handling of cross-border data transfers to ensure the protection of personal data, based on the commitments made in FTAs and Digital Free Trade Zones.

17. Strengthen the PDPA to ensure that personal data are protected from any loss, modifications, unauthorised or accidental access or disclosure, alteration, destruction, or misuse by third parties. Further, apply the PDPA to the public sector and State agencies.

On procurement, investment and tax

18. Include compliance with human rights standards as a criterion in the selection of vendors in the government procurement process.

19. Enact and implement a new Government Procurement Act to reduce the risks and issues related to compliance and governance in the procurement process.

20. Adopt international procurement standards such as CoST to foster transparency and accountability, specifically in the construction sector.

21. Accede to the World Trade Organization (WTO) Agreement on Government Procurement, as Malaysia currently only has observer status.

22. Impose a mandatory requirement on companies to obtain the ISO 37001:2016 ABMS certification before bidding for government contracts.

23. When negotiating trade agreements, ensure that Malaysia's position on human rights is aligned with international human rights standards. The adverse impact of trade agreements on human rights should

also be considered. There should also be a focal ministry or agency (which could be the proposed MHRJ) to coordinate all human rights issues and considerations for the government.

24. Amend the relevant laws to meet international human rights standards, and for the domestic application and implementation of a high-quality human rights framework. Special support should be given to Malaysian companies impacted by the changes to the legal landscape to assist and promote an inclusive trading environment that respects human rights consistent with international standards.

25. Commit to implementing the 15 per cent global minimum tax as recommended under Pillar 2 of the OECD Two-Pillar Solution.

26. Improve tax governance within the private sector by promoting private sector participation in initiatives such as the Tax Corporate Governance Framework (TCGF) by IRBM and PLCT by Bursa Malaysia.

Government response

JULY 2023 - JUNE 2024

In line with the announcement of the 2024 Budget, the government is expected to implement the Global Minimum Tax (GMT) from 2025 to multinational companies that have an annual global income of at least EUR750 million.

The government is also carrying out a tax incentive restructuring study on the Income Tax Act 1967 and the Investment Promotion Act 1986. The study is being carried out by MOF with support from MITI, MIDA and IRBM to ensure that the standardisation of incentives through a revenue-based approach can be implemented effectively. This approach also considers the GMT factor.

27. Include human rights in the government's annual budget as a subject matter that should be funded in order to mainstream human rights in society including in business.

28. Use tax as a behaviour-changing instrument to encourage ethical corporate behaviour and respect for human rights in the business sector. Measures to promote and protect human rights should be rewarded by tax incentives. Human rights should be included as one of the categories for NGOs or foundations to be granted tax exemption.

On diversity, equity and inclusion (DEI)

29. Incorporate a gender lens when developing the NAPBHR and introduce gender-responsive budgeting among government agencies and companies.

30. Impose a mandatory requirement on public listed companies to meet the 30 per cent target of women participation both at the boardroom and workforce level within a fixed period. To counter tokenism, limit the number of times one woman director can sit on boards. Regulators such as Bursa Malaysia and SC should, through their rules and regulations, implement these targets and enhance their reporting requirements. This can be done in a phased approach. Affirmative action for employment, and related targets should also be considered for underserved and underrepresented groups, such as minorities, PWDs and IPs.

31. Impose on companies mandatory DEI assessments with a human rights lens to prevent and mitigate against discrimination based on the prohibited categories under international human rights standards. Regulators such as Bursa Malaysia and SC should, through their rules and regulations, implement the same in a phased approach.

32. Strengthen the Anti-Sexual Harassment Act 2022 to improve its operationalisation such as by making it mandatory for companies to initiate HRDD measures that support the prevention of any form of harassment and further, to impose civil and criminal accountability on employers.

Government response

JULY 2023 - JUNE 2024

Practice 5.9 of the MCCG recommends that the board comprises at least 30 per cent women directors. Guidance 5.9 elaborates that if the composition of women on a board is less than 30 per cent, the board should disclose the action it has or will be taking to achieve 30 per cent or more, and the timeframe to achieve this. A reasonable timeframe is three years or less.

While the MCCG is not mandatory, disclosure of its application is mandated under the Listing Requirements. In this regard, a listed issuer must disclose the application of Practice 5.9 in its Corporate Governance report issued together with the annual report. If a PLC departs from the Practice, it must explain such departure and disclose the alternative practice adopted and how such alternative practice achieves the intended outcome under the MCCG. Bursa Malaysia and the SC will be able to monitor the practice and the progress of the same through the company's report.

Regarding the limitation on directorship, paragraph 15.06 of the Listing Requirements stipulates that a director must not hold more than five directorships in listed issuers. For transparency, the Listing Requirements also prescribe that a PLC must disclose in the annual report the directorships of its directors in public companies and other listed issuers.

Further, section 196 of the CA provides for a minimum number of directors in a private or public company. This section imposes only a minimum number of directors and does not deal with administrative or operational matters. The objective of having a lower number of directors is to facilitate and promote the ease of doing business in Malaysia.

Presently, the Listing Requirements do not prescribe DEI assessments. Going forward, Bursa Malaysia may assess and consider the appropriateness of such recommendations. Any new policies or requirements to be introduced will be subject to consultation with other regulators such as the SC as well as the public.

On the enforcement of business-related human rights standards in governance

33. Provide for a clear, legal definition of "human rights" that can be enforced in the courts. An amendment to the Federal Constitution to include human rights is favoured. Alternatively, the proposed Human Rights Act or BHR Act may include this definition, as well as set out a cohesive human rights standard that companies are to follow and comply with. Existing regulatory guidelines on human rights which are voluntary should also be made mandatory through the new law to instil a culture of HRDD in business.

34. Review and identify governance-related federal laws and regulations that state enforcement agencies face difficulties in enforcing and determine the gaps and bottlenecks in their implementation.

35. Conduct a review at both the federal and state levels to identify the related BHR requirements of each state and determine how to ensure that businesses comply with human rights standards.

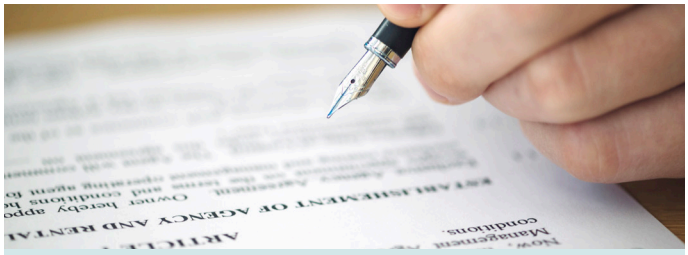
36. Improve the coordination between ministries, federal and state agencies, and federal and state governments, to resolve overlapping jurisdictions and weak enforcement of governance-related laws. Implement capacity building measures for state-level government agencies to improve their enforcement activities. The proposed MHRJ should take the lead in mainstreaming the enforcement of business-related human rights throughout all government ministries, departments, and agencies.

37. Include human rights impacts as a criterion for banks

and financial institutions to consider when deciding to fund a project or development initiative, and impose penalties for the failure to identify and assess adverse human rights impacts, or if the said project or development is known to cause or contribute to human rights abuses.

38. Establish a governmental monitoring and evaluation mechanism to track the implementation by businesses of the relevant human rights laws and rules imposed on them, and the effectiveness of the same. This should be included as part of the proposed MHRJ's mandate.

39. Amend sections 213 and 214 of the CA to include, as part of a director's duty to exercise reasonable care, skill and diligence, the duty to consider the impact of the business' operations on human rights and the need to act in compliance with human rights standards. Non-compliance can result in civil and criminal liability and punishment subject to a due diligence defence.



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Section 220 presently recognises duties and responsibilities of directors of a company under other written laws. In view of this, separate legislation must be enacted to address issues relating to human rights, which includes the adverse impact of business operations on rights. Such a proposal would also involve jurisdictional issues, particularly related to investigative matters.

A proposal for a ministry that looks specifically into human rights and justice matters, if feasible and sensible, must come hand in hand with a specific law that governs this work. This includes the role of businesses in human rights protection, such as the duties that ought to be imposed on directors.

Pillar 2: Corporate responsibility to respect human rights

To promote corporate responsibility and respect for human rights, it is recommended that the NAPBHR include the following actions for businesses to adopt:

1. Publicly commit to respecting human rights by adopting human rights policies, and act to identify salient human rights issues, implement HRDD, and prevent, mitigate and cease adverse impacts on human rights, even if Malaysian law does not yet require it. Further, align policies, standard operating procedures, and practices with international standards on human rights.

2. Conduct regular, transparent, and genuine HRDD assessments on own operations and supply chains to ensure that they do not cause, or contribute to, negative impacts on human rights. Governance-related matters such as anti-bribery and anti-corruption, access to information, and personal data privacy and security, procurement, investment and tax, and DEI are relevant areas to be covered.

3. Support under-resourced companies and SMEs (including those in the company's value chain) by providing training, capacity building, and funding for them to comply with international human rights standards and good practices in governance-related human rights matters.

4. Where there are existing ESG sustainability measures in place, they should be augmented by the human rights practices mentioned above. Where there are no ESG measures, they should be introduced and operationalised immediately.

5. Allocate an adequate budget for a specialised team to carry out sustainability and human rights compliance, and commit to an annual plan for continuous improvement of standards.

6. Whether it is mandatory or discretionary, report on the company's efforts to ensure corporate responsibility for human rights, including the implementation of HRDD, and steps taken to identify and prevent, mitigate and cease adverse impacts on

human rights. The UNGPs Reporting Framework (Shift and Mazars LLP, 2015) as well as the World Benchmarking Alliance's Corporate Human Rights Benchmark could be used as guidance.

7. Include as part of the company's code of ethics and conduct, the duty of directors to assess and consider human rights concerns when making decisions on the business operations of the organisation, at every stage. Disclose in the annual reports how the duty has been operationalised and fulfilled, and if not, reasons for this.

8. Where industry or sectoral standards on governance-related human rights issues are unclear, work towards establishing good practice standards in cooperation with trade associations and business chambers of commerce. Where such standards are available and being promoted through well-accepted certification programmes run by respected bodies, organisations should incorporate the standards within their organisational framework and obtain the relevant certificates.

9. Investors, development banks and lending institutions should demand that companies or project proponents conduct HRDD and risk assessments before they invest in, or provide financing to, these enterprises. Certain types of high-risk activities should be avoided altogether.

10. Institutionalise anti-bribery and anti-corruption policies and practices, including but not limited to, obtaining the ISO 37001:2016 ABMS certification.

11. Support the efforts and initiatives by the government and regulators to elevate the standards of doing business in Malaysia, specifically to ensure that the operations of Malaysian companies are free from adverse impacts on human rights.

12. Set targets and increase training among the board of directors, management, and employees of the company on the responsibility to respect human rights and support awareness-raising programmes for consumers, contractors, suppliers, and communities.

Pillar 3: Access to remedy

To improve access to justice, enhance grievance mechanisms and provide for effective remediation measures, we make the following recommendations for the State and businesses (as applicable) that should be included in the NAPBHR:

1. Study the weaknesses of State and non-State grievance mechanisms, and the invisible barriers to access to justice (including lack of information, legal representation, and long processing times), with a view to improving the same. For example, the scope of legal aid for business-related human rights cases should be expanded to cover non-Malaysians and undocumented migrant workers and refugees. Impecunious litigants should not be required to bear court costs to commence a case or be ordered to pay costs to the winning party if he or she loses the case.

2. In respect of vulnerable groups such as IPs who live in remote and rural interiors, affirmative action should be taken to have mobile courts as a temporary solution to handle their legal disputes. In the long term, the State must establish a grievance handling mechanism specifically to help vulnerable communities seek effective remedies.

3. For litigation over the use and ownership of native ancestral lands, reverse the legal burden of proof from IPs to the State and businesses. A presumption should be accorded in favour of the indigenous once they are able to provide primary evidence of long use and occupation. The burden then shifts to the party intending to displace the indigenous communities to rebut the presumption.

4. Establish a government-funded Public Defender (PD) office with a mandate to provide legal representation to those who cannot afford it, particularly in cases involving human rights abuses committed by companies. The office should be staffed with lawyers specialising in human rights and corporate accountability, and experienced in representing survivors and victims of human rights abuses.

The PD can offer a range of legal services, including legal advice, representation in court, and support in negotiations with companies. It can also provide training to help affected communities understand their legal rights and navigate the legal system. To ensure the effectiveness of the office, it should be adequately funded and will need to be independent of the government and free from political interference. The PD should be on par with the Attorney General of Malaysia (who currently also acts as the Public Prosecutor), and therefore a constitutional amendment is required to establish the position.

5. Enhance the powers of SUHAKAM on BHR. The Commission should be given binding adjudicative and mediation powers for business-related human rights cases including to award damages and compensation, and order other remedial action such as to make a public apology. Further, section 4(4) of the SUHAKAM Act should be amended to become the "domestic transformative" provision that applies the UDHR and other ratified treaties as part of Malaysian law which can be invoked by litigants in human rights cases.

6. Amend the WBA to, among others:

    a. Establish an independent Whistleblower Enforcement Commission to handle whistleblower reports and all matters related to whistleblowing. The proposed Commission reports to Parliament.

    b. Expand the reporting channels and protections for whistleblowers by removing the current limitations for whistleblowing immunity. Once it is shown that the disclosure is a matter of public interest and the information is credible, protection should be granted.

    c. Make it mandatory for companies to publicly commit to a whistleblowing policy, establish a whistleblowing protection mechanism and publish annual reports on its use and effectiveness.

7. Expedite the establishment of a national Public Ombudsman that is independent and reports to Parliament. The office should be empowered to receive complaints, investigate, hold public inquiries, adjudicate, mediate, and make binding awards on matters including BHR infringements.

8. Introduce mediation and reconciliation as forms of alternative dispute resolution mechanisms for business-related human rights cases that are effective, faster, affordable, and more accessible for survivors and victims of human rights violations.

9. Impose a mandatory requirement on companies to establish an accessible, transparent, and responsive operational grievance mechanism for employees, suppliers, and rightsholders to report on the human rights violations they have suffered and protect complainants from retaliation. The mechanism should also include ways to obtain effective remedies.

10. Impose a mandatory requirement on companies to establish an accessible, transparent, and responsive external grievance mechanism for consumers, rightsholders, CSOs and HRDs to report business-related human rights abuses and seek effective remedies.

11. On SLAPP cases in Malaysia:

    a. Study the use of SLAPPs by the State and businesses, and identify the patterns and technicalities adopted by plaintiffs using the courts and law enforcement authorities to impede access to justice for survivors and victims of human rights abuses.

    b. Given that power asymmetry is often at the root of SLAPP abuses, and efforts to address this issue must be to ensure that justice is accessible to all individuals regardless of their social or economic status, enact anti-SLAPP legislation to limit the use of SLAPP and enhance the range of defences available for defendants. At the same time, court rules, procedure and evidence, and grievance mechanisms must be modified and geared towards balancing the power relations by eliminating commonly used tactics to unnecessarily prolong or frustrate public participation and public interest litigation for human rights.

c. Impose mandatory requirements for companies to establish grievance mechanisms and encourage more forms of non-State grievance mechanisms that may be hosted by independent civil society groups, certification bodies, trade associations, and business industries or sectors. These mechanisms should provide for effective and binding remedies, including compensation and other measures.

d. Operationalise and implement, through law and policies, the rights and responsibilities mentioned in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998, and UNHRC Resolution 22/6 adopted in 2013, on the protection of HRDs. This should include the provision of legal services and support to survivors and victims of business-related human rights abuses and HRDs in SLAPP cases.

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In general, the courts implement judicial administration according to the powers provided by law. Courts also preserve judicial independence in interpreting laws passed by the Legislature.

Currently, Malaysia does not have a specific law or act in relation to SLAPP cases. However, SLAPP can be seen through cases related to defamation.

Any consideration regarding a SLAPP application is a judicial discretion that should be exercised freely based on the factors and circumstances of the case. Therefore, there is no party or guideline that can be held to give such instructions to the court.

The power to make legislation rests with the legislative body. In this matter, Article 121 of the Federal Constitution has empowered the civil court to hear cases under its jurisdiction as provided under the Constitution and any other written law.

Article 4 of the Constitution also clearly provides that the Federal Constitution is the supreme law in this country and any law that is contrary to it will be null and void to the extent of the conflict. However, the court's role is to balance fundamental rights by guaranteeing that fundamental rights do not conflict with the provisions of existing written law.

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CHAPTER 2

LABOUR

This chapter sets out Malaysia's obligations under international and domestic law on the right to work while assessing the labour priority areas and making recommendations for the NAPBHR. The labour priority areas identified are as follows:

- **Forced labour, child labour and other forms of labour exploitation**
- **Social protection**
- **Right of association and collective bargaining**
- **Grievance mechanisms and remedies**

Dr. Andika Ab. Wahab led the study in the area of labour and wrote this chapter in consultation with Edmund Bon Tai Soon who also edited and provided inputs on the same.

Of the three thematic areas of focus for the NBA, labour rights violations are the most widely reported. Articles and reports by human rights actors bring attention to the myriad of issues related specifically to worker rights and employment. Terms like "forced labour" or "modern slavery" are often used. Malaysia has long had a judicial system that promotes the protection of workers' rights by mediation and adjudication through the labour courts, industrial tribunals and civil judicial review processes. In fact, slavery and forced labour are expressly prohibited by the Malaysian Federal Constitution. Yet, the problems of forced and child labour continue to exist, requiring proactive and agile policies to meet these complexities.

There is a need to look into strengthening policy, enforcement and the capacity of labour inspectors in addressing the issue of forced labour and child labour comprehensively. Labour rights groups and trade unions assert that even with their years of advocacy, businesses continue to have major influence over policymaking. Malaysia has good employment laws, even if they are presently inadequate to meet international human rights standards. Therefore, the selection of labour as a focus area for the NAPBHR signals that the government is serious in combatting the challenges highlighted here.

At the outset, the question of whether or not labour is a human rights issue should be clarified. The right to work under Article 6 of the ICESCR is multi-faceted, encompassing other derivative rights under Articles 7 and 8, specifically:

- right to enjoy favourable and just conditions of work;
- right to fair wages and equal remuneration for work of equal value without discrimination;
- right to a decent living;
- right to safe and healthy working conditions;
- right to equal opportunity for everyone to be promoted in employment;
- right to rest and leisure;
- right to form and join trade unions, and participate in them;
- right to strike; and
- right to social security including social insurance.

These fundamental rights have been translated and operationalised through specialised organisations working on labour such as the ILO. ILO standards define these human rights in greater detail. Once this link is understood, it becomes clearer why labour rights abuses are also human rights abuses.

This chapter proceeds as follows:

I. Labour rights, standards and laws

Malaysia's international human rights and labour rights obligations

Malaysia currently subscribes to three human rights instruments, namely: (i) CRC, acceded to in 1995; (ii) CEDAW, acceded to in 1995; and (iii) CRPD, ratified in 2010.

This means Malaysia has obligations under international law to respect, protect, and fulfil human rights standards, particularly towards women, children and PWDs. Malaysia has also ratified seven of 10 ILO Fundamental Conventions:

ILO Fundamental Conventions	Status
C029 - Forced Labour Convention 1930 (No. 29)	In force (1957)
C087 - Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)	Not ratified
C098 - Right to Organise and Collective Bargaining Convention 1949 (No. 98)	In force (1961)
C100 - Equal Remuneration Convention 1951 (No. 100)	In force (1997)
C105 - Abolition of Forced Labour Convention 1957 (No. 105)	Not in force (denounced in 1990)
C111 - Discrimination (Employment and Occupation) Convention 1958 (No. 111)	Not ratified
C138 - Minimum Age Convention 1973 (No. 138)	In force (1997)
C155 - Occupational Safety and Health Convention 1981 (No. 155)	The Convention will enter into force for Malaysia on 11 Jun 2025
C182 - Worst Forms of Child Labour Convention 1999 (No. 182)	In force (2000)
C187 - Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187)	In force (2012)

Government response

JULY 2023 - JUNE 2024

The 110th session of the International Labour Conference (ILC) in June 2022 adopted the fifth element of the ILO Declaration on Fundamental Principles and Rights at Work 1998, which concerns “a safe and healthy working environment”.

In addition to the existing eight core conventions, two conventions on Occupational Safety and Health, namely, the Occupational Safety and Health Convention 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187), have been added to the core conventions thereby totalling 10 (as above).

Of the four Governance (Priority) ILO conventions, Malaysia has ratified two:

Governance (Priority) ILO Conventions	Status
C081 - Labour Inspection Convention 1947 (No. 81)	In force (1963)
C122 - Employment Policy Convention 1964 (No. 122)	Not ratified
C129 - Labour Inspection (Agriculture) Convention 1969 (No. 129)	Not ratified
C144 - Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144)	In force (2002)

Six of 177 (three instruments have been abrogated) ILO Technical conventions are also in force as follows:

- C088 - Employment Service Convention 1948 (No. 88)
- C095 - Protection of Wages Convention 1949 (No. 95)
- C119 - Guarding of Machinery Convention 1963 (No. 119)
- C123 - Minimum Age (Underground Work) Convention 1965 (No. 123)
- C131 - Minimum Wage Fixing Convention 1970 (No. 131)
- MLC, 2006 - Maritime Labour Convention 2006 (MLC, 2006)

Further, in March 2022, the Malaysian government ratified Protocol of 2014 to the Forced Labour Convention 1930. This ratification came into force on 21 March 2023, a year after the registration of ratification. It strengthens Malaysia's commitment to combat forced labour as it requires a guarantee of the equal treatment of workers, including matters of compensation for migrant workers in the informal sector.

Thus, Malaysia must ensure that these international labour standards are applied locally in the country.

Malaysia's national laws and regulations

The Federal Constitution provides certain fundamental liberties relevant to labour rights. They include the right to life, equality before the law, freedom of movement, freedom of expression, assembly and association, and the prohibition of slavery and forced labour. The right to work is however not expressly provided for.

Malaysia also has laws and regulations that govern the recruitment, treatment, and rights of workers, as follows:

- Penal Code (e.g. section 374 states that any act to unlawfully compel any person to labour against the will is a criminal offence)
- Contracts Act 1950
- Employment Act 1955
- Trade Unions Act 1959
- Immigration Act 1959/63
- Passports Act 1966
- Industrial Relations Act 1967
- Employment (Restriction) Act 1968
- Employees' Social Security Act 1969
- Private Employment Agencies Act 1981
- Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990
- Occupational Safety and Health Act 1994
- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
- National Wages Consultative Council Act 2011
- Labour Ordinance (Sabah Cap. 67)
- Labour Ordinance (Sarawak Cap. 76)

Over the past few years, the government intensified efforts to promote and protect labour rights. Some of the initiatives include the following:

(a) In March 2021, MOHA launched its third NAP on Trafficking in Persons 2021-2025 (Malay Mail, 2021). The National Action Plan on Forced Labour (NAPFL) was adopted on 26 November 2021. The plan was expected to increase public awareness and strengthen enforcement, remediation, and support services (MOHR, 2021).

(b) Several laws were revised to strengthen workers' rights and well-being. They included the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990 in 2020 and the EA in March 2022. Separately in March 2022, forced labour was expressly prohibited with the insertion of section 90B in the EA. Human rights advocates welcomed the effort but also criticised the definition and scope of forced labour as being distinctly narrow (Lee & Pereira, 2023).

(c) The minimum wage was increased from RM1,200 to RM1,500 effective from 1 May 2022 nationwide (including Sabah and Sarawak) (MOHR, 2022). This was gazetted under the Minimum Wage Order 2022. However, employers with less than five workers were exempted until 31 December 2022. The exemption was further extended until 1 July 2023.

(d) In May 2022, the government announced its commitment to strengthen the protection and well-being of approximately four million workers in the gig economy, including the

possibility of having specific legislation (Lee, 2022).

(e) On 5 October 2022, the government approved the Trade Unions (Amendment) Bill 2022. The amendment was made to comply with ILO's standards on freedom of association and protection of the right to organise and unionise (The Edge Markets, 2022).

Government response

JULY 2023 - JUNE 2024

The Trade Unions Act 1959 was recently amended by the Trade Unions (Amendment) Act 2024 which was gazetted on 12 January 2024.

The Employment Act 1955, Labour Ordinance (Sabah Cap. 67) and Labour Ordinance (Sarawak Cap. 76)

In Peninsular Malaysia, labour rights are governed by the EA, while in Sabah, they are regulated by the Labour Ordinance (Sabah Cap. 67) and in Sarawak, by the Labour Ordinance (Sarawak Cap. 76).

While the EA has been revised several times, the latest amendment being in 2022, the ordinances in Sabah and Sarawak have not been revised in nearly two decades. Urgent revisions are necessary.

The 2022 amendment to the EA was to strengthen worker protection and welfare, aligning with international labour standards. They included the following:

(a) increase in maternity leave from 60 to 98 days;

(b) inclusion of seven days paternity leave where there was no such benefit previously;

(c) reduction of regular working hours from 48 to 45 hours a week;

(d) application of flexible working arrangements, with employers being required to provide a written rationale for rejecting an application for such arrangements;

(e) requirement for employers to display a notice to raise awareness on sexual harassment at the workplace; and

(f) the prohibition of forced labour where employers are liable to a fine not exceeding RM100,000 or imprisonment not exceeding two years, or both.

Civil society, however, has raised concerns that while the latest EA amendments have filled some gaps, these improvements were yet to be reflected in Sabah and Sarawak's labour laws.

Both ordinances continue to maintain 60 days maternity leave; no paternity leave; 48 regular working hours a week; and the absence of protection from sexual harassment. MOHR is expected to present a bill to amend Sabah's ordinance to Parliament mid-2023 (Lai, 2023). A Sabah Labour Advisory Council (SLAC) is also expected to be set up to look into the bill's implementation.

In terms of coverage, the Sabah and Sarawak labour ordinances apply to those earning below RM2,500 a month, whereas the revised EA – which is applicable in Peninsular Malaysia – now covers all employees irrespective of wages, except for some areas (e.g. on overtime rates), where a salary threshold of RM4,000 applies. However, the Malaysian government is in the midst of amending these ordinances to harmonise with the provisions provided for under the EA.

In addition, section 60K(4) of the revised EA requires employers in Peninsular Malaysia to obtain the Department of Labour's (Jabatan Tenaga Kerja [JTK]) approval before hiring migrant workers. This amendment enables the department to conduct an initial screening of employers to ensure that they have clean records and comply with labour standards (Nor Ain Mohamed Radhi, 2022).

Government response

JULY 2023 - JUNE 2024

The proposed establishment of SLAC has been mooted with the objective to obtain views from industry players in Sabah regarding any proposed improvements to the state's labour law.

Materiality map

Feedback received during the stakeholder consultations and a review of secondary sources, including academic articles and grey literature, surfaced numerous labour issues affecting the business sector. Many of these are already widely known. They include, but are not limited to, forced labour, unethical recruitment practices and child labour (Andika Wahab, 2022; Lee & Pereira, 2023). During the COVID-19 pandemic, issues that compounded the negative impact on migrant workers included unpaid wages, unfair dismissals, and being forced to live in cramped and squalid conditions (ILO, 2020; Andika Wahab, 2020). During this period, high infection rates were found amount migrant workers.

These problems involve a wide range of human rights violations, with some having direct, adverse impacts on workers' rights. These issues have been prioritised in a materiality map that examines two domains, namely: (i) the level of risk (i.e. low or high risk), and (ii) the severity of impact (i.e. low or high severity of impact).

Based on the map, four labour priority areas have been identified:

(a) forced labour, child labour and other forms of labour exploitation;

(b) social protection:

(c) right of association and collective bargaining; and

(d) grievance mechanisms and remedies.

These four priority areas are aligned with the ILO's decent work agenda (ILO, n.d.-a). The figure below illustrates the four priority areas according to their levels of risk and severity of impact.

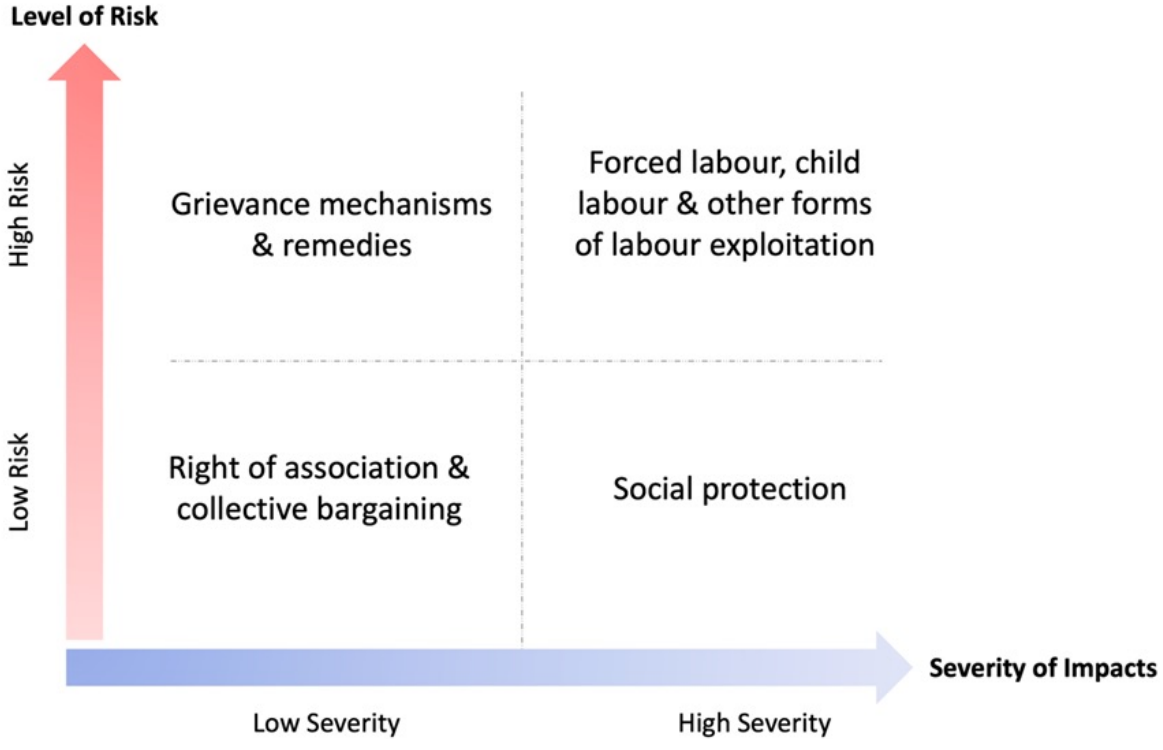

Figure 11: Materiality map of labour priority areas. Source: Andika Ab. Wahab.

II. Labour priority areas: Assessment and findings

In 2023, 16 million individuals were recorded as employed persons in Malaysia, working mostly in sectors such as services (e.g. wholesale and retail trade, and food and beverage), manufacturing, plantation, construction, mining and quarrying, and the agriculture sector (DOSM, 2023). Some sectors such as manufacturing, plantation and construction rely significantly on manual labour, performed largely by the migrant workforce.

Scholars estimate as few as two and up to 5.5 million migrant workers work temporarily in such sectors (Lee & Khor, 2018; Andika Wahab & Mashitah Hamidi, 2022). They constitute around 20 per cent of the country's total labour force (UN Malaysia, 2019, cited in ILO, n.d.-b).

Government response

JULY 2023 - JUNE 2024

Among the conditions set in the Manufacturer's Licence issued by MITI in 2016 is full-time employment of which at least 80 per cent constitutes Malaysians (80:20).

However, as manufacturing companies still face challenges in obtaining a local workers, the government has decided that compliance with this requirement in the Manufacturer's Licence will be postponed until 31 December 2024. The implementation of this condition will be able to reduce the hiring of migrant manual or trade workers in the manufacturing sector.

In addition, support in the form of incentives and grants to adapt to automation in production and digitalise operations is also provided to reduce the dependence on a migrant workforce.

This chapter refers to two broad groups of migrant workers, as follows:

(a) Regular or documented migrant workers (those who lawfully enter Malaysia and possess a Visit Pass for Temporary Employment or VPTE). These workers are only allowed to work in sectors such as manufacturing, plantation, agriculture, construction, mining and quarrying sectors, and in selected sub-services (e.g. food and beverage).

(b) Irregular or undocumented migrant workers (those without valid passports and/or VPTEs, including overstayers who fail to leave the country after the expiry or cancellation of their VPTEs and non-citizens not authorised to work, such as refugees and asylum-seekers).

Government response

JULY 2023 - JUNE 2024

The entry and presence of foreign nationals in Malaysia are subject to the policies, regulations and laws in force. In this regard, it is stipulated that all migrant workers employed in Malaysia must possess a valid VPTE in accordance with regulation 11 of the Immigration Regulations 1963.

MOHA, through the Department of Immigration [Jabatan Imigresen Malaysia (JIM)], is committed to ensuring the efficient and effective management of migrant workers to safeguard national sovereignty and security.

Foreign nationals who violate immigration laws under the Immigration Act 1959/63, Passports Act 1966, and Immigration Regulations 1963 are considered unauthorised foreign immigrants.

Malaysia is not a state party to the 1951 Refugee Convention or the 1967 Protocol relating to the Status of Refugees. Malaysia also does not have specific provisions or definitions relating to refugees, including under the Immigration Act. However, based on humanitarian grounds, the government allows unauthorised foreign immigrants holding UN High Commissioner for Refugees (UNHCR) cards to reside temporarily in the country on a case-by-case basis.

The government's approach differs for regular and irregular workers. To ensure the rights of working unauthorised foreign immigrants are protected, the government periodically introduces regularisation programmes. Failure to register working unauthorised foreign immigrants may result in enforcement actions, in line with the objective of safeguarding national sovereignty and security.

Therefore, for the purpose of this report, its findings should not be applied to those with this status given that the rights and protection of workers are enforced under the EA. Moreover, the government does not deny this group's human right to access justice.

Priority area 1: Forced labour, child labour and other forms of labour exploitation

A. Forced labour practices remain prevalent

The ILO's 11 indicators of forced labour were used to measure compliance by businesses. These include, among others:

- Abuse of the vulnerability of migrant workers (e.g. taking advantage of the irregular employment status of migrant workers).
- Restriction of movement, including retaining workers' identity documents.
- Isolation (i.e. workers placed in remote locations and denied contact with the outside world).
- Withholding of wages (i.e. where workers are obliged to remain with an abusive employer while waiting for wages owed to them).
- Use of deception (particularly during the recruitment stage).
- Debt bondage (i.e. due to excessive recruitment costs).
- Excessive working hours and overtime.
- Use of threats and intimidation.
- Use of physical and sexual violence.
- Abusive work and living conditions.
- Excessive overtime.

We found the following:

Retention of migrant workers' identity documents

There are employers in the manufacturing, plantation, and construction industries who continue to retain migrant workers' identity documents, including passports and immigration-issued cards (locally termed as i-KAD), purportedly for safekeeping. Some employers, however, retain such documents to prevent workers from absconding.

Restriction of movement

Some employers have ceased the practice of retaining migrant workers' passports by providing them with facilities to keep their documents and personal belongings. Yet, stakeholders shared that some employers have adopted other measures to restrict their movement instead, such as:

- Introducing rigid procedures that limit free movement, such as requirements to fill "outing" forms and obtain management approval to leave the premises, including during off-days. Such procedures are necessary to ensure the workers' security when they travel outside their accommodation or locality, as well as for logistical arrangements, especially for those in remote workplaces. However, they should not infringe on the workers' freedom of movement.

- Workers are required to deposit a sum of money with their employer before taking long holidays in order to guarantee their return.

- Migrant domestic workers are required to work long hours and have insufficient rest time. They are also restricted from moving freely due to the live-in nature of their work and the long working hours. It is also common practice for employers to keep these workers' passports to prevent them from absconding.

Withholding of wages

There are cases where workers' wages are with held, including the delayed payment of wages, which may not directly imply forced labour. However, when wages are delayed or deliberately withheld as a means to compel workers to stay, or prevent them from absconding, or changing employment, this potentially indicates forced labour.

Excessive working hours

Employers in sectors such as manufacturing, construction and services normalise the requirement for workers to work longer than 12 hours a day for a continuous seven-day period, without any rest day in between. Such requirements were necessary during the pandemic, particularly in the rubber glove manufacturing industry, for companies to meet the sudden surge in product demand (Peter, 2021).

Government response

JULY 2023 - APRIL 2024

Under MOHR, several legislative and policy frameworks are already in place to deal with the retention of documents and restriction of movement:

(a) Section 90B of the EA stipulates that any employer who prevents their employees from proceeding beyond the place of work commits an offence and shall, on conviction, be liable to a fine not exceeding RM100,000 or imprisonment for a term not exceeding two years or both.

(b) Employees' Minimum Standards of Housing, Accommodations and Amenities (Accommodation and Centralized Accommodation) Regulations 2020 stipulate that any employer or centralised accommodation provider shall provide accommodation or centralised accommodation with a locked cupboard for the safe custody of the employees' valuables, including their passport, which is accessible to employees at any time.

(c) Memorandums of Understanding (MoUs) with countries of origin also contain a clause on the safekeeping of an employee's passport in the contract of employment.

In the domestic services sector, employers do not have a standard to govern working hours. Domestic abuse and exploitation cases highlighted in Case Study 5 show that migrant domestic workers typically work more than 12 hours a day, without a rest day in a week (Free Malaysia Today, 2022a).

Unfair use of disciplinary measures

Employers use disciplinary measures, including imposing monetary and physical punishment (e.g. workers asked to perform push-ups and squats for arriving late to their morning call), to enforce work rules and achieve productivity targets. Some employers threaten to cut or withhold workers' salaries if they fail to adhere to work rules.

Government response

JULY 2023 - JUNE 2024

The Sabah Labour Ordinance covers the following in an effort to address forced and child labour:

(a) Wages must be paid within seven days of the employment period, as stipulated in section 108(1).

(b) Employees are not allowed to work more than 12 hours a day, as stipulated in section 104(11).

(c) Salary deductions cannot be made if it is contrary to the provisions of sections 113(1) and 115.

(d) Employers can take enforcement action as stipulated in section 130J.

(e) Chapter XI provides for special provisions relating to the employment of children and young persons.

Further, actions can be taken based on the provisions of ATIPSOM.

Case Study 3

Allegations of forced labour in Malaysia's business operations

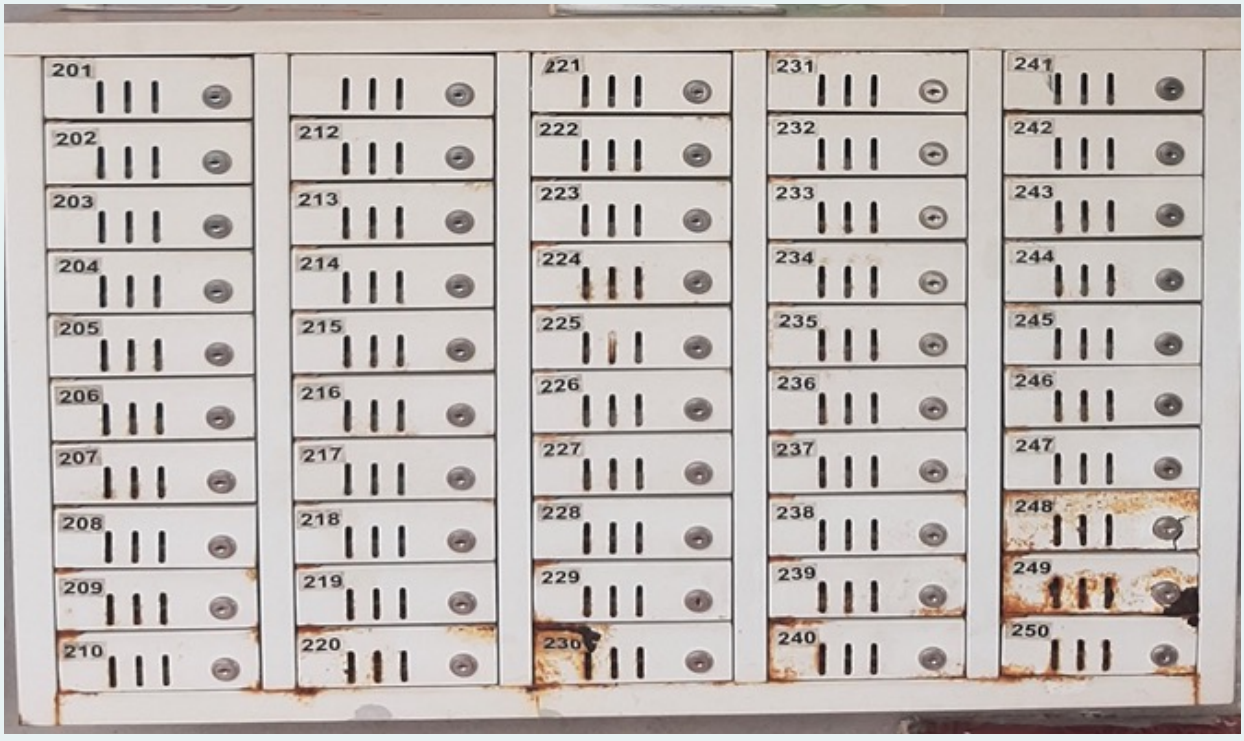

Figure 12: A set of lockers installed by a plantation company to allow migrant workers to keep their passports. Source: Andika Ab. Wahab.

In recent years, allegations of forced migrant labour in business operations have increased. Between 2020 and 2022, at least eight Malaysian companies were issued withhold release orders (WROs) by the US Customs and Border Protection (US CBP) due to forced labour allegations. The WROs directly impacted the importation of Malaysian gloves and palm oil products to the US (The Star, 2022).

In 2009, the US Bureau of International Labor Affairs listed Malaysian-made palm oil products as produced by forced labour. Subsequently, in 2014, 2018 and 2020, the Malaysian palm oil industry was included in the US' sanctions list. During these years, the sector was accused of committing both forced and child labour.

Impacts on businesses, and what is needed to address forced labour?

The WROs against Malaysian companies had far-reaching negative consequences, not only to the relevant sectors and their access to the global market, but also to Malaysia's image as a moderate nation and active member of the UN.

These allegations and sanctions demand businesses to review and strengthen their governance structures and carry out robust HRDD assessments to identify and evaluate the risks of forced labour. It requires companies to identify value chains where forced labour is likely to occur and to develop measures to prevent, mitigate and remediate instances of forced labour.

Government response

JULY 2023 - JUNE 2024

Currently, only two companies in oil palm and glove manufacturing are listed under the WROs imposed by the US CBP. Six companies have been removed from the sanctions list.

B. Opaque and exploitative recruitment practices

Recruitment costs and debt bondage

Migrant workers have to pay high recruitment costs in their home countries to secure their employment. The sum varies across the different groups of migrant workers and nationalities, and is estimated to be between 12 and 36 months' worth of salaries. The costs may include facilitation payments and/or recruitment services fees to both authorised and non-authorised intermediaries in the home countries. Migrant workers without adequate savings often resort to taking loans from various sources, including unauthorised financial entities and recruitment intermediaries. They eventually find themselves in debt bondage when they arrive in Malaysia and are compelled to repay the costs for an agreed duration with high interest rates. Some migrants resort to mortgaging or selling valuable assets and land in order to afford the costs.

Migrant workers are in no position to bargain on a level playing field to secure employment, and are in a weaker, more vulnerable position vis-à-vis the recruitment agent or employer. In Malaysia, private recruitment agencies are regulated under the Private Employment Agencies Act 1981. The need to address excessive recruitment costs and unethical recruitment practices requires a strong commitment, coupled with regulatory reforms and effective enforcement from both Malaysia and the governments of home countries.

Involvement of unregulated intermediaries

The involvement of unregulated or unlicensed intermediaries, including individual brokers, contribute to high recruitment costs. Often, workers have to make facilitation payments to enforcement authorities in countries of origin to ease their recruitment and migration to Malaysia. Some Malaysian employers are not aware of these illegal payments and unwittingly become part of a scheme that holds migrant workers in debt bondage.

The need to engage ethical private recruitment agencies

While stakeholders agreed that employers in Malaysia are not in a position to address the use of unregulated intermediaries in countries of origin, they could choose to engage only with ethical firms that have clean recruitment records. Ethical recruitment practices must be imposed by the governments of the sending countries and Malaysia, the host country. For example, the stringent requirements of the Philippines in relation to their domestic workers could be emulated. Further, there is a need for mandatory due diligence to be conducted on recruitment agencies before they are approved by both the sending and host countries. The government has yet to impose such a requirement.

Exclusion of stakeholders from bilateral agreement consultations

Years of advocacy with the Malaysian government to eliminate unethical recruitment practices with its counterparts in sending countries have not borne fruit. Companies, trade unions, and labour rights organisations are baffled as to why little positive action has been taken. NGOs and businesses alike feel that they should be included in negotiations on bilateral agreements between the government and source countries. Employers complain they are not consulted, and when things go sour, they are the first to be blamed.

Lack of national regulations or guidelines on recruitment costs

While some employers are committed to strengthening recruitment practices, including remedying the often astronomical recruitment costs borne by migrant workers, the lack of national regulations and guidelines complicate such a commitment. Without a common standard, there are various practices which create an unequal playing field among businesses. There is also no standard governmental

guidance defining "recruitment costs" and "recruitment fees" that should be paid by employers, and what is deemed fair compensation. In reality, there is no legal requirement whereby employers are to reimburse migrant workers for recruitment fees and related costs, or to bear those costs when recruiting them.

Government response

JULY 2023 - JUNE 2024

MOHR is in the midst of getting Cabinet's approval to make the substance of MOUs available to stakeholders, which also includes the cost structure agreed with the countries of origin.

C. Complex bureaucratic procedures to recruit migrant workers

There is consensus among stakeholders, including employers, workers' communities, and NGOs, that the current migrant worker recruitment process is unduly bureaucratic and complex. This causes many employers, particularly SMEs, to rely heavily on private recruitment agencies to source for a migrant workforce. Employers thus lose their bargaining position to negotiate better recruitment terms, including the costs imposed by recruitment agencies. Additionally, red tape causes employers to be left with little choice but to either fill their immediate labour shortage with undocumented or irregular workers, or cease their operations completely.

D. Contract substitution

Contract substitution commonly occurs when irresponsible employers and recruitment agencies seek to limit or eliminate workers' rights and benefits. In many cases, migrant workers found that the contracts they signed upon their arrival in Malaysia were different from the ones they had signed back home. Sometimes, the lack of communication between employers and recruitment agencies in countries of origin contribute to contract substitution.

E. Salary deductions

Some employers make unlawful deductions from their workers' salaries. This includes deductions for levies, which employers are supposed to bear, and recruitment fees and related costs, for example, for airfare and/or recruitment agency fees. Some also deduct workers' salaries without getting the approval from the Department of Labour, unlawfully covering the costs of accommodation, food, advances or loans.

Government response

JULY 2023 - JUNE 2024

The Department of Labour Sabah conducts the inspection and investigation of complaints made at employers' premises to identify any non-compliance by employers.

Further, salary deductions cannot be made if it is contrary to the provisions of sections 113(1) and 115 of the Sabah Labour Ordinance, and without permission from the Director of Labour Sabah.

F. Work and living conditions

Some migrant workers, especially those employed in critical sectors like construction and agriculture, are made to live in unsavoury and unsafe conditions, including in overcrowded quarters or sub-standard dormitories (e.g., container homes) with little to no basic sanitation and hygiene facilities. They may even be required by employers to pay for accommodation fees through monthly wage deductions, sometimes for a sum exceeding the legal limit prescribed under the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990.

G. Working without legal documents

Many migrant workers abscond from their respective employers for various reasons, and eventually end up losing their legal status in Malaysia. Some do so as a form of protest over disputes with management or unaddressed complaints. Despite losing their legal status, many stay back in Malaysia and work without the necessary legal documents, risking arrest and prosecution; demand for migrant labour is high,

and it is not difficult for them to find jobs. However, these workers remain at risk of exploitation and manipulation as they continually face the threat of being discovered, or reported to the enforcement authorities due to their status.

H. Workplace discrimination

Migrant workers face discrimination over their racial characteristics and nationalities. These workers are unfairly treated by their employers, including through exclusion from skills training opportunities and being passed on for promotions, among others. Compared to local workers, migrant workers are also commonly excluded from receiving bonuses and salary increments. The EA revised in March 2022 now protects all workers against discrimination at the workplace regardless of status or nationality.

Government response

JULY 2023 - JUNE 2024

The proposed amendments to the Sabah Labour Ordinance aim to:

(a) Harmonise the Labour Ordinance (Sabah Cap. 67) with the amendments to the provisions of the EA, Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990, and Children and Young Persons (Employment) Act 1966.

(b) Standardise labour law provisions between Peninsular Malaysia and Sabah.

(c) Ensure Sabah's industries are aligned with current economic developments, as well as in compliance with the requirements of labour conventions and other international instruments.

(d) Create equal rights for workers in Peninsular Malaysia and Sabah.

I. Children at the workplace

Children assisting parents are exposed to risks and hazards

It is not uncommon for both local and migrant children below 18 years of age to assist their families who are small growers in the oil palm plantations in Sabah. They perform simple and light activities such as collecting loose fruits and bringing food to their parents. In line with ILO Minimum Age Convention 1973 (No. 138), ratified by Malaysia in 1997, the Children and Young Persons (Employment) Act 1966 (Act 350), amended in 2019, permits "any work that is not likely to be harmful to a child's health, mental and physical capacity" for children aged 13 and above, and regulates the types of activities they may engage in.

However, in some circumstances, children may be left unaccompanied when performing such activities, and are thereby left exposed to safety risks and hazards (e.g., exposure to wild and venomous animals, chemical materials, sharp tools, and getting lost in the jungle). While local children are only expected to help their parents after school hours and during school breaks, undocumented migrant children who do not attend school are likely to help their parents far more often and for longer hours.

"Child" as defined by Act 350 means any person under the age of 15 years, while "young person" means any person who has attained the age of 15 years and is under the age of 18 years.

Government response

JULY 2023 - JUNE 2024

The draft amendments to the Sabah Labour Ordinance are aligned with the provisions under Act 350, which was amended in 2019.

Among the amendments proposed are as follows:

(a) Defining "hazardous work" following section 2 of Act 350.

(b) Listing "hazardous work" as including:
- (i) work related to machines, installations and other equipment;
- (ii) work conducted in hazardous environments;
- (iii) work of a certain hazardous nature and hazardous conditions; and
- (iv) work included in the categories of "physical hazard", "chemical hazard", and "biological hazard" under the Fourth Schedule of Act 350.

Children working in oil palm plantations

Existing studies assert that some migrant children may be involved in performing various types of oil palm activities on site (World Vision, 2012; Earthworm Foundation, 2019; Andika Wahab & Ramli Dollah, 2022). Their involvement may deprive children of their education, and impair their social development.

As these children may lack official documents such as birth certificates, passports and/or working passes, they are often hired as "ghost workers" – a term that refers to informal workers with no employment contracts. As ghost workers, they are excluded from any form of social protection, especially in cases of occupational-related injuries, accidents, and diseases.

Case Study 4

Children in Sabah's oil palm plantations

According to the ILO and United Nations Children's Fund (UNICEF) (2021), global estimates indicate that there are 160 million (63 million girls and 97 million boys) children in child labour. Some 70 per cent are said to be employed in agriculture, performing different types of light and hazardous activities, mostly in rural and remote farms and plantations.

More than 70 per cent of all children in child labour - 112 million children - are in agriculture.

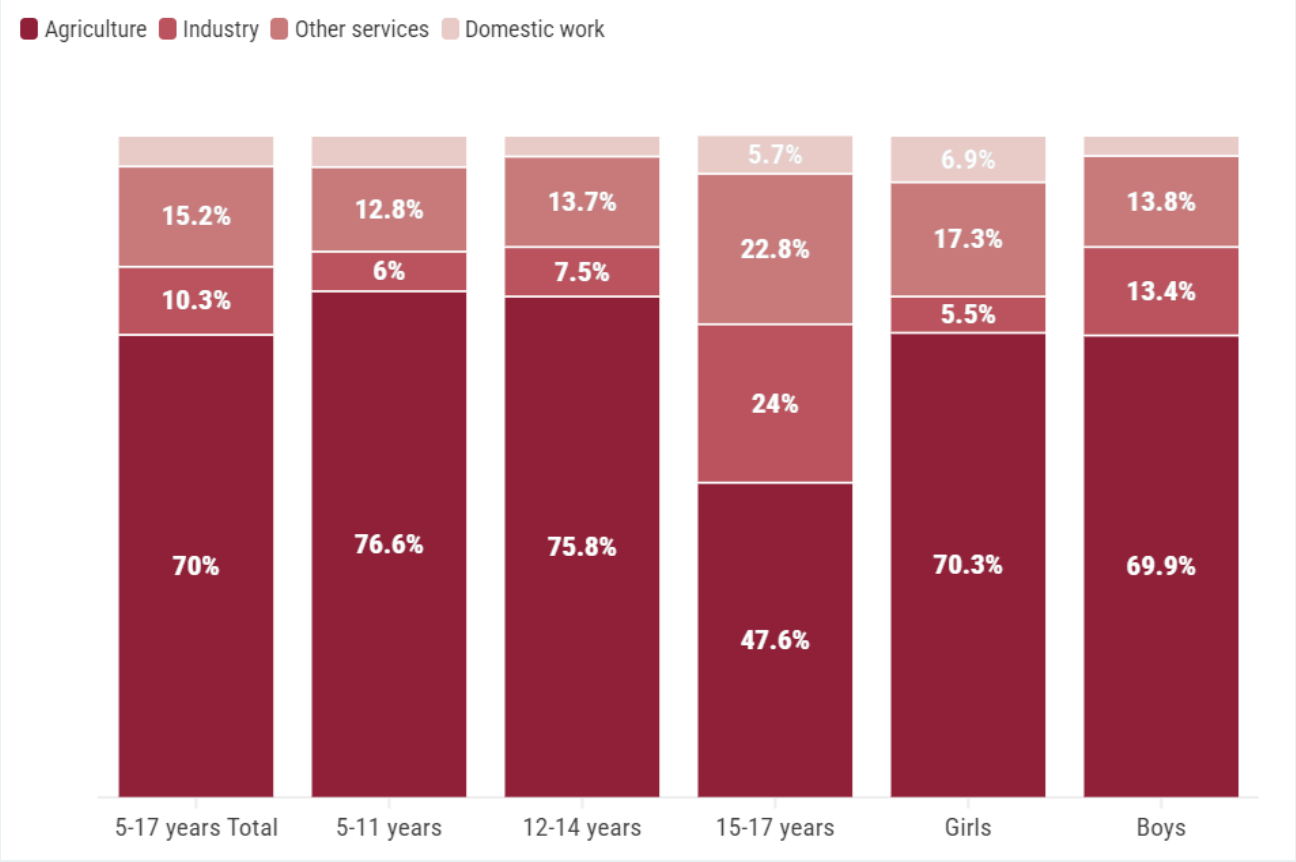

Figure 13: Global estimates 2020, trends and the road forward, ILO and UNICEF, New York (2021).

Malaysia is the world's second largest palm oil producer after Indonesia. In Malaysia, Sabah is the second largest palm oil-producing state after Sarawak. The history of migration in Sabah has resulted in tens of thousands of migrant and stateless children, some living alone and some with their families, mostly in remote areas. Unfortunately, there are no verified figures on the actual number. Current studies highlight the complex intersection between work on oil palm plantations and various social phenomena, including household poverty, lack of identity documents, and legal employment (World Vision, 2012).

Do migrant children work?

Yes, migrant children often assist their small grower parents by collecting loose fruits and helping their mothers perform light activities at oil palm nurseries (Dzurizah Ibrahim & Jalihah Md. Shah, 2014). However, studies also find that children as young as 14 can be exposed to job-related vulnerabilities (World Vision, 2012).

From open consultations held with Sabah palm oil companies, the Earthworm Foundation (2019) reported that activities performed by children and young persons include:

- Collecting loose fruits (by children and young persons).
- Filling poly bags and weeding at the nursery (by children and young persons).
- Spraying (by young persons).
- Stacking palm fronds (ages undetermined).
- Slashing (ages undetermined).

What can be done to protect children working in plantations?

Earthworm Foundation's report in 2018 included a list of recommendations to help companies and regulators prohibit and prevent child labour (Earthworm Foundation, 2018). They include:

(i) Creating standards for businesses.
(ii) Strengthening the ability of labour inspectors to monitor instances of child labour.
(iii) Raising awareness among palm oil companies and small growers to differentiate between "children assisting parents", "working children", and "child labour".
(iv) Strengthening access to education, especially among migrant children.
(v) Strengthening access to healthcare services, including psychosocial support.
(vi) Issuing identity documents to all undocumented and stateless children.
(vii) Establishing a state-level database and monitoring system to identify the actual number of vulnerable children, including migrant and stateless children in plantations.

UNICEF, together with the UN Global Compact (UNGC) and Save the Children, published a set of guidelines known as the Children's Rights and Business Principles (UNICEF et al., n.d.). The principles aim to guide the business community in their interactions with children directly or indirectly affected by their business operations.

They call on businesses to respect children's rights through their core business actions and policy commitments, due diligence and remediation measures. Specifically, the principles state that businesses are to:

- meet their responsibility to respect children's rights and commit to supporting the human rights of children;
- contribute to eliminating child labour, including in all business activities and relationships;
- provide decent work for young workers, parents and caregivers;
- ensure the protection and safety of children in all business activities and facilities;
- ensure that products and services are safe, and seek to support children's rights through them;
- use marketing and advertising that respect and support children's rights;
- respect and support children's rights concerning the environment, and land acquisition and use;
- respect and support children's rights in security arrangements;
- help protect children affected by emergencies; and
- reinforce community and government efforts to protect and fulfil children's rights.

Government response

JULY 2023 - JUNE 2024

Amendments to the Sabah Labour Ordinance which are in the pipeline include, among others, the alignment with Act 350 that was amended in 2019. The amended provisions relating to the employment of children and young persons are in line with ILO Conventions No. 138 and No. 182 that Malaysia has ratified.

Migrant children in the informal economy

Migrant children in urban and peri-urban cities across Sabah are actively involved in a range of informal economic activities and services such as selling cigarettes, beverages and plastic bags, and pottering (i.e. carrying items, luggage and groceries). These activities are typically undertaken in places like fish markets, night markets, and by the roadside.

Some stateless children, including from the Bajau Laut community, in particular in the districts of Tawau, Lahad Datu and Semporna, also beg on the streets. They risk being involved in road accidents and child trafficking. There are also migrant and stateless children in Sabah who collect waste and recyclable items in cities and landfills. Some even live in the landfills and are exposed to foul-smelling waste and dangerous gasses like ammonia and methane, both of which are hazardous to health.

J. Gaps in labour laws concerning domestic workers

Despite the many reported cases of migrant domestic worker abuse, they are still excluded from basic but essential labour protection. The EA protects domestic workers from irregular or late payment of wages, but they are excluded from other protective measures such as hours of work, rest days, annual leave, public holidays, and maternity benefits. In this regard, Malaysia's legal position does not fully comply with international labour rights standards such as those in the ILO Equal Remuneration Convention 1951 (No. 100), which, among others, guarantees the provision of equal remuneration for men and women workers for work of equal value.

Case Study 5

Exploitation and abuse of migrant domestic workers

Figure 14: Migrant domestic workers. Source: Keertan Ayamany (2021).

As of January 2022, there are 1,157,481 migrant workers registered in Malaysia and 86,084 of them are domestic workers. The majority of domestic workers are from Indonesia (59,605), followed by the Philippines (22,803), Vietnam (1,031), Cambodia (976) and others (1,669) (Aufa Mardhiah, 2022). Other migrant domestic workers are from Thailand, Sri Lanka, India, Lao PDR, and Nepal. In Malaysia, only women migrants aged between 21 and 45 years are allowed to work as domestic workers.

Migrant domestic workers in Malaysia suffer numerous human rights violations. Being women, they also face gender discrimination. Since the case of Nirmala Bonat was highlighted in 2004, similar cases of exploitation, domestic violence and abuse against domestic workers have been reported. Many work in isolated places, are restricted in their movements, and are afraid of speaking out against their employers. They commonly suffer long hours of work from 14 to 20 hours a day, seven days a week, with inadequate time for rest (Human Rights Watch, 2022).

In 2022, the media reported on numerous cases of domestic worker abuse. In one case, Indonesian domestic worker Zailis reportedly suffered physical abuse that left her with bodily injuries such as a swollen left eye and a broken arm (Free Malaysia Today, 2022a). She was also not paid since the first day of her employment in 2019, amounting to a total of RM32,000 in unpaid wages. Zailis' experience is not uncommon, and represents only the tip of the iceberg as many and most cases of abuse go unreported.

K. Enforcement of labour laws

Even with the existing regulations and standards, enforcement remains a weak component of Malaysia's labour rights framework due to a lack of expertise and human resources. While businesses grow in number, there is close to no significant increase in the number of labour law enforcers to ensure that companies comply with the law. There are also concerns about the ability of enforcers to investigate complex labour cases such as child labour, forced labour and debt bondage.

Government response

JULY 2023 - JUNE 2024

As labour issues become more complex in nature and have become a main element of FTAs with other countries, the government is exploring increasing the number of labour inspectors in order to ensure higher compliance among employers.

L. Jurisdictional matters between MOHR and MOHA

The continuing lack of clarity over which ministry – MOHR or MOHA – oversees migrant worker recruitment has long frustrated stakeholders, especially employers. In December 2022, MOHR stated that the One-Channel System (OCS) to recruit domestic workers fell under its purview, while the One-Stop Centre (OSC) for migrant worker recruitment was MOHA's responsibility (Tay, 2022). This represented a shift from the position of the previous administration. However, more recently on 1 January 2023, a notice by MOHR suggested the ministry was coordinating applications to recruit migrant workers under the OSC.

This "back-and-forth" between ministries has caused much confusion and bureaucratic challenges. While MOHR signs agreements with countries of origin to recruit migrant workers and manages them administratively, it is MOHA that has the final say on their approval through the issuance of work permits. There are also complaints that unauthorised facilitation payments have to be made for such approvals. Stakeholders engaged overwhelmingly

suggested that there should be a single ministry tasked to oversee all matters related to migrant worker recruitment and management, including enforcement.

M. Federal and state legislation

As described earlier, Sabah and Sarawak have yet to review their respective labour laws to reflect the revised EA provisions, which introduced new provisions on forced labour. This creates a disparity in the commitment and practices of employers operating in Peninsular Malaysia (i.e. regulated by the EA), and those operating in Sabah and Sarawak (i.e. no clear legal obligation to prohibit forced labour). Incorporation of the stronger EA provisions into Sabah and Sarawak's labour ordinances is currently in the pipeline.

Government response

JULY 2023 - JUNE 2024

MOHR, through the Department of Labour, has put in place strict legal requirements to scrutinise employers who wish to employ migrant workers through section 60K of the EA.

In addition, MOHR is in the midst of amending the Sabah and Sarawak Labour Ordinances to bridge the mismatch between the EA, Act 350 and the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990.

N. Integrity and good governance

There is a shared view among stakeholders that it is not only the private recruitment sector, made up of agencies, intermediaries, and social compliance auditors, that is plagued with problems of integrity and governance but also law enforcement. Migrant worker recruitment is a lucrative business, and misconduct and unethical practices are constantly reported.

Government response

JULY 2023 - JUNE 2024

The government has put a greater emphasis on the enforcement of integrity and good governance among civil servants.

O. Social audits addressing forced labour and other forms of complex labour rights violations

Stakeholders strongly agree that social compliance audits alone cannot effectively address labour rights violations. Employers must be compelled to identify violation risks and invest in the necessary actions to prevent and remedy such risks.

It is encouraging that the Malaysian Sustainable Palm Oil (MSPO), formerly known as the Malaysian Palm Oil Certification Council (MPOCC), a national scheme to certify industry players in the palm oil sector on sustainability standards, recently revised its standards to elevate its requirements. For example, the standards now include a clear prohibition on forced labour, with an explicit mention of ILO's 11 indicators of forced labour.

However, there remain concerns over gaps in the social audit methodology and the lack of skilled auditors to assess complex issues such as forced labour and debt bondage. Also present is the issue of conflict of interest possibly corrupting the auditing process, as companies or buyers pay social auditors for certification. Allegedly, auditors have been lenient with clients paying for their services. Audit findings and outcomes must therefore be transparent about the relationship between the relevant parties, and be accompanied by a reliable peer review process and public feedback session. Unless these issues are addressed, it is unlikely that social audits will hold companies appropriately accountable for labour rights violations in the foreseeable future.

Government response

JULY 2023 - JUNE 2024

The MSPO is a third-party certification scheme with the Department of Standards Malaysia (DSM) as the accreditation body. DSM is also one of the accreditation bodies registered under the International Accreditation Forum (IAF). DSM adopted ISO 17011:2017, which specifies requirements for the competencies, consistency of operations and impartiality of accreditation bodies assessing and accrediting conformity assessment bodies.

Certification Bodies (CB) accredited by DSM and registered with MPOCC will need to comply with ISO 17021:2015, an international standard that provides CBs with a set of requirements that will enable them to ensure that their management system certification process is carried out in a competent, consistent and impartial manner. This acts to demonstrate that the MSPO certification process complies with the standards set by the DSM.

Priority area 2: Social protection

The ILO defines social protection as "... sets of basic social security guarantees which secure protection, aimed at preventing or alleviating poverty, vulnerability and social exclusion" (ILO, 2012). ILO further encourages states, in accordance with national circumstances, to establish and maintain social protection floors comprising basic social guarantees such as access to essential healthcare and basic income security, which together secure effective access to goods and services.

For this report, social protection broadly refers to both contributory (or insurance-based) schemes such as social insurance, involving compulsory contributions from beneficiaries and employers; and non-contributory schemes such as universal or targeted social assistance schemes (UN Committee on Economic, Social and Cultural Rights, 2007).

To Malaysia's credit, it has consistently recognised the need to support society's poorest through government subsidies for essential items such as food and fuel, as well as for aid and welfare cash assistance. Malaysia also provides universal healthcare for all citizens and legal residents whereby medical costs in public hospitals are heavily subsidised by the government. However, there are still gaps to be addressed.

A. Minimum wages

Some workers, especially migrant workers, continue to receive salaries lower than the statutory minimum wage of RM1,500. Without legal work documents, irregular migrant workers and refugees are not in a position to demand for wages consistent with the legal minimum. These groups are often sought to fulfil labour gaps due to persistent labour shortages and bureaucratic hurdles causing delays in worker recruitment in the country.

Other local manual or trade workers, hired through third party agencies to work in specific sectors such as to clean and maintain buildings and facilities, are paid below the minimum wage. As these workers need the jobs and would not ask for written employment contracts or trade union representation, they are left vulnerable to a range of labour rights abuses.

Many women in the plantation and agriculture sectors are informal workers; they are not hired directly by employers but perform work to help their spouses meet production quotas and targets. Although they perform almost the same tasks as their spouses and work under similar conditions, they do so without a formal employment contract and are not compensated. This practice contributes to gender discrimination practices and widens gender inequality.

Government response

JULY 2023 - JUNE 2024

Inspections by the Department of Labour are carried out comprehensively, with respect to the National Wages Consultative Council Act 2011 and the Sabah Labour Ordinance. Non-compliance is dealt with enforcement through the respective labour laws.

Further, the recently amended EA 1955 has incorporated provisions on the presumption as to who is an "employee" and who is an "employer" to further facilitate the identification of the employer-employee relationship under section 101C.

B. Employers' awareness of labour standards and social protection

While large businesses are more aware of international and local labour standards, SMEs require more exposure and support. Without a legal counsel or human resources manager, they are often unfamiliar or inexperienced with issues related to minimum and overtime wages, housing standards, social security protection and levies for migrant workers.

Government response

JULY 2023 - JUNE 2024

The Department of Labour Sabah actively conducts face-to-face and virtual labour education for all employers.

MOHR, through its departments and agencies always seeks to prioritise awareness-raising programmes to educate employers, private employment agencies and other related entities on labour standards. MOHR also collaborates with CSOs and NGOs in awareness programmes to ensure wider socialisation.

C. Gaps in social security for migrant workers

Migrants are not entitled to the SOCSO invalidity pension scheme

Only migrant workers with legal documents such as valid passports and work passes are covered by the Social Security Organisation (SOCSO) (Pertubuhan Keselamatan Sosial [PERKESO]). The scheme provides for employment-related injury protection such as payment of medical expenses, and benefits for temporary and permanent disability (i.e. invalidity pension), including for dependants. However, migrant workers are not eligible for the invalidity pension scheme, leaving them unprotected from injuries or death occurring outside of employment. This exclusion is a form of discrimination and unequal treatment based on nationality and ethnicity.

Government response

JULY 2023 - JUNE 2024

With regard to the Employment Injury Scheme, effective 1 January 2019, employers who hire migrant workers shall register their employees with PERKESO and contribute to the scheme, as mandated by the Employees' Social Security Act 1969. The rate of contribution is 1.25 per cent of the insured monthly wages, to be paid by the employer.

Currently, the invalidity scheme is not extended to migrant workers. PERKESO is in the midst of reviewing the invalidity scheme to be extended to include this group of workers.

Any such changes to the current law, rules, regulations, and practices will require policy decisions and mandate from the government.

The non-compulsory nature of the Employees' Provident Fund (EPF) scheme for migrant workers

Unlike Malaysian workers, migrant workers are eligible but not required by law to participate in the EPF pension scheme. Should they do so, they will contribute 11 per cent of their monthly salaries to the fund, while their employers will pay the statutory RM5 per worker. EPF is known to pay attractive dividend rates of 4 to 6 per cent. As the scheme remains voluntary for migrant workers, it has failed to attract their participation. Its lack of portability features, for example, cross-border payment of benefits, including periodic pension payments, also contribute to low take-up rates among this population.

D. Untapped contribution of refugee workers to Malaysia's economy

According to a study by Todd et al. (2019) for IDEAS, granting refugees the right to work in the formal employment sector will significantly impact Malaysia's economy and public finances. The study estimates that if refugees are given the right to work, they could potentially contribute over RM3 billion to Malaysia's gross domestic product (GDP) and increase tax collection to over RM50 million each year by 2024. However, these remain untapped potentials due to the government's continued denial to allow refugees to work.

Case Study 6
Refugee workers in Malaysia

Who are refugees and how many of them are in Malaysia?

The UNHCR defines refugees as "... people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country" (UNHCR, n.d.-a).

As of 7 December 2022, Malaysia hosts 181,000 refugees and asylum-seekers. About 85 per cent are from Myanmar and the vast majority (103,000) are Rohingyas. The remaining 15 per cent are from over 50 countries including Pakistan, Yemen, Syria, and Somalia (UNHCR, n.d.-b).

From a gender perspective, about 67 per cent of refugees and asylum-seekers in Malaysia are men while 33 per cent are women. One in every four (45,650) are children below 18. Refugees and asylum-seekers live mostly in the cities and towns across Peninsular Malaysia, with sizeable populations in the Klang Valley, Johor, and Penang.

Do refugees work?

Malaysia has not signed the 1951 Convention Relating to the Status of Refugees and as such, does not recognise the rights of refugees in the country. They receive no cash or other forms of welfare support from the government. As refugees are not permitted to work, many undertake odd or informal jobs where they are at a great risk of exploitation. Largely due to their lack of professional skills and expertise, a substantial number work in the construction, agriculture, food and beverage, and cleaning sectors (Todd et al., 2019).

NGOs and refugee community groups have highlighted the typical forms of work carried out by refugees and asylum-seekers as follows:

OCCUPATIONS

- Teacher or administrative assistant at refugee learning centres
- Butcher
- Hairdresser
- Salesperson
- Cook, dishwasher, or server at restaurants
- Electrician
- Plumber
- Tailor
- Farmer
- Factory worker
- Construction worker

OTHER INCOME-GENERATING ACTIVITIES

- Online sales and business
- Handicraft business
- Recycling business such as selling plastics, aluminium, and steel
- Food stall business
- Grocery shop business for their respective local communities

The consequences of working irregularly

Due to their vulnerabilities, refugees face various challenges when they work including:

- Unpaid wages and wage theft.
- Low wages that are inadequate to fulfil their daily needs, including paying for their rent and children's education.
- Physical abuse and harassment by employers and recruitment agents.
- Mental health issues, resulting in suicide attempts and depression.
- Intimidation, blackmail, and extortion by law enforcement personnel.
- Poor working conditions and lack of protective equipment when working.
- Exclusion from social security schemes.

E. Labour market integration programmes do not adequately cover the informal sector

The government's five-phase wage subsidy programme under the Prihatin Rakyat Economic Stimulus Package (Pakej Rangsangan Ekonomi Prihatin Rakyat [Prihatin]) and the National Economic Recovery Plan (PENJANA) aimed to reduce unemployment by integrating the unemployed and those affected by the pandemic back into the labour market.

As of August 2022, the government distributed a total of RM21 billion, benefiting nearly 360,000 local workers in the formal employment sector. However, these subsidy programmes and other labour market integration initiatives continue to elude self-employed Malaysian workers and those in the informal economy.

F. Voluntary social security schemes continue to hinder informal workers' participation in the economy

i-Saraan is a scheme where self-employed Malaysian workers or those in the informal sector can voluntarily contribute to a retirement fund (MOF, 2020). Members below 60 years of age will receive 15 per cent of their contributions or a maximum of RM250 as an annual contribution from the government. However, given the voluntary nature of the scheme, the take-up rate is low.

In July 2022, the government announced that nearly 600,000 Malaysians had subscribed to the i-Saraan scheme (Ignatius, 2022). This makes up less than half of the total number of workers in informal employment –

1.36 million people – excluding the agricultural sector, as recorded in 2017 (DOSM, 2020a).

G. Self-Employment Social Security Scheme (SESSS) continues to be undersubscribed

In 2017, the government introduced the Self-Employment Social Security Scheme (SESSS), regulated under the Self-Employment Social Security Act 2017. It is a compulsory scheme for the self-employed in 19 economic sectors including transportation, agriculture, construction, manufacturing, online business, and healthcare. Protection, in the form of medical, temporary disability, dependant and educational benefits, is provided for employment injuries, including occupational diseases and accidents occurring during work-related activities.

Although the SESSS is compulsory, subscription is not automatic. Contributors are expected to register on their own and make monthly or annual contributions by using the SOCSO-initiated platform known as "Matrix-PERKESO". Not all self-employed workers are keen to subscribe to the platform, and those interested are not fully cognisant of the administrative procedures or have the ability to use the platform. Consequently, there is still room for more people to subscribe to the SESSS.

Summary of selected social protection schemes in Malaysia

Scheme	Type of social security	Workers in the informal sector/ self-employed persons	Migrants with a valid passport and working pass	Migrants and refugees without a valid passport and working pass
EPF	Contributory	Voluntary	Voluntary	Ineligible to participate
SOCSO/ PERKESO	Contributory	Ineligible to participate	Compulsory, but migrants are excluded from the invalidity pension scheme	Ineligible to participate
Social intervention schemes (e.g. BKM PEMULIH and MySalam*)	Non-Contributory	Eligible to benefit but limited to lower income households	Ineligible to participate	Ineligible to participate
Prihatin and PENJANA	Non-Contributory	Voluntary	Ineligible to participate	Ineligible to participate
i-Saraan (self-employed retirement scheme)	Contributory	Voluntary	Ineligible to participate	Ineligible to participate
SESSS	Contributory	Voluntary	Ineligible to participate	Ineligible to participate

Note: Adapted from DOSM, EPF, SOCSO, and MOF, which are publicly accessible until 15 March 2023

** BKM: Bantuan Keluarga Malaysia*

PEMULIH: Pakej Perlindungan Rakyat dan Pemulihan Ekonomi

MySalam: Skim Perlinungan Kesihatan Masyarakat

Government response

JULY 2023 - JUNE 2024

PERKESO implements a multifaceted approach to increase the number of self-employed contributors. It leverages comprehensive and ongoing awareness campaigns using various channels such as social media, radio, television, and print media. These campaigns touch upon the benefits of the scheme and protection in case of accidents or occupational diseases arising from the self-employment activities, including while travelling for the self-employment activity.

PERKESO also conducts workshops to educate organisations or associations for the self- employed, including platform operators. The workshop presents detailed information about the scheme and the process to register. In addition, building networks and partnerships by MoUs is also a way forward in making the scheme more visible to self-employed workers.

The government is always mindful of the concerns and needs of those in the self-employed group, and this can be seen through prior and current budget announcements where the government provides an allocation to cover the subscription of almost 90 per cent of Plan 2 of the scheme.

In this vein, PERKESO continues to work towards the objective of having more self-employed workers come forward to subscribe to the SESSS provided under the Self-Employment Social Security Act 2017.

H. The problem of treating and normalising the migrant workforce as short-term capital

It is said Malaysians are not interested and not willing to work in jobs that are “dirty, demeaning, or dangerous”, particularly in the plantation and construction sectors. This leaves employers with no choice but to rely predominantly on migrant workers.

However, hiring practices involving migrant workers are often temporary, without the prospect of long-term employment. Once the project or task ends, they have to return home or find another job. It is also government policy to restrict the employment of migrant workers to ten years. Extensions are discretionary and limited.

Consequently, businesses view migrant workers as short-term capital that they need not invest in, whether through occupational-related and life-skills training, or career promotions, pension schemes and other incentives. This encourages discrimination based on nationality and ethnicity.

Government response

JULY 2023 - JUNE 2024

MOHR is in the midst of finalising the implementation of a multi-tier levy mechanism to regulate the intake of migrant workers in Malaysia and facilitate the shift from labour-intensive work to automation, addressing as much as possible this labour issue.

Case Study 7

Malaysian gig workers

Who are "gig" workers?

The ILO defines gig workers as those who perform their work independently, in isolation, over geographically expansive areas, and in direct competition. They are also independent contractors, often performing short-term or task-based work with a higher presence on online labour platforms, that is, services offered online (DOSM, 2020b). In Malaysia, there is no official definition of gig workers. Self-employed persons or "own-account" workers are also identified as gig workers.

How many gig workers are there in Malaysia?

Estimates can be gleaned from two national surveys.

Source 1: Labour Force Survey

According to the national Labour Force Survey published in 2021, 2.2 million own-account workers were recorded in Malaysia (DOSM, 2021). About 72 per cent (1.6 million) of them are men, while the remaining 28 per cent are women (627,700). More than two-thirds are located in urban areas and one-third in rural areas.

Source 2: Informal Sector Workforce Survey

According to Malaysia's Informal Sector Workforce Survey in 2019, nearly 1.3 million informal employments were recorded throughout Malaysia (DOSM, 2020b). It accounts for less than 10 per cent of the total labour force i.e. 15 million workers. Slightly more than half are men (56 per cent or 707,200 workers) and 44 per cent are women.

Note that not all own-account workers and the self-employed are workers in the gig economy. However, given rapid advancements in technology, coupled with the rise of many platform economies, own-account workers and self-employed persons tend to work in conditions mirroring the broad definition of gig workers – an absence of a long-term contract or fixed workplace.

E-hailing drivers and p-hailing riders

Workers in the gig economy include independent contractors and freelancers in various sectors such as information technology, data processing, beauty and healthcare, and transportation. There has been an increase in Malaysians working as e-hailing drivers and delivery riders, yet there remains no official national database that records their actual numbers. Nevertheless, the following statistics are worth highlighting:

E-hailing drivers

- As at May 2022, there were 190,000 registered e-hailing drivers throughout Malaysia (Free Malaysia Today, 2022b).
- As at June 2022, 33 e-hailing companies were registered with the Land Public Transport Agency of Malaysia (Dashveenjit Kaur, 2022). Among the e-hailing companies in Malaysia are Grab, MyCar, Maxim, AirAsia Ride and InDriver.

Delivery or p-hailing riders

- As at August 2022, there were 400,000 registered delivery riders in Malaysia (Mohd Yusof, 2022).
- Of the 400,000, about 70,000 were food delivery riders working for p-hailing operators such as GrabFood and Food Panda (Wiki Impact, 2022).
- The government revealed that between 2018 and 2021, there were 1,242 accidents recorded involving food delivery riders, including 122 deaths (Carvalho, Tan & Vethasalam, 2022).

Due to the nature of their workplaces, e-hailing drivers and p-hailing riders run the risk of occupational injuries and accidents. However, as of October 2022, only 175,499 p-hailing riders were subscribed to the SESSS (Malay Mail, 2022a). This is less than half of their total population (400,000).

Acknowledging the risks faced by these riders, the government has made it mandatory for all riders to contribute to the SESSS before receiving their vocational licences (Malay Mail, 2022b). The new regulation was passed by the Parliament in October 2022 (Ong, 2022).

In general, more attention should be paid by the State and businesses to the plight of gig workers. In addition to unpredictable and irregular incomes and non-standard employment periods, gig workers face numerous social risks such as being unable to afford basic healthcare and medical services or support their families, making them vulnerable to poverty and social exclusion.

Priority area 3: Right of association and collective bargaining

The right to freedom of association is a fundamental right guaranteed under Article 10(1)(c) of the Federal Constitution but it is subject to exceptions. In October 2022, the government approved the Trade Unions (Amendment) Bill 2022, which aims to allow more than one union to be formed in a single workplace. The amendment was made to comply with ILO's standard on freedom of association and protection of the right to organise and unionise (Ong, 2022). Despite this recent development, stakeholders engaged raised the following issues.

A. Migrant workers' participation in trade unions

Trade union density in Malaysia is low with only less than 10 per cent of the total workforce unionised. The numbers are significantly lower among migrant workers. Although section 8 of the EA prohibits employment contracts from restricting the right of migrant workers to join trade unions, they cannot hold office-bearer positions unless approved by the Minister of Human Resources. Employers say they do not prohibit migrant workers from participating in unions, but invisible barriers exist.

Migrant workers are in no position and do not have the capacity to bargain or negotiate their terms of employment with their employers, even if they speak as union members. There is a latent fear among workers that their participation in a union may result in ill-treatment by their employers. As such, there is a distinct lack of involvement and representation of migrant workers in the collective bargaining process.

B. Migrant workers' low awareness of the value of unions

Lack of awareness among migrants of their right to freedom of association and collective bargaining is a critical barrier that hinders their participation in trade unions. Most migrant workers want to earn their daily keep and focus on earning as much as possible. They are here with a narrow goal of

earning a wage, and do not always understand the power of unions and how unions could help them achieve social justice, as well as deal with their grievances, which is a secondary goal, if at all.

Government response

JULY 2023 - JUNE 2024

MOHR, through the Department of Trade Union Affairs (JHEKS), provides various promotional and educational programmes to support and encourage the establishment and membership of trade unions in the workplace.

Through the implementation of the Trade Union Outreach Programme, JHEKS has successfully implemented several initiatives including union awareness programmes, trade union management courses, membership promotion programmes, collaboration programme with departments, agencies or external companies, Community Social Responsibility (CSR) programmes and interview sessions on social and electronic media.

These programmes involve various target groups including trade unions, workers, employers, school students, higher education students, women, and indigenous peoples.

In promoting the establishment of unions in the workplace, an amendment to the Trade Union Act 1959 was also achieved in accordance with the principles of international labour standards and requirements of international trade agreements. With this amendment, the establishment and membership of trade unions are expected to increase, creating a more competitive and healthy union and labour ecosystem.

C. Fear of employer retaliation

Another factor that hinders migrant worker participation in trade unions is the fear of retaliation by their employers. Although under section 4 of the Industrial Relations Act 1967 no person may interfere with a worker's right to join and participate in union activities, the reality experienced by migrant workers is different.

Even if migrant workers wish to join and participate in unions, they tend to be reluctant or feel discouraged, for fear that doing so would negatively affect their relationship with their employers.

D. Lack of legitimacy in internal employer-employee consultative committees

Businesses assert that migrant workers have access to social dialogue mechanisms. One example is a joint employer-employee committee, typically known as the Joint Consultative Committee (JCC). Workers, including migrants, are represented by their leaders and can raise their concerns and grievances through such committees.

However, some employers intervene directly in its formation by getting involved in the selection and appointment of the workers' representatives. This creates a bias, and the independence of the committee is questionable.

E. Lack of trust, confidence and respect between employers and unions

Many employers are sceptical about the role of trade unions due to negative prior experiences. It is no wonder that little effort is taken to build mutual confidence and respect between employers, union leaders and their members. This lack of trust hinders positive and effective communication, engagement, and interaction that can further the interests of both employer and worker.

F. Lack of capacity and ability to resolve complex employment issues

Employers claim that trade unions often fail to resolve worker grievances in a way that is acceptable to all parties. One factor contributing to this is said to be the

lack of mediation skills and knowledge among company management and union members to negotiate and address worker complaints.

G. Union busting used to deny workers' right to collective bargaining

Some employers use union busting tactics to deny workers their right to collective bargaining. Even though Malaysian law prohibits employers from interfering in trade union management and activities, as specified in the Industrial Relations Act 1967, workers may face intimidation and threats when exercising their right to participate in trade union work.

Companies also use indirect methods of union busting, such as facilitating the establishment of an in-house union controlled by the company's management behind-the-scenes to compete with the sectoral or industry union and weaken it.

Case Study 8

Union busting in Malaysia

What is the role of trade unions?

Workers of a particular trade or occupation join trade unions to strengthen their bargaining power with employers. Unions negotiate on behalf of workers as a collective, on matters such as wages, benefits, and work conditions. They also represent workers in trade disputes with employers, and channel grievances regarding the workplace. At times, unions also mediate disputes between workers and employers.

In Malaysia, workers have the right to form and join trade unions. Migrant workers are allowed to join, but cannot form a union or hold office without the permission of the Minister of Human Resources.

Further, union activities are heavily circumscribed and regulated under several laws, including the EA, Trade Unions Act 1959, and Industrial Relations Act 1967. This is the result of years of government policies that have weakened employees' prerogative to organise themselves, hold strikes, and disrupt economic activities as forms of protest and advocacy for better work floor conditions.

How many trade unions and union members are there in Malaysia?

As at the end of 2019, there were 762 trade unions registered in Malaysia, up from 729 in 2015 (Department of Trade Union Affairs, 2019). Of the 762, more than two-thirds are private sector unions, followed by trade unions in the government sector (20.5 per cent) and statutory bodies (13 per cent).

In terms of membership, these 762 trade unions represented 948,772 members. Slightly more than half of them are men, while 49.5 per cent are women. To illustrate, in 2019, DOSM reported a total of 15.3 million active workers (DOSM, 2019); this means that nine of every 10 workers are not represented by a trade union.

Yet, employers continue to rally against trade unions in an apparent fear that their business operations would be detrimentally affected if more workers unionise.

Trade union busting incidents

Despite clear legal provisions guaranteeing the right to form and join unions, some employers continue to prevent or discourage their workers from exercising this right. Unions that are strong and vocal, in particular, are weakened through different means tantamount to union busting.

Several cases highlighted in the media indicate that employers from the manufacturing, banking, and cleaning services sectors are most frequently associated with such practices.

For instance, in 2019, two banks were found liable for union busting over their promotion of workers to executive level positions that came without any real executive power (Azril Annuar, 2019). Such promotions were purportedly to strip employees of their eligibility to become members the National Union of Bank Employees (NUBE).

In 2020, the National Union of Workers in Hospital Support and Allied Services (NUWHSAS) alleged that a local healthcare support company providing services to a hospital in Perak employed union busting tactics by denying protective equipment for union members (Coconuts KL, 2020). Members also claimed that they were denied a monthly special government allowance of RM600 meant for frontline workers but were instead given a one-off cash token worth RM300.

In 2022, the Electronics Industry Employees' Union Northern Region (EIEUNRPM) alleged that a Malaysian electrical and electronics company had unfairly interfered in union organising activities (IndustriALL Global Union, 2022). Workers were told not to vote for the union in a secret ballot scheduled for February 2022. They were threatened that if they did so, they would not receive their bonuses and would have no future in the company.

Government response

JULY 2023 - JUNE 2024

Based on existing legal provisions, non-citizen workers are allowed to join trade unions. However, if they intend to hold positions within the union, they must obtain an exemption from the Minister of Human Resources.

In essence, all migrant workers have the right to participate in trade unions in Malaysia. This right is clearly stipulated in section 8 of the EA, which expressly guarantees the rights of workers to form and join trade unions. Section 8 provides as follows:

"Nothing in any contract of service shall in any way restrict the rights of any employee who is a party to such contract,
(a) to join a registered trade union;
(b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or
(c) to associate with any other person for the purpose of organizing a trade union in accordance with the Trade Unions Act 1959 [Act 262]".

This right is also provided in section 4 of the Industrial Relations Act 1967, as follows:

"(a) No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities.
(b) No trade union of workmen and no trade union of employers shall interfere with each other in the establishment, functioning or administration of that trade union.
(c) No employer or trade union of employers and no person acting on behalf of such employer or such trade union shall support any trade union of workmen by financial or other means, with the object of placing it under the control or influence of such employer or such trade union of employers".

In general, in relation to trade unionship, workers are protected under Malaysia's labour laws.

Priority area 4: Grievance mechanisms and remedies

Arguably, the most neglected of the three pillars of the UNGPs is the third: access to remedy. This pillar is supported by principles 25 to 31 of the UNGPs (OHCHR, 2011). It requires that when rights are violated by business, survivors and victims must have access to effective mechanisms which are legitimate, accessible, predictable, equitable, transparent and rights-compatible.

Judicial and non-judicial grievance mechanisms implemented by both the State and businesses must meet certain criteria. Operational-level mechanisms should be in place, and they must be based on genuine engagement and dialogue with rights-holders and other stakeholders.

Access to remedy, if effective, often leads to compensation awards, restitution payments, sanctions, and civil or criminal penalties. This is why corporate entities shy away from aspiring to effectively implement this third pillar. But the elements falling under access to remedy are the ones that businesses must pay the most attention to. Unfortunately, the findings show that insufficient energy and resources are channelled towards grievance mechanisms and remediation for business-related human rights abuses.

A. Employer-operated grievance mechanisms do not guarantee non-retaliation and dismissal

Many large businesses in Malaysia have already established internal grievance mechanisms that allow workers to raise complaints and grievances for resolution. However, worker representatives assert that such mechanisms fail to work, as non-retaliation by companies is not guaranteed, even if the grievances are handled directly by an independent, third-party service provider.

Retaliation at the workplace may include specific actions taken to make conditions difficult and inhospitable for the grievance-raiser, and at times, leading to an outright dismissal. There is a lack of clear and genuine assurance of non-retaliation and the non-application of sanctions for raising complaints. Employees generally do not have faith and trust in company-operated grievance procedures when they do not meet the criteria for effectiveness.

B. Employer-operated grievance mechanisms are not socialised among workers

Although employer-operated grievance mechanisms (even with the existing flaws) are generally appreciated, employers need to put in more effort to obtain employee buy-in. They must take into account the diverse backgrounds and contexts of their workers, especially migrant workers. For instance, if grievance procedures are not translated into the languages of origin of migrant workers, they are unable to access the mechanism.

C. Employer-operated grievance mechanisms are ineffective in addressing serious grievances

Where workers have used employer-operated grievance mechanisms, they are said to be effective only in handling administrative complaints such as faulty accommodation facilities and occupational safety issues. Serious complaints such as unpaid wages, non-payment of premium overtime rates, physical harassment and abuse are usually unresolved or dismissed.

Worse, there are also claims of management cover-up and grievance-raisers being accused of lying. Recurring worker issues indicate structural problems and the ineffectiveness of existing grievance mechanisms. For instance, repeated complaints of a similar issue, such as unpaid wages, indicate that the root causes of the problem have not been addressed.

D. Workers are accustomed to making verbal complaints

Even where there is a company grievance mechanism in place, some workers still prefer to directly verbalise their complaints to their superiors and supervisors. It may be that they are hoping for a quick resolution or that they are not in the habit of writing. However, these verbal complaints tend to go unrecorded, and employers cannot therefore be held to account for their inaction, or any action they do take in the end.

Government response

JULY 2023 - JUNE 2024

Aggrieved workers may file complaints to the Department of Labour and the Department of Industrial Relations through existing grievance procedures.

In addition, collective agreements between trade unions and employers must include a provision on the establishment of a platform called a JCC that acts as a formal channel for workers to address their grievances at the enterprise level, and get feedback from the employer according to the procedures provided for under the provision.

This is required under the Code of Conduct for Industrial Harmony, a national guideline which has been recognised by the national tripartite body, the National Labour Advisory Council (NLAC). However, this guideline is voluntary in nature, has no punitive effect and is only implemented in unionised environments.

E. Worker awareness of external grievance mechanisms

While most leaders or representatives of worker organisations are exposed to a range of external grievance mechanisms, migrant and refugee workers may not be aware of the same. Apart from SUHAKAM's complaint mechanism, there is a growing number of independent and multistakeholder grievance mechanisms that enable workers to raise their grievances without fear of reprisal.

These include the MyVoice project (Social Accountability International, n.d.), Suara Kami (Responsible Business Alliance & ELEVATE., n.d.), and Just Good Work (Just Good Work, n.d.). It is good practice for workers to be acquainted with these channels in case they have a need for them.

F. Grievance mechanisms overlook the power asymmetry between employers and workers

Despite the growing number of employer-initiated and third-party grievance mechanisms available at workplaces, worker uptake remains low mainly due to the fear of reprisals and poor awareness. Efforts to establish grievance mechanisms are a good start but they must be paired with confidence-building measures to help level the power asymmetry between employer and employee.

Available grievance mechanisms seem more oriented towards reacting to an existing case or grievance. Where barriers exist, potential grievances will not be raised, and the purpose of grievance mechanisms will not be met.

Efforts to establish grievance mechanisms are a good start but they must be paired with confidence-building measures to help level the power asymmetry between employer and employee.

G. Access to the government's labour complaint mechanism among irregular or undocumented migrants including refugees and asylum-seekers

Migrant workers are able to access the Department of Labour's complaint mechanism by logging into the "Working for Workers" online application or lodging a complaint at one of its offices (MOHR, n.d.). However, concerns have been raised that where workers are considered irregular or undocumented because they do not have legal and valid work permits (including previously documented migrant workers who have lost their documented status, and working refugees and asylum-seekers), they will also be investigated for possible immigration offences by the Department of Immigration. This has caused fear among workers leading to their reluctance in lodging labour claims against their employers.

It also seems that there are inconsistencies in previous cases of awarding compensation to irregular or undocumented workers based on their status. Some claims were approved while others (of the same) were not. Encouragingly, recent legal precedent indicates that refugee workers lacking valid travel and working permits can pursue claims in industrial courts, even regarding unfair dismissals (Asylum Access, 2023).

Despite assurances from labour enforcement authorities that complaints from irregular or undocumented workers will be fairly investigated, mediated, and compensated regardless of their status, it is imperative to have a written government policy affirming this commitment. Such a policy would alleviate workers' concerns when filing claims. Moreover, employers should not be permitted to use the irregular or undocumented status of workers to reject their claims. Thus, the current uncertainty regarding the eligibility of undocumented workers to receive relief from State judicial remedies should be clarified.

Government response

JULY 2023 - JUNE 2024

"Working for Workers" is an application enabling workers to submit labour complaints online. The Department of Labour investigates complaints received through "Working for Workers" similar to how it addresses complaints received directly by other means.

H. Lack of a common standard and guidance on fair and effective remedies

There are no national standards or guidance for companies to follow on remediation of business-related human rights abuses. Without such guidance, companies are reluctant to impose on themselves the heavy burden of ensuring fair and effective compensation or restitution when workers suffer from human rights abuses.

They may rely on good practices of other countries and guidance from international organisations, but these are non-binding and vary from one to another, resulting in industry confusion and an uneven application of remedial actions. Businesses that implement one standard may be accused of failing to adhere to another, placing a lot of pressure on already limited resources.

I. Inability of vulnerable workers to access lawyers for legal advice and court representation

Many migrant and refugee workers find themselves without appropriate remedies when they have had their human and labour rights violated. When they are unable to find justice through their company's grievance mechanism, they have no choice but to turn to State judicial mechanisms.

However, they usually lack the necessary legal support as legal costs are high, they are based in remote locations, and they do not have the proper documents or evidence to mount a case. Some workers are also illiterate, may not fully grasp the legal procedures and are not members of trade unions who can represent them. Consequently, the legal process to access remedies is too daunting and workers either give up or go to court representing themselves, thereby jeopardising their cases and compromising their rights.

Government response

JULY 2023 - JUNE 2024

During representations at the departmental level, workers who are members of a trade union may be represented by any officer or employee of the trade union, and those who are not members may be represented by officials of a registered organisation of workmen such as the Malaysian Trade Union Congress (MTUC) or any other persons who are not advocates and solicitors, according to section 20 of the Industrial Relations Act 1967.

III. What should the Malaysian NAPBHR contain?

In this section, we make key recommendations that should be undertaken by the State and businesses. We have segmented our proposals into the three pillars of the UNGPs as follows.

Pillar 1: State duty to protect human rights

Ratification and domestication of international human and labour rights standards and treaties

1. The government should ratify and domesticate the following:

   a. ILO Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)
   b. ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111)
   c. ILO Migration for Employment Convention (Revised) 1949 (No. 97)
   d. ILO Domestic Workers Convention 2011 (No. 189)
   e. ILO Violence and Harassment Convention 2019 (No. 190)

f. UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990

g. ICESCR 1966

The full implementation of international human and labour rights standards and treaties presently ratified by the government

2. Where Malaysia has ratified international standards but has yet to fully implement them, actions should be taken to ensure their full and effective implementation, including:

a. Ensure alignment between the EA, Sabah Labour Ordinance and Sarawak Labour Ordinance, particularly on the issue of forced labour, consistent with the ILO Protocol of 2014 to the Forced Labour Convention 1930.

b. Enact a Gender Equality Act to domesticate State and business obligations under CEDAW, and ensure that equality in the workplace is a matter justiciable in the courts.

c. Close the legal gaps in the present versions of the Child Act 2001 and PWD Act 2008 by incorporating in full all provisions of the CRC and CRPD that Malaysia has ratified. These include matters on labour rights, and making the rights of children and PWDs justiciable in the courts.

d. Codify and consolidate all relevant provisions on forced labour, child labour, and other forms of labour exploitation into a new law on modern slavery. The legislation should strengthen the definition of forced labour as a crime by including the 11 ILO indicators as part of the law. It should also include mandatory HRDD assessments and reporting on supply chains to ensure they are clean and free from exploitative labour practices.

3. Strengthen all other existing national labour legislations and regulations to ensure alignment with international labour standards including on work hours, right of association involving migrant workers, and employment of children and young persons in high-risk economic sectors.

4. Enact a mandatory human and labour rights due diligence legislation requiring businesses to perform regular, credible and transparent due diligence, failing which they may be sanctioned. The law should be implemented in a phased approach but eventually create long-term pathways to impose mandatory due diligence for businesses of all sizes and economic sectors.

5. Strengthen existing migrant worker policies and regulations governing the recruitment of migrant workers. These include, among others:

a. Tightening the licensing requirements and application process for private recruitment agencies, including submitting a list of company affiliates and intermediaries in countries of origin, ethical recruitment codes of conduct and disclosure commitments.

b. Establishing clear ethical recruitment regulations and regular monitoring procedures to ensure compliance with international human rights standards.

c. Simplifying recruitment and hiring application processes, with minimal administrative costs imposed on employers.

d. Reviewing the existing employer-tied permit system, with the view to provide opportunities for migrant workers to change employers or opt for employment of their choosing, without jeopardising their legal and employment status.

e. Introducing new work models, such as an industry-tied, short-term and flexible work permit system to allow employers to hire migrant workers to suit their labour needs without compromising workers' rights, benefits

Government response

JULY 2023 - JUNE 2024

MOHR always reviews and amends Malaysia's existing labour laws to ensure that they are in line with international labour standards and national policies.

Operational, administrative and enforcement matters related to labour

6. Clarify the scope of power and jurisdiction of MOHR and MOHA in the recruitment and management of migrant workers. There should only be one ministry to manage migrant worker applications and labour law enforcement.

7. Include mandatory HRDD assessments and mandatory reporting on recruitment practices as conditions to be met by recruitment agencies before they are permitted to recruit migrant workers.

8. Align the working relationship between various enforcement agencies tasked to implement ATIPSOM and the Department of Labour tasked to enforce employment laws on forced and child labour and other exploitative labour practices.

9. Align the working relationship between federal and state agencies and local authorities to effectively implement national laws such as the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990, with state or local authority regulations governing public housing and migrant workers' accommodations.

10. Standardise new bilateral agreements and review existing ones with countries of origin to include enhanced provisions on the rights, benefits, and welfare of migrant workers. The government should consult with stakeholders, particularly employers, trade unions and CSOs, and agree on a template for negotiations.

11. Ensure the inclusive and transparent implementation of labour reform initiatives, including the implementation of various existing NAPs on forced labour and trafficking in persons. This includes the need to ensure fair representation and transparent appointments of representatives of employers, trade unions, workers, and CSOs in implementing the reform initiatives.

12. Strengthen labour enforcement capacity and capability including the following:

    a. Increase the number of trained labour law enforcers and inspectors commensurate with the number of workers according to ILO's benchmark and recommendations.

    b. Increase awareness, knowledge, and skills of labour law enforcers on critical labour standards such as forced and child labour.

    c. Ensure observance of international human rights standards in labour inspection methodologies, including inspection checklists, worker interview protocols, and protection of whistleblowers and vulnerable witnesses such as children.

    d. Develop coordinated labour inspection systems and procedures that include other non-labour enforcement agencies to jointly act on complex labour cases such as forced and child labour, labour trafficking, and debt bondage.

Government response

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MOHR is making an effort to increase staffing, especially of labour inspectors. Training and courses for existing officers are also provided to further improve the knowledge and competencies of officers.

13. Implement mandatory post-arrival orientation programmes and interviews for new migrant worker arrivals to identify and eliminate risks of unethical recruitment practices in countries of origin, and to inform workers of their rights in Malaysia.

14. Abolish the current employment policy that enables the employment of contracted workers or utilises a contract appointment system for specific sectors, especially for work that is continuously needed such as cleaning tasks and security services.

15. Decentralise and strengthen labour governance at the state level, such as by establishing a state-level advisory council, especially for Sabah and Sarawak, with the mandate and function to deliberate and make strategic decisions concerning the labour market, welfare, and social protection matters.

16. Establish national-level and state-level mechanisms to regularly collect, monitor and identify labour market data to address labour shortages and prevent incidents of irregular hiring among migrant workers (i.e. with migrant workers becoming "undocumented" or "irregular").

17. Strengthen social security for migrant workers, including by developing a migrant worker savings programme modelled after the EPF, and extending the invalidity pension scheme under SOCSO to all regular migrant workers.

18. Strengthen social security initiatives, including making self-employment insurance schemes mandatory through automatic subscriptions for all workers in the informal sector. In addition, use a targeted distribution strategy to ensure the adequacy and accessibility of social security initiatives that will benefit all workers in the informal sector, as well as regular migrant workers.

19. Strengthen relevant measures and mechanisms to promote access to employment, including access to a living wage, non-discriminatory career promotions and other work benefits for vulnerable workers such as PWDs, elderly persons, persons living with HIV/AIDS, and persons commonly discriminated against for their identities.

20. Review and amend laws, policies and regulations to allow refugee and asylum-seeker workers to enter the formal labour market and have access to redress mechanisms and social security schemes.

21. Review and amend laws to allow migrant workers to form trade unions of their choice.

22. Provide funds for capacity building activities and trainings to enhance trade unions' skillsets in order to represent their members more effectively by negotiating and mediating with their employers, and to increase trade union promotional and outreach activities.

Pillar 2: Corporate responsibility to respect human rights

Good governance and corporate accountability principles require that businesses own up and be held responsible for exploitative labour practices in their supply chains. While it remains a challenge to compel businesses to operationalise HRDD in the absence of legislation under Pillar 1, the recommendations under Pillar 2 in many ways reflect what some transnational corporations are already doing in Malaysia.

Further, the progressive taxonomy rolled out under Malaysia's sustainability agenda, as promoted by Bursa Malaysia, the SC, and BNM, has compelled larger companies, particularly listed issuers, to initiate best practice measures in a "voluntary-mandatory" way.

The following are recommendations for the NAPBHR for businesses:

1. Establish clear, binding and justiciable policies and internal operating procedures that prohibit, prevent, and remedy any form of labour rights violations and exploitative labour practices, directly or indirectly.

2. Conduct regular, genuine, effective and transparent HRDD assessments to identify, prevent and mitigate the negative impacts of exploitative labour practices on business operations and supply chains. Further, develop a comprehensive management approach to mainstream the practice of HRDD and human rights-based risk assessments within the company.

3. Ensure that suppliers and business partners adhere to international human rights standards. Establish contractual obligations with suppliers and business partners on human rights matters, and when they are found to have violated such standards, remedial or punitive actions should be taken. There must be a hierarchy of responses from the least to harshest actions, depending on the severity of the violations and facts of each case. Only as a last resort should businesses cut ties and contractual relationships with suppliers or business partners.

4. "Know and show" human rights due diligence processes through regular reporting and communications. Not only should companies gather and disclose information for the benefit of their boards, investors and consumers, they should also ensure that their reports reflect actual practices on the ground. This may be done by assurance, audits and verification exercises conducted by social auditors, assurance service providers and human rights organisations.

5. Where the law does not require it, strive to adopt good labour practices expected by the global marketplace such as the standards set by ILO and the International Organization for Migration's (IOM). Companies are encouraged to join industry- or sector-specific collectives or organisations that proactively subscribe to international human rights standards, and provide certification or support services to their members to achieve those standards.

6. Cooperate with private sector-led sustainability compliance initiatives and mechanisms on labour standards, and allow regular and independent audits to be conducted by certified auditors or NGOs. Findings should be made public.

7. Take proactive steps to prohibit and prevent child labour, particularly for companies operating in high-risk industries, including establishing clear policies and procedures to urgenty remedy such cases of abuse if they occur.

8. Ensure the implementation of the minimum (or living) wage and other employment benefits (e.g. annual and medical leave, health coverage, and employment injury insurance) among the company's suppliers and business partners. The implementation of the minimum wage and other benefits should be regularly monitored as part of the company's due diligence process.

9. Increase the participation of workers, trade union members and civil society representatives at every level of the company's social audits and sustainability compliance initiatives. Their selection must be transparent and fair to ensure credible and effective participation. There should be no reprisals by employers for active participation.

10. Encourage the active participation of workers and trade union representatives in business-led dialogues and multistakeholder engagement activities.

11. Ensure that no restrictions, penalties, sanctions or any other forms of retaliation or reprisal are imposed on or taken against workers for joining and participating in a trade union of their choice.

12. Develop fair, transparent, legitimate, and impartial grievance and remediation policies and mechanisms ' to receive and act on labour-related complaints and grievances. These policies and mechanisms should be accessible to external parties, including individuals, business partners, governmental institutions and NGOs. There should be full and regular disclosures of the grievances raised with specific updates on actions taken.

Pillar 3: Access to remedy

The recommendations under Pillar 3 are for both the State and businesses. Companies should form the first layer of the remediation process whereby corporate grievance mechanisms should, at the earliest opportunity, handle the complaint and attempt to resolve it.

Where the employer-operated mechanism does not work for whatever reason, or in its absence, then industry- or sector-led mechanisms are to be used. When these fail, complainants should ultimately be able to access State-led grievance mechanisms.

Malaysia must therefore take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur, survivors and victims are able to access justice and seek effective remedies.

For the government

1. Clarify the law to ensure that State-led non-judicial and judicial complaint and grievance mechanisms can act on grievances from all workers, irrespective of nationality or legal status. Irregular or undocumented migrant workers seeking redress through the Department of Labour or the Department of Industrial Relations should be allowed to remain in Malaysia and work until their cases are resolved.

2. Enact a new law on modern slavery that provides survivors and victims of forced and child labour, and other forms of labour exploitation, direct access to the courts to sue their employers in civil claims. These types of cases should be heard by a specialised modern slavery court.

3. Enact legal provisions that allow for litigation on "extraterritorial obligations" and "foreign direct liabilities" where adversely affected workers can sue Malaysian parent companies that have subsidiaries operating in countries outside of Malaysia. The provisions should provide universal or extraterritorial jurisdiction to the Malaysian courts, where allegations concern matters of modern slavery. The corporate veil should also be lifted to ensure shareholders and company directors are held personally liable for egregious human rights breaches.

4. Impose a requirement that all employment contracts must contain enforceable clauses for grievance mechanisms to be established by the employer, and to be easily accessible by complainants. There should be demonstrable assurances that there will be no retaliations or reprisals for raising grievances. The proposed modern slavery law should also impose a requirement for companies to establish grievance mechanisms and to report on the same annually, failing which they are liable to be punished.

5. Enhance the capacity of State grievance-handlers to effectively mediate and address grievances received from workers or other grievance-raisers. Such capacity enhancements should also include the ability of grievance-handlers to perform gender-sensitive investigations of violations, and to commit to addressing gender-linked power imbalances.

6. Amend the SUHAKAM Act 1999 to empower the Commission to mediate and address grievances related to business-related human rights abuses, and to sanction, penalise or award damages, compensation, and other forms of restitution to the appropriate parties.

7. Ensure labour rights grievances received by State-led judicial and non-judicial mechanisms are made regularly and publicly available, and that the information is disaggregated by key labour aspects such as gender, age, nationality, and employment status.

8. Expand the scope of State- and Bar Council-led legal aid services and coverage to include complex labour rights violations – such as forced labour and debt bondage – through a rights-based lens, and widen the scope of eligible persons who can receive legal aid to include migrant and refugee workers.

9. Draft and formalise national guidelines containing a common standard to be met for the remediation of worker grievances concerning labour rights violations. The guidelines should be disseminated widely and apply to businesses progressively in a phased approach, from largest to smallest.

10. Remove disproportionate legal restrictions on the right to unionise and strike, and enhance the penalties and sanctions for violations of the right to freedom of association such as prohibiting workers from joining trade unions, participating in collective bargaining processes or reaching out to third parties such as NGOs to seek redress.

11. Conduct specific needs assessments among prosecution and judicial officials on complex labour matters such as forced and child labour, debt bondage, and labour trafficking. The outcomes of such assessments should support the overall effort towards improving existing training programmes for continuous learning and capacity enhancement of law enforcement personnel.

For businesses

12. Internalise and operationalise a credible grievance mechanism and continuously monitor and evaluate the same against the UNGPs' criteria for effectiveness: legitimate, accessible, predictable, equitable, transparent, rights-compatible, source of continuous learning, and based on engagement and dialogue.

13. Ensure that grievance mechanisms are firmly established centering gender and diversity in the formation of related committees/divisions and remediation processes, with adequate training on gender sensitivity and anti-discrimination.

14. Submit to regular audits and certification exercises to test the effectiveness of in-house and company-led grievance mechanisms. Regularly publish the findings and recommendations from said assessments.

15. Work with industry, multistakeholder and other collaborative initiatives that are based on a respect for human rights-related standards to internalise good practices and constantly improve the effectiveness of grievance mechanisms, striving for the highest possible standards.

16. Ensure that grievance mechanisms and remediation policies (including whistleblowing protection measures) are included in all relevant internal and external company documents such as codes of conduct, performance standards, operating procedures and agreements with suppliers and business partners.

17. Establish nationwide socialisation and engagement programmes that aim at building worker confidence and trust and encourage the use of non-State, non-judicial grievance mechanisms. Such programmes should consider specific invisible barriers faced by women, including norms, cultural traditions, and gender-linked power imbalances.

18. Strengthen company-led grievance mechanisms by ensuring adequate socialisation of such mechanisms to all workers (in languages of origin) and guaranteed protection for complainants, grievance-raisers and whistleblowers, and providing for a transparent and efficient resolution process.

19. Increase social support and interventions for vulnerable migrant and refugee workers experiencing domestic violence and labour exploitation. Such support must be comprehensive, gender-sensitive, and made immediately available, while being integrated with other social and welfare support, including access to shelters and State protection.

20. Develop a comprehensive management approach to implement and mainstream the practice of raising grievances within the company.

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CHAPTER 3

ENVIRONMENT

This chapter sets out Malaysia's obligations under international and domestic law on the right to a clean, safe and healthy environment while assessing the priority areas and making recommendations for the NAPBHR. The environment priority areas identified are as follows:

- **Environmental rights governance and accountability**
- **Sustainable forest management and biodiversity**
- **Pollution, waste management and plastic circularity**
- **Climate change**
- **Environmental justice – indigenous peoples, human rights defenders and SLAPPs**

Ili Nadiah binti Dzulfakar led the study in the area of the environment and wrote this chapter in consultation with Edmund Bon Tai Soon who also edited and provided inputs on the same.

A triple planetary crisis of climate change, biodiversity loss and pollution has irreversibly affected the planet. Impacts have been felt in Malaysia with changed weather patterns, environmental destruction, fatal landslides, serious flood damage, and increased health risks. Businesses contribute significantly to these environmental changes, multiplying their effects on vulnerable communities that are already disproportionately impacted by the crisis.

The UN Special Rapporteur for Human Rights and the Environment has established a framework on the protection of human rights in relation to the environment (Knox, 2018) rooted in the core principle that States have a duty to respect, protect, and fulfil the people's "universal right to a clean, healthy, and sustainable environment" (UN, 2022).

States must aim to reduce environmental injustices, close protection gaps, and empower vulnerable groups such as environmental human rights defenders (EHRDs), children, youth, women, and IPs. Businesses must, in turn, view their responsibility to the environment through a human rights lens, acknowledging that business activities that harm the environment also infringe on the rights of people. To illustrate this simply, if a factory pollutes a river, this also affects the right to health of those whose lives and livelihoods depend on the river.

This chapter is informed by a series of consultations and discussions held with various stakeholders, including businesses, civil society, and rightsholders impacted by environmental rights violations. Its scope is broad, and at the same time, the intersection between the environment and human rights is the most novel (and least developed) when compared to the first two thematic areas covered in this report.

We emphasised several key environmental human rights such as access to information and to grievance mechanisms, preserving civic space, non-discrimination, protecting the rights of EHRDs and IPs, addressing climate justice and accountability, and licensing, transparency and disclosure requirements.

This chapter highlights five key issues – described as priority areas – that require immediate attention by the Malaysian government and businesses. Given the human rights focus of this analysis, matters that do not directly impact rights, although still important, are not addressed here.

We now provide a snapshot of the five priorities related to the environment. First, on environmental rights governance and accountability, specific attention is paid to the environmental impact assessment (EIA) process, public procurement and environmental policy. Also in focus is Malaysia's legal position on the scope of locus standi in relation to environmental litigation.

On sustainable forest management and biodiversity, challenges in the palm oil and timber sectors are examined and the two mandatory national certifications – the Forest Management Certification and MSPO Certification Scheme – are assessed on aspects of implementation, compliance and transparency.

On pollution, waste management and plastic circularity, the impacts of air and water pollution, and of the plastic life cycle in Malaysia are examined, alongside key national policy interventions across economic, technological, social, regulatory, and international instruments.

On climate change, the human rights impacts of climate governance are explored through specific issues of maladaptation, climate-related disasters and risks, carbon emissions and pricing, climate financing, and green technology.

On environmental justice, the assessment focuses on how the rights of EHRDs, IPs, and grievance-raisers, among others, are directly impacted and violated through the use of SLAPPs and other means. These rights include the right to freedom of expression, assembly and public participation, and the right to a fair hearing in matters that affect them.

This chapter concludes with key recommendations for the government of Malaysia and businesses to prioritise in the development of the NAPBHR.

This chapter proceeds as follows:

I. Environmental rights, standards and laws

II. Environmental priority areas: Assessment and findings
- Priority area 1: Environmental rights governance and accountability
- Priority area 2: Sustainable forest management and biodiversity
- Priority area 3: Pollution, waste management and plastic circularity
- Priority area 4: Climate change
- Priority area 5: Environmental justice – indigenous peoples, human rights defenders and SLAPPs

III. What should the Malaysian NAPBHR contain?
- Pillar 1: State duty to protect human rights
- Pillar 2: Corporate responsibility to respect human rights
- Pillar 3: Access to remedy

Figure 15: KESAS Highway during a flash flood in March 2022 (The Edge).

I. Environmental rights, standards and laws

Malaysia's international environmental rights obligations

Malaysia is not short of global and regional declarations on environmental sustainability and is party to numerous international agreements, many of which include commitments to protect human rights. Some of these are briefly described below.

The Rio Declaration on Environment and Development 1992 acknowledged the people's right to participate in developing their economies and the responsibility of the State to safeguard the environment. It also introduced the "precautionary principle" to encourage decision-makers to assess the possible harmful effects of activities on the environment; and the "polluter pays" principle, where polluters bear the costs of managing the pollution caused to prevent further damages to human and environmental health.

In 1994, Malaysia ratified the UN Convention on Biological Diversity (CBD), committing to the conservation, sustainable use and equitable sharing of benefits derived from biodiversity. Following the ratification of the CBD, Malaysia developed a National Policy on Biological Diversity (NPBD) in 1998 with subsequent reviews of the policy in the following years.

Malaysia also adopted the Sendai Framework for Disaster Risk Reduction 2015-2030 (SFDRR) in 2015, which recognises climate change as one of the underlying drivers of disaster risk. Among others, strengthening disaster risk governance, investing in disaster risk reduction (DRR), and enhancing disaster preparedness are key actions that should be undertaken by the State. In the context of climate change, the State is to promote resilience and effective responses in recovery, rehabilitation, and reconstruction. However, the implementation of the framework is not legally binding.

In 2021, Malaysia participated in the 15th Conference of the Parties to the CBD (COP15) and committed to the 2030 Global Biodiversity Framework, which includes targets to promote the mainstreaming of biodiversity across all government sectors and society. This whole-of-government approach recognises that biodiversity conservation is not just the responsibility of environmental agencies, but involves entire sectors and actors participating in the development of the agriculture, forestry, fisheries, energy, and tourism industries.

Malaysia has also been working to align its environmental and climate policies with the SDGs and Paris Agreement, both adopted in 2015. The 2030 Agenda references the UNGPs (UN, 2015), emphasising the responsibility of States to create a regulatory and policy environment that enables the private sector to contribute to SDG targets.

These goals are closely linked to economic, social, and cultural rights, such as health, education, food, and shelter. Additionally, they focus on specific issues, such as women, children, and IPs (Goals 5 and 16), climate action and the environment (Goals 13, 14 and 15), and promote the importance of public-private partnerships for sustainable development (Goal 17).

Malaysia, under the coordination of the Economic Planning Unit (EPU), has submitted various reports including two Voluntary National Reports (EPU, 2017; 2021), seven Voluntary Local Reviews (Majlis Bandaraya Pulau Pinang, 2021; Urbanice Malaysia & Majlis Bandaraya Shah Alam, 2021; Urbanice Malaysia & Majlis Bandaraya Subang Jaya, 2021; Urbanice Malaysia & Majlis Bandaraya Kuala Lumpur, 2022; Urbanice Malaysia & Majlis Bandaraya Melaka Bersejarah, 2022; Urbanice Malaysia & Majlis Perbandaran Alor Gajah, 2023; Urbanice Malaysia & Majlis Perbandaran Sepang, 2023) and one Voluntary Subnational Review (Urbanice Malaysia & Selangor State Government, 2022) to measure and monitor its progress towards sustainable, resilient, and inclusive development.

Malaysia is also a party to the Paris Agreement, which is a legally binding international treaty aimed to manage global warming. The agreement emphasises the need to limit global warming to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C compared to pre-industrial levels.

Parties must periodically review and communicate their Nationally Determined Contributions (NDCs) every five years to determine what is feasible based on their national circumstances. They also provide updates on their priorities, implementation progress, and support needs for adaptation. Article 6 of the Paris Agreement establishes rules for a carbon market, allowing countries to transfer carbon credits earned from reducing greenhouse gas (GHG) emissions to assist other countries in meeting their climate targets.

Indonesia	Enhanced NDC – Republic of Indonesia	English		3	Active	23/09/2022
Lao People's Democratic Republic	Lao People's Democratic Republic First NDC (Updated submission)	English		2	Active	11/05/2021
Malaysia	Malaysia First NDC (Updated submission)	English		2	Active	30/07/2021
Myanmar	Myanmar First NDC (Updated submission)	English		2	Active	03/08/2021
Philippines	Philippines First NDC	English		1	Active	15/04/2021

Figure 16: Snapshot of NDCs communicated by State Parties as recorded in the registry. Source: UNFCCC's NDC Registry.

On the export and import of hazardous wastes, Malaysia has been a party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 since 1993.

On the rights of IPs, Malaysia was among 144 countries in 2007 that voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The document sets a minimum standard for safeguarding the collective rights of IPs, including their right to the lands and resources they have traditionally owned, occupied, or used. This is crucial as much of the daily subsistence and general livelihoods of the indigenous are linked to the environment in which they live.

As a member of ASEAN, Malaysia has also committed to a series of regional environmental obligations such as the ASEAN Agreement on Transboundary Haze Pollution 2002 (AATHP), which aims to prevent and monitor cross-border haze pollution through national, regional, and international cooperation. This agreement has unfortunately not been effective in achieving its intended goals, and haze in the region remains a persistent environmental and social challenge.

Additionally, the country adopted the ASEAN Human Rights Declaration 2012, which recognises the right to an adequate standard of living for every person, and specifically includes the right to a safe, clean, and sustainable environment, as outlined in Article 28. However, no enforcement mechanism currently exists to apply these rights.

The ASEAN Agreement on Disaster Management and Emergency Response (AADMER), another regional instrument supported by Malaysia, emphasises regional collaboration in disaster management. The agreement represents ASEAN's collective commitment towards the Hyogo Framework for Action 2005-2015 (HFA), as a means of building disaster-resilient communities. The HFA, endorsed by 168 countries, is the predecessor to the SFDRR.

While environmental rights are not explicitly mentioned in the ICESCR, the right to health is extended under the Covenant to include the underlying determinants of health such as environmental conditions. Malaysia has yet to ratify the treaty, but it is likely that this position is now considered a part of customary international law given that the UNHRC in October 2021 recognised the right to a clean, healthy, and sustainable environment as a standalone human right. Malaysia supported this resolution.

Malaysia's national laws and regulations

While Malaysia's Federal Constitution is, at present, not updated to include the right to a clean, healthy and sustainable environment, the country has a "complex landscape of environment-related legislation" such as the EQA and other laws governing waste management (e.g. Solid Waste and Public Cleansing Management Act 2007), land and marine wildlife protection (e.g. Fisheries Act 1985 and Wildlife Conservation Act 2010), and land and natural resources (e.g. Local Government Act 1976, National Forestry Act 1984 [NFA], Water Services Industry

Act 2006 and National Land Code 1965) (Malaysian Centre for Constitutionalism and Human Rights & Collective of Applied Law and Legal Realism, 2023, p. 22).

The Malaysian government has also taken steps towards institutionalising environmental sustainability through the introduction of policies found in the Malaysia plans, as well as through the establishment of national councils to facilitate federal-state governance, such as the National Land Council, National Water Council, Malaysia Climate Change Council, and the National Energy Council, all chaired by the prime minister.

The recent 12MP articulates Malaysia's aspiration to achieve net-zero emissions by 2050 and establishes ambitious emission reduction targets. The National Physical Plan, on the other hand, translates environmental policies into spatial and physical land use planning through State Structure Plans and Local Plans governed by the Town and Country Planning Act 1976 (TCPA) (PLANMalaysia@Johor, n.d.).

Other examples include the introduction of two crucial initiatives in 2021 towards advancing urban sustainability: the National Low Carbon Cities Master Plan and the Low Carbon Cities Mobility Blueprint 2021-2030. These initiatives build upon the foundation laid by the 2017 Low Carbon Cities Framework, focusing on promoting sustainable mobility and energy-efficient transportation.

Their implementation is expected to play a pivotal role in reducing energy consumption and helping Malaysia meet its emission reduction targets. Of note, the effective execution of the Mobility Blueprint could potentially result in a cumulative reduction of 165.4 million tonnes of CO^2 emissions. A key element of this strategy is the targeted development of electric vehicles (NRECC, 2017).

Further, Malaysia has put in place policies to address environmental protection and climate change mitigation. The National Policy on the Environment 2002 (Dasar Alam Sekitar Negara [DASN]) and the National Policy on Climate Change 2009 (NPCC) are instrumental in these efforts.

One of the objectives of DASN is to enhance the involvement of the private sector in environmental protection and management. In a broader context, DASN underscores the significance of environmental protection and accountability across all decision-making bodies, including the public and private sectors, NGOs, and the civil society. It calls for the integration of environmental considerations into all policy planning, mandates, and implementation measures across various sectors.

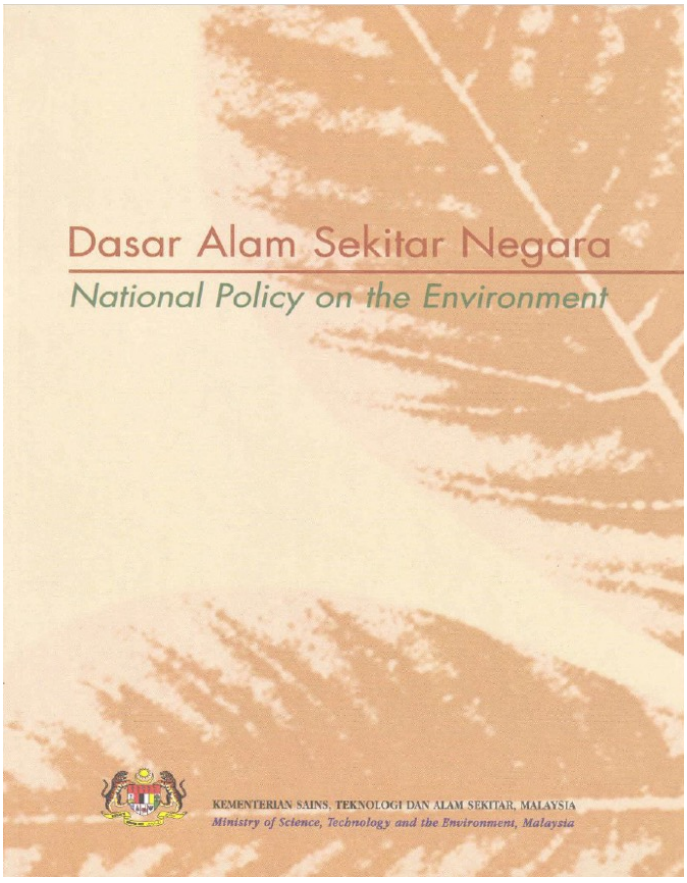

Figure 18: Cover of the National Policy on the Environment 2002. Source: NRES.

The NPBD 2016-2025 serves as the current guiding framework for biodiversity conservation in Malaysia. It emphasises key principles such as empowering stakeholders, ensuring fair and equitable sharing of benefits, and establishing a strong scientific foundation for biodiversity efforts, including financing (NRECC, 2016).

This policy is harmonised with the objectives of the CBD Strategic Plan, including the 20 Aichi Biodiversity Targets, which sets the course for biodiversity conservation. The policy also expresses the need to address business practices and enforce stricter measures to combat illegal deforestation and forest degradation.

As elaborated below, this governmental push for environmental protection is complemented by the imposition of new compliance requirements by Malaysia's financial and corporate governance regulators, as part of the global drive towards greener and cleaner financing and sustainable business practices.

The ESG landscape across corporate Malaysia

In the realm of ESG sustainability, Malaysia has witnessed significant developments particularly in the area of governance, environment and climate change reporting, and green financing. Regulatory bodies such as BNM, SC, and Bursa Malaysia have steered this shift, and notable documents emerging from their work have been published to guide businesses.

The table below provides a brief description of these documents and initiatives:

Regulator	Guidelines, regulations or initiatives	Brief description
BNM	BNM Climate Change and Principle-based Taxonomy (BNM, 2021)	Providing guiding principles on climate objectives, this framework offers a standardised classification and reporting system for climate-related exposures. It aids financial institutions regulated by BNM in assessing risks and making informed investment and business decisions.
	Value-based Intermediation Financing and Investment Impact Assessment Framework – Guidance Document	This framework is designed to establish an impact-based risk management system for evaluating the financing and investment activities of Islamic financial institutions. It includes guidance for financial institutions aiming to integrate ESG risk factors into their risk management systems.
	Corporate Governance Policy Document	This document outlines the expectations regarding directors' oversight responsibilities while recognising the board's role in promoting good corporate governance. In turn, ethical, prudent and professional behaviour is expected.
SC	MCCG 2021 (SC, 2021)	The 2021 update of the MCCG introduces new best practices and guidance aimed at strengthening board oversight and the integration of sustainability considerations into the strategic direction and day-to-day operations of companies.

Regulator	Guidelines, regulations or initiatives	Brief description
Bursa Malaysia	Main Market and ACE Market Listing Requirements, Corporate Governance Guide (4th Edition) (Bursa Malaysia, 2022a)	This guide provides practical guidance to listed companies, enabling them to follow the recommended Practices under the MCCG issued by SC, and enhanced corporate governance disclosure requirements in the Main Market and ACE Market Listing Requirements. Given the increased attention by stakeholders on sustainability or ESG risks and opportunities, boards need to increase their focus on ESG stewardship. This guide intends to provide boards with guidance to implement the Practices in the MCCG (SC, 2021, p.15).
	FTSE4GOOD Bursa Malaysia Index	In December 2014, Bursa Malaysia and the Financial Times Stock Exchange introduced the FTSE4GOOD Bursa Malaysia Index. This index serves to assist investors in ESG investment decisions, promote transparent best practices, and foster a low-carbon and sustainable economy.
	Main Market and ACE Market Listing Requirements, The Sustainability Reporting Guide (3rd edition) (Bursa Malaysia, 2022b)	Sustainability reporting has been mandatory for all PLCs since 2016. After a consultation process was completed, an enhanced sustainability reporting framework was rolled out in September 2022 (Bursa Malaysia, 2022c). Listed issuers must now include common sustainability matters and indicators, as well as climate change-related disclosures aligned with the TCFD recommendations. While there are currently no requirements for a listed issuer's Sustainability Statement to be subjected to a mandatory assurance process, Bursa Malaysia strongly recommends this as a matter of best practice. To enhance transparency pertaining to the credibility of the Sustainability Statements, Bursa Malaysia requires listed issuers to provide a statement on whether its Sustainability Statement has been subjected to an assurance process (an internal review or independent assurance performed in accordance with a recognised assurance process). If assurance is undertaken, the statement must also include the subject matter and scope covered, as well as

Regulator	Guidelines, regulations or initiatives	Brief description
		conclusions from the independent assurance. The statements may also be internally reviewed by auditors or independently assured. This document guides companies on how to embed sustainability in their organisations and to meet the disclosure requirements.
JC3	TCFD Application Guide for Malaysian Financial Institutions (JC3, 2022)	The JC3 aims to fortify the financial sector's resilience to climate-related risks. It achieves this by enhancing the sector's ability to assess and manage the risks, facilitate financial innovation to assist transition to a low carbon and climate resilient economy, and foster cooperation among stakeholders. This document guides institutions towards that goal.

The Malaysian government is actively advancing towards sustainable and responsible investments. In April 2021, the government achieved an important milestone by issuing the world's first sovereign sustainability sukuk. This was accomplished through the issuance of $800 million in 10-year trust certificates and $500 million in 30-year trust certificates. The funds raised from this endeavour are earmarked for projects aligned with the SDGs. The sukuk was issued through a special purpose vehicle, Malaysia Wakala Sukuk Bhd, and based on Malaysia's SDG Sukuk Framework.

At least 44 out of 54 Sustainable and Responsible Investment (SRI) funds were approved by SC over the past two years. Further, by December 2021, 94 per cent of Malaysia's top 50 listed companies had adopted an ESG strategy and 68 per cent had established an emissions reduction policy (MOF, 2022).

There is increased interest by the private sector to get more involved in sustainability measures. Their contributions to environmental conservation and biodiversity protection have moved beyond just CSR activities and are now more focused on long-term conservation programmes.

This shift is supported by the government through joint collaborations, tax incentives, and reporting initiatives. Petronas is one example. The company has consistently allocated substantial funds to support biodiversity conservation, a commitment reflected in its sustainability disclosures (Petronas, 2019).

The private sector-driven Malaysia Platform for Business and Biodiversity was formed as a collaborative space to share and work together on issues related to biodiversity conversation, as well as mainstream the implementation of the NPBD. The Platform has pledged to adopt mandatory requirements for businesses to disclose their impacts and dependencies on biodiversity by 2030 as voluntary action is not enough (Soon, 2022).

There are also several models of public-private sector partnerships in protected area management, including concession models such as the Sugud Islands Marine Conservation Area (Reef Guardian, n.d.), the Habitat Penang Hill (n.d.), and matching grant programmes such as Yayasan Hasanah's biodiversity conservation initiative in the central forest spine region of Peninsular Malaysia. It is a biologically diverse region that provides ecosystem

services to 80 per cent of Malaysians including water supply and carbon absorption.

The move to embed ESG in the corporate space has spawned a great many opportunities for sustainability service providers to support companies in need of assistance, whether on a pro bono basis or otherwise. Numerous entities, including business associations, law firms, and management consultants, are providing tools and advisory services to assist companies in becoming more socially and environmentally responsible.

Impact of trade with foreign nations and the EU's ongoing efforts on due diligence

Trade has emerged as a significant external driver shaping the Malaysian ESG landscape. An illustration of this influence is the EU's Carbon Border Adjustment Mechanism (CBAM) which has stimulated serious discussions on the adoption of carbon pricing initiatives in Malaysia.

Additional directives such as the Corporate Sustainability Due Diligence Directive (CSDDD) and the new regulation on deforestation-free products will have deep implications for those sectors connected to forestry, including timber and palm oil in Malaysia.

In February 2022, the EU Commission proposed the CSDDD to foster responsible corporate behaviour and anchor human rights and environmental considerations in companies' operations (European Commission, Directorate-General for Justice and Consumers, 2022). This proposal – now formally endorsed by the European Council – would require businesses to identify, stop, prevent, and mitigate actual or potential adverse human rights and environmental impacts. It also calls for the establishment and maintenance of a complaints procedure, monitoring of the effectiveness of due diligence policies and measures, and public communications regarding due diligence.

Importantly, CSDDD extends to a company's own operations, its subsidiaries, and its value chains, encompassing direct and indirect business relationships. The Directive is applicable to large EU companies and those defined as operating in high-risk sectors. Large, domestic non-EU companies will also be impacted, while microbusinesses and SMEs are not directly affected by this proposal.

At the same time, a coalition comprising over 100 companies, investors, and business associations issued a strong statement urging the EU Commission to swiftly put in place a proposal for mandatory human rights and environmental due diligence (mHREDD) (BHRRC, 2022).

Notable endorsers of the statement included prominent companies such as Aviva, Danone, Ericsson, IKEA, Hapag-Lloyd, and VAUDE. The mHREDD obligations are anticipated to be more comprehensive in scope than the CSDDD. It introduces five key principles, namely:

1. Alignment with the UNGPs to encompass all businesses operating within the EU market regardless of their sector or size.
2. A broadened due diligence obligation that spans the entire value chain.
3. Mandatory requirements that go beyond superficial compliance, addressing irresponsible procurement practices and integrating them into appropriate governance structures, including at the board level.
4. Effective and safe stakeholder engagement as part of the due diligence.
5. The establishment of credible accountability mechanisms, including a strong civil liability provision.

These developments in the global North will likely trickle down to Malaysian companies as part of the growing ESG movement to robustly enforce due diligence assessments and avoid adverse impacts to people and the planet.

II. Baseline assessment and findings on the priority areas regarding the environment

Despite numerous laudable policies and regulations, there are still gaps and challenges in implementing a rights-based approach on environmental matters. Many of these issues have been raised by civil society in advocacy platforms (Malaysian Centre for Constitutionalism and Human Rights & Collective of Applied Law and Legal Realism, 2023) and are not new to the Malaysian government. In particular, business conduct in the context of the environment leaves much to be desired. We focus on several priority issues here.

Priority area 1: Environmental rights governance and accountability

Environmental rights are not justiciable under Malaysian law

The Federal Constitution does not expressly guarantee the right to a safe, clean, healthy, and sustainable environment. Although judges have recognised this right as implied under the right to life in Article 5, their opinions and interpretations of the provision may differ on a case-by-case basis.

Similarly, rights protected under the UDHR or the ASEAN Human Rights Declaration 2012 cannot be enforced in the Malaysian courts as judges have said that these declarations are unlike treaties, and do not have the force of domestic law to allow for their application.

This effectively means Malaysians currently have no right to seek direct enforcement of the right to a clean, healthy and sustainable environment. Recalling the previous example, if a river is directly polluted by a factory, one cannot sue the polluting company or its directors for breaching the users' right to a healthy environment. Only the State can take action through enforcement by criminal action. But if law enforcement authorities do not wish to pursue any action, there is little that communities affected by the pollution can do to claim the right to enjoy a clean, healthy and pollutant-free river.

Similarly, should Malaysia fail to meet its emissions reduction targets by a certain period or not take sufficient urgent action to meet its sustainability goals, civil society cannot sue the government. Their only redress for State action is through public pressure campaigns with media outlets and advocacy groups. This lack of accountability concerning environmental rights has contributed to inaction. When water is contaminated or the supply cut for days, there is nothing anyone can do effectively against the water suppliers.

Additionally, there is a legal and social disconnect relating to the ways in which environmental and human rights are perceived and dealt with. For example, companies have traditionally dealt with environmental issues separately, and as a standalone matter, from human rights. This mindset is also prevalent among ESG practitioners.

In reality, sustainability matters and environmental rights issues encompass both procedural and substantive rights. While procedural rights guarantee access to information, participation in decision-making and access to effective remedies, substantive environmental rights include the right to a clean environment, safe climate, unpolluted air and water, and related rights. National authorities are responsible for monitoring and enforcing these rights, while environmental laws exist to impose legal obligations on entities and enterprises.

There is an urgent need for the State to actualise the right to a clean, healthy, and sustainable environment through legislation, in order to expand the scope of legal standing to sue for environmental harms, thus empowering citizens to hold violators to account.

Environmental crimes and the "precautionary principle"

A key component of well-drafted environmental and biodiversity laws is to incorporate the "precautionary principle", as a means to prevent adverse impacts on the environment. This principle is not embedded in Malaysia's environmental law or policies. For instance, our NPBD, that refers to the CBD, refrains from using the term. This has impacted how environmental crimes are viewed.

Various strategies have been implemented to address

environmental offences, including legal provisions targeting both individuals and corporate entities. However, it remains unclear whether directors bear a duty to consider the precautionary principle in their decision-making for the company.

Section 43 of the EQA stipulates that individuals serving as directors, chief executive officers, managers, or similar officers of a company, firm, society, or body of persons at the time an environmental offence occurred can be held liable for the offence unless they can demonstrate that they did not consent to it and that they exercised all due diligence to prevent it.

The question arises: How will a court determine if due diligence was indeed exercised when the law does not specify the factors that should be taken into account, such as the importance of adopting a precautionary approach?

Public participation: A mixed picture

Public participation is essential to ensure proper enforcement of environmental laws and to bring justice to those affected by developmental activities. Three international tools guide public participation principles, namely:

- Principle 10 of the Rio Declaration, which sets out access to information, public participation in decision-making, raising public awareness, and access to justice as key elements in environmental matters.
- Bali Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines), which are voluntary and provide guidance on the implementation of Principle 10.
- UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention), which helps balance development with the environment, for example by requiring authorities to make a viable plan for efficient and timely public participation.

The domestication of international instruments has facilitated varying degrees of public participation across different domains. A notable example is access to information, going as far as organising sector-specific data:

- MAMPU, under the Prime Minister's Office, promotes access to public sector information by its open data policy.
- DOSM launched OpenDOSM, an online platform that offers visualisation and analysis of its extensive data. This site's data is open source and intended for national benefit (Malaysia Biodiversity Centre, n.d.; Department of Irrigation and Drainage, n.d.; PLANMalaysia, n.d.).
- DOSM and the Energy Commission collate and disseminate data related to the environment, health, and energy.
- TCPA mandates that draft Structure Plans and Local Plans be open to public inspection and communicated through major newspaper notices. Once ratified, these plans are published in the official gazette.
- The National Flood Forecasting and Warning Centre in Malaysia employs a flood forecasting model to identify potential flood risks, subsequently notifying affected state residents through flood warning bulletins.

However, despite these measures, data gaps continue to be a significant challenge, as highlighted in JC3's report (BNM, 2022). Further, a specific federal law on freedom of information is still being discussed by the government, and if enacted, could notably influence the effectiveness of environmental rights protection. This legislation is badly needed.

The problem with EIAs and SIAs

EIAs are required for projects involving certain large activities like mining, logging, and heavy industrial operations. Project proponents typically engage their own EIA experts to conduct the assessments, which must be submitted for approval to the relevant authorities such as the Director of the DOE and the Natural Resources and Environment Board (NREB). While the activities requiring EIAs are listed in different laws, requirements on public participation, open hearings, and the need for Social Impact Assessments (SIAs) are varied.

Based on inputs gathered from the consultations with civil society, the EIA process is problematic for a range of reasons, with transparency (or lack thereof) being the biggest concern. Others include:

(a) Limited or inconsistent public participation

Public participation in the EIA process is crucial to ensure transparency and accountability. This is not an institutionalised practice in Malaysia, however, with limited avenues available for public concerns to be raised and addressed.

In Sabah, for example, public hearings are only conducted for "special" EIA matters, which are more detailed and required specifically for projects of high public interest. In other cases, project proponents and the relevant authorities are neither obliged to ensure that community concerns are addressed and monitored for implementation, nor required to provide reasons for the decisions they make.

(b) Poor information quality and accessibility

For rightsholders, project information is not always forthcoming and gaining access to it is challenging. EIA documents are primarily in English, which is not the mother tongue of many Malaysians, and are rarely translated into the languages of affected communities (often, only the executive summary is translated into Bahasa Malaysia).

A physical copy of the EIA report is only available at specific DOE offices, where photography is not permitted. Only the executive summary of the EIA report is published on the DOE's EIA web portal. The public can purchase the EIA report from the appointed EIA consultant, however, the cost can be prohibitive.

The limited time for public feedback (usually one month) also makes it challenging for communities to seek expert advice, especially on the technical aspects of the EIA. In some cases, EIA reports are available only after the project has been approved and awarded. It is only after such problems are highlighted in the media is there positive action by the authorities or efforts by project proponents to improve information access.

(c) Conflict of interest between project proponent and EIA consultant

Project proponents pay the consultants they appoint from a list of DOE-approved experts. As proponent patronage is a driver for their work, EIA consultants are unlikely to prepare unfavourable reports. In the event of conflicting expert opinions, very little can be done by communities to issue corrections or amendments to the EIA report. Going to court is not an option because in a judicial review, judges will only evaluate if procedural rules of the process in law have been followed, without commenting on the substantive content of EIAs.

Additionally, the issue of limited financial and non-financial resources faced by both project proponents and the authorities render the EIA process ineffective, according to community consultations and an interview with DOE officers (Abdul Mahmud & Zaini Sakawi, 2015).

For project proponents, the shortage of technical know-how, qualified personnel and adequate funding to comply with EIA guidelines have resulted in poor overall planning and the inability to fully recognise all the environmental risks.

In some cases, there are businesses that are not genuinely committed to the EIA process and regard it as a mere cost of doing business, making them more willing to pay fines for non-compliance as long as their project moves forward. To them, the EIA process is cumbersome, and may even seem counterproductive to the business' ultimate objectives.

Due to the DOE's resource constraints, on the other hand, monitoring efforts are inconsistent as the agency struggles to deploy officers to remote locations. Primarily, monitoring is conducted when complaints or concerns receive media or civil society attention.

Poor federal-state coordination and conflicting regulations also weaken State enforcement, leading to issues such as the displacement of indigenous communities, non-payment of land compensation, and the lack of meaningful participation of affected groups in the EIA process.

Similar issues arise in the implementation of TCPA requirements for an SIA to be conducted before an approval from the state and local planning authorities is obtained. The SIA report assesses the social effects of major infrastructure projects. To support this, the Town and Country Planning Department (PLANMalaysia) has published a manual on SIA reporting that applies to Peninsular Malaysia and certain projects in Sabah and Sarawak (PLANMalaysia, 2018). However, because the TCPA lacks explicit SIA provisions, and the manual is non-binding, non-compliance with its guidance does not invalidate an SIA report.

Moreover, the manual lacks comprehensive guidelines on the process for approval, post-submission enforcement, and even the criteria required for SIA consultants developing the report. This has led to much confusion over the report preparation process and non-uniform implementation of SIAs across states.

Case Study 9

The Bakun dam

The EIA's shortcomings can be illustrated by the 1997 case of the Bakun hydroelectric project near Belaga in the Kapit division of Sarawak. The case highlights the jurisdictional contradictions between federal and state environmental regulations which, due to the courts' literal interpretation, resulted in a complete failure of meaningful participation by the indigenous communities.

The project inundated a large tract of land and created a reservoir and water catchment area. About 10,000 indigenous people occupying the land through their customary rights, were displaced. Even before it began, the construction of the dam faced criticism from various groups, including environmentalists and indigenous communities, over issues related to land acquisition and compensation, the lack of due process and public participation, and its environmental impacts. The state government disregarded the criticisms and proceeded with the project. The IPs of the land sued but lost the case.

In Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals, the Court of Appeal held that the IPs (plaintiffs) did not have vested rights to be provided with a copy of the EIA report, and in any event, they did not apply for a copy of it.

The plaintiffs also had no right to be heard as they did not have legal standing (locus standi) to commence the action since they were trying to enforce a public law remedy under statute, while such enforcement could only be done by the Attorney General. They were also faulted for failing to demonstrate that the harm caused to them was unique to them, compared to other persons whose rights were equally affected by the dam but were not before the court as plaintiffs.

The court also found that even if the plaintiffs' displacement affected their lives, culture and heritage, which are protected by the right to life in Article 5 of the Constitution, the State and the developers had acted in accordance with the law and did not violate Article 5.

The decision thus deprived the affected indigenous community not only of their ancestral lands, but also of their right to be consulted on such projects. Although this particular example is close to three decades old, the core problems of the case, as they relate to the pursuit of environmental and human rights, remain relevant today.

Government response

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On the Kajing Tubek case referred to above, the court's decision (pg. 295) states the following:

"An interested public is entitled to the report if he applies for the report to be supplied to him on payment of a certain cost. He would not be given the report if he did not ask for it. There is no accrued 'right that the report must be distributed to the public without the public asking for it. From the evidence adduced which was by way of an affidavit, there was no evidence to show that any of the respondents had requested for the report to be supplied to him".

Other examples of failed EIA consultations can also be traced to mega dam projects. For example, the earthworks of the Murum hydropower dam started some 10 months prior to the EIA approval. The social and environmental impact assessments had yet, by then, to be completed and approved by the NREB (Tham, 2022).

In Kelantan, villagers affected by the Ulu Nenggiri dam development in Gua Musang could not access the EIA report. Despite efforts by SUHAKAM and Tenaga Nasional Bhd. to mediate the situation (Lee, 2021), over 3,000 villagers from 17 indigenous territories issued a memorandum to the Prime Minister demanding the cancellation of the project (Malaysiakini, 2022).

These instances serve as representative cases of a more extensive environmental and human rights issue with the EIA process. Overall, the EIA process is viewed by affected communities as largely symbolic and disconnected from on-the-ground realities, with limited possibility to influence project approvals, alterations, or rejections (Formby, 2012). Their implementation remains merely part of a box-ticking exercise for development project proponents and state authorities to expedite approvals.

Confusion around the government's environmental governance structure

Malaysia's governance is dynamic, with every change in government leading to a reconfiguration of ministerial portfolios.

These changes showcase adaptability and agility but have also affected progress and created uncertainties in the civil service over the different agency responsibilities. The jurisdictional shifts in Malaysia's environmental governance at the ministerial level, through the years since 2009, is elaborated in this report's previous chapter on governance.

Moreover, the co-existence of federal and state jurisdiction over land, natural resources and the environment has caused problems of overlap, inconsistency, and operational enforcement. Calling for a review of the delegation of constitutional powers is politically sensitive due to the current federal-state climate. At times, this lack of clarity has affected inter-agency and inter-ministerial cooperation and the mainstreaming of environmental protection, while hampering the effective implementation of safeguards that are required by Malaysia's international obligations on EIAs, natural resource management, DRR, and climate governance.

Public procurement as another vulnerability

In Malaysia, public procurement and licensing requirements are not standardised, leading to multiple disputes over governance, accountability, and transparency between the public, government, and businesses. Public procurement is also one of the six priority areas vulnerable to corruption, as outlined in the NACP (C4 Center, n.d.).

For example, the NFA makes it mandatory that licenses to harvest forest products from a permanent forest reserve or state land be awarded by open tender. In Sabah and Sarawak, however, the law does not require competitive award procedures.

In the energy sector, complaints are raised from independent power producers (IPPs) pushing for direct awards rather than participating in open and competitive bids. However, data on these practices remains shielded by the OSA, limiting public insight and scrutiny. In a move towards energy reform in 2018, the PH government revoked four Power Purchase Agreement (PPA) licenses from IPPs due to non-compliance with the Energy Commission's competitive bidding principles.

Historically, following the 1992 national blackout, the then government entered into a 21-year PPA with IPPs, allowing market access to private entities. This agreement, as highlighted by the Economist Intelligence Unit (2014), is covered by the OSA. Notably, early IPPs, such as those involved with the Bakun hydropower dam (Bawe, 1996), seemed to closely align with government interests, despite potential gaps in sector-specific experience.

ESG sustainability challenges and government direction: Reporting, due diligence and greenwashing

The UNGPs prescribe that the corporate responsibility to respect human rights should go beyond mere compliance with the help of national laws and regulations. We note the sustainability statements and reports of three large corporations from three major sectors in Malaysian business: Sime Darby Plantation Bhd. (Sime Darby Plantation), Petronas, and CIMB.

Commitment to human rights	Sime Darby Plantation has a human rights charter that focuses on environmental sustainability (Sime Darby Plantation, 2021). However, it does not as yet expressly address the nexus between the environment and human rights. Instead, it commits to minimising environmental harms, and enhancing biodiversity and the ecosystem; no deforestation and no new development on peat land; enhancing resilience against climate change impact; and adopting responsible consumption and production (Sime Darby Plantation, 2019). Petronas has committed to incorporating the UNGPs into its business operations, focusing on "community well-being" to include health, protection against involuntary resettlement, safeguarding IPs, and ensuring access to natural resources. CIMB's commitment focuses on ending the forced or involuntary displacement of IPs and not to finance or support capital raising for companies involved in converting high conservation value (HCV) areas, developing on peatlands, or those lacking policy commitments on free, prior and informed consent (FPIC) of local communities.
Due diligence	Sime Darby Plantation's HRDD policy focuses on migrant and labour practices in Malaysia. Environmental practices are implicit. Petronas has aligned its internal HRDD guidelines fully with the UNGPs and the International Petroleum Industry Environmental Conservation Association benchmark. CIMB conducts Basic Sustainability Due Diligence through interviews with business clients (excluding SMEs) and desktop reviews, to assess environmental and social risks. If a client fails the due diligence, an Enhanced Sustainability Due Diligence is performed using standards of the UNEP Finance Initiative's (UNEP FI) Environmental & Social Risk Analysis (ESRA).
Remediation	Sime Darby Plantation implements remediation and compensation strategies through the Roundtable on Sustainable Palm Oil (RSPO) Remediation and Compensation Procedure, specifically concerning land use by the company in Indonesia and Papua New Guinea. Petronas has a grievance mechanism focused on employment issues, but this does not apply to its environmental commitments. CIMB engages with clients to address sustainability risks and implements sustainability action plans, including on remediation.

Currently, environmental commitments by PLCs are driven by Bursa Malaysia's requirements for these companies to report on ESG matters. But because Malaysia's domestic law does not clearly define environmental rights, many Malaysian businesses lack clear policies that address the environmental challenges within their operations, a dimension that is often overlooked. In comparison, foreign subsidiaries accustomed to stringent environmental and human rights regulations are better positioned to navigate this space.

An effective regulatory environment, which includes a set of incentives, is a crucial motivator for businesses to implement good environmental policies. However, the government needs to have a clearer transition plan for businesses to wholly adopt sustainable practices. For example, regulatory clarity on business pathways to achieve carbon reduction targets – 50 per cent by 2030 and 100 per cent by 2050 – is lacking. There should be an immediate review of current practices, feasibility studies to assess business and sector capacities, and sufficient data and funding to support the shift.

The integration of human rights and environmental concepts has to be improved, as this is integral to the BHR compliance landscape. If environmental management mechanisms such as EIAs and other tools are to be effective, effort must be taken to ensure the human rights elements contained therein are strengthened and not diluted.

The protection of environmental rights must equally prevent discrimination, and prioritise the needs of vulnerable groups such as children, women, indigenous communities, migrants, PWDs, older persons, refugees, asylum-seekers, and stateless persons.

Environmental due diligence is not mandatory in Malaysia save for specific projects, and this should change. Supply chains must also be assessed for risks as part of due diligence. The importance of due diligence is apparent when such cases involving the excision of permanent forest reserves in Bukit Cherakah and Kuala Langat North Forest Reserve (Kalidas, 2021) are considered.

There are tools available to help companies conduct environmental due diligence, such as the Environmental Management System (EMS). EMS is the most widely used data management system as it supports all types and sizes of companies meet their environmental and sustainability targets.

The Department of Standards Malaysia, the National Accreditation Body under the Ministry of Science, Technology and Innovation, established the MS ISO 14001: 2015 (EMS) standard to accredit companies using a systematic approach to protect the environment, prevent pollution (air, water, land, noise and nuisance), and improve their environmental performance. Additionally, BNM's Climate Change and Principle-based Taxonomy (BNM, 2021) encourages financial institutions to assess their economic activities against climate objectives and incorporate broader environmental outcomes through the principle of no significant harm.

However, while such instruments are available to businesses on their journey towards sustainability, SMEs seem to be left out of the BHR conversation. They do not view ESG initiatives positively due to the innate business structure of small enterprises that focuses on shorter-term value creation (which supersedes longer-term sustainability goals) and overall capacity issues, including reporting capabilities, talent, external funding, and time.

Compliance is both costly and challenging for SMEs, and some sectors, like palm oil, complain about "compliance fatigue".

Finally, it is said that one of the primary factors contributing to greenwashing is uncertainty surrounding "hard information" in sustainability reports, such as carbon information across the supply chain. As highlighted by Noor Raida Abd Rahman et al. (2020), companies often steer clear from providing such definitive data in their reports, primarily due to the uncertainty associated with it.

This ambiguity not only weakens the credibility of the reports but also allows companies to frame their actions in a positive light without substantial backing, which may amount to greenwashing. When firms are allowed to gloss over the specifics and present generalised claims, the focus tends to shift from genuine environmental action to merely building reputation. Compounding this problem, Malaysia's current legal framework is unable to tackle greenwashing.

Building on the challenges mentioned, there remains risky implications for Malaysia's current approach to carbon information disclosures. The present framework risks promoting disclosures that focus more on companies' communications and public image than genuine transparency.

This will become even more pressing as voluntary carbon emissions reporting gains traction, increasing the risk of ambiguous or misleading claims. But despite its growth, this voluntary approach remains a work in progress, anticipated to undergo refinements for more robust disclosure mechanisms in the future.

Even with the current obstacles, some SMEs are slowly taking up the challenge of carbon emissions disclosure. Socialisation to the entire ecosystem of small enterprises, however, requires creativity and innovative approaches, guiding companies towards accurate and genuine reporting that will further empower consumers to make climate-responsive decisions.

Priority area 2: Sustainable forest management and biodiversity

In Malaysia, the management of forests is placed under the jurisdiction of state governments. Each state has its own forestry department that is responsible for the administration, management, and conservation of forest resources within its territory. However, several federal agencies and national policies provide overarching guidance and coordination to ensure sustainable forest management across the country.

For example, the Forestry Department of Peninsular Malaysia and the various state forestry departments are responsible for managing forests in Peninsular Malaysia, operating under the regulatory framework of the NFA and guided by the Forestry Policy of Peninsular Malaysia 2021.
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In Sabah, forest management by the Sabah Forestry Department is governed by the Forest Enactment 1968, Forest (Timber) Enactment 2015 and Sabah Forest Policy 2018. In Sarawak, the work of the Forest Department Sarawak (FDS) is governed by the Forests Ordinance 2015 (Cap. 71) and Sarawak Forest Policy 2018. The National Land Council plays a role in trade policies and compliance related to forest products, offering technical advice on forestry matters.

Policies on forestry in Peninsular Malaysia, Sabah, and Sarawak share common objectives related to transparency, enforcement, licensing, and forest management certification. They emphasise compliance with international regulations and the involvement of local communities in forest management.

Participation in forest management

Sarawak's Forest Policy mandates that license holders establish a Compliance Unit, while Sabah's Forest Policy places an emphasis on both internal and external auditing. Forestry policies in Peninsular Malaysia and Sabah, additionally, stress the alignment with regional and international regulations on carbon emissions reduction and prioritise the participation of IPs and local communities through regular consultations and dialogues.

Sabah, in particular, focuses on the involvement of indigenous communities through a Payment for Ecosystem Services (PES) fund that benefits rural and forest-dwelling communities, and supports forest restoration. In Peninsular Malaysia, state governments are required to conduct a public inquiry before permanently excising forest reserves, and on the condition that these forests must be replaced with an equal or larger land area. As mandated by the NFA, states must also provide up-to-date information on the forest area and tree cover on their website.

Licensing and certification

Both Malaysia's timber and oil palm sectors are highly regulated, with mandatory certifications required such as the MSPO and Malaysian Timber Certification Scheme (MTCS). The timber sector has set ambitious targets for certification, aiming to certify 50 per cent of total forest cover (including natural forests and plantations) by 2030,

for an export value of RM28 billion (Malaysian Timber Certification Council [MTCC], 2022). The MTCS, overseen by the MTCC, provides independent assessments of forest management practices in Malaysia, with external audits conducted every five years.

Two types of certifications are offered: Forest Management Certification and Chains of Custody. The MTCC aims to have 750 companies under the Chains of Custody certification by 2030 (MTCC, n.d.). In Sarawak, Forest Management Certification is mandatory for all long-term Forest Timber Licence (FTL) areas, so that the tools and frameworks are in place to address various technical, management, and social issues related to forest operations (FDS, n.d.). The FDS and Sarawak Timber Association conduct capacity building and awareness trainings on sustainable forest management (SFM) for government agencies, timber companies, and local communities.

Efforts to develop the Forest Plantation Management certification are mainstreamed in various policies and action plans, including the National Agricommodity Policy 2021-2030, Sarawak Forest Policy, Sabah Action Plan on Forest Plantation Development 2022-2036, and Malaysia Policy on Forestry 2021. Notably, MSPO 2.0 incorporates GHG accounting and includes provisions to prevent the conversion of natural forests and protected and HCV areas after 31 December 2019.

Beyond this date, any new land conversion for planting necessitates the completion of an EIA, a SIA, and an HCV assessment prior. It also emphasises safeguarding the rights of IPs and ensuring that their rights are not infringed on. As mentioned before, there should be fair opportunities for conflict resolution through the FPIC process, where evidence of land ownership or land-use rights, accompanied by historical land tenure records, are provided. Customary rights should never be undermined or diminished, and any land-related conflicts should be addressed urgently and in good faith. In Sarawak, the mapping of native customary rights (NCR) lands is conducted by a participatory approach, with the outcomes made accessible to affected rights-holders and all relevant stakeholders.

However, grave concerns have been raised on the definition of forest used to maintain 50 per cent of terrestrial land as forested areas, as it may include clearcut harvest zones and fragmented forests that do not provide the same ecosystem services as natural forests. Additionally, there remains inconsistencies in Malaysia's policies regarding forest-linked commodities. While timber forest plantations are allowed in permanent forest reserves, palm oil plantations are not, following the MSPO certification, despite both requiring various assessments and approvals.

Moreover, despite increasing concerns about climate change impacts and biodiversity loss, investments and financial resources continue to flow to companies involved in forest-risk commodities. Between 2020 and 2021, bank credit to such companies increased by over 60 per cent (Forests & Finance, 2022).

Challenges in legal logging

While substantial effort has been made to address illegal logging, legal logging is also a growing concern. Issues encompassing enforcement and compliance, inadequate engagement with local communities, and the lack of a well-defined concessions strategy, are often raised.

It is also unclear how the number of concessions for legal logging is rationalised and their limits defined, apart from the target to maintain 50 per cent forest cover. SFM initiatives are inundated with complexities and challenges, including ensuring compliance with public consultations, FPIC, and environmental standards. Further, Malaysia's timber legality assurance systems lack standardisation and consistent multistakeholder and public participation. Both the Peninsular Malaysia Timber Legality Assurance System and Sabah Timber Legality Assurance System involve multiple stakeholders (Preferred by Nature, n.d.), while the Sarawak Timber Legality Verification System was developed with industry, but without consulting NGOs or CSOs (FDS, 2021).

Case Study 10

The Forest Plantation Programme: An unsuccessful attempt at SFM

The Forest Plantation Development Programme has laid bare systemic issues deeply rooted in the SFM framework. These issues cover a range of problems, from non-compliance with planting contracts and irregularities in EIAs, to outdated forestry data and significant gaps in capacity and enforcement.

Initiated in 2007 by the Malaysian Timber Industry Body (MTIB), the programme had a lofty objective: disbursing government loans exceeding RM1 billion to incentivise planters. These loans were to be repaid between the 16th and 20th years, following the planting (Forest Plantation Development, n.d.). By 2019, the programme had allocated funds to 53.5 per cent of established plantations in Peninsular Malaysia, accumulating RM913.7 million across 70 private companies and government agencies (Law, 2022a). Intriguingly, there is no publicly available list of borrowers.

In 2012, the National Land Council granted an approval for forest plantation zones spanning 439,189 hectares, equivalent to 9 per cent of the total area of permanent forest reserves in Peninsular Malaysia. These zones allowed for the establishment of plantations within these forest reserves, with oversight and regulation vested in state forestry departments.

The rationale behind this move was to bolster the domestic wood industry, rejuvenate degraded forests, and diversify revenue sources for state governments to reduce the dependency on natural forest logging. However, this policy was halted in 2021 when the National Land Council imposed a non-binding 15-year moratorium on new forest plantations in Peninsular Malaysian reserves (Free Malaysia Today, 2021).

A major problem was the awarding of contracts to planters who failed to fulfil their planting obligations. For example, in Kelantan, 30,000 contracts were terminated for planters who had cleared the forest but failed to replant within three years, accounting for 37 per cent of the reserves cleared from 2007 to 2017 (Law, 2022b). Making matters worse, the penalties for non-compliance are far from prohibitive, with companies often finding it more cost-effective to pay the fines rather than to adhere to the regulations. In Kelantan, a meagre penalty of RM3,000 per hectare is imposed for failing to replant. The state forestry department and MTIB lack the necessary workforce to conduct regular site audits, particularly in locations deep within remote forests. These lapses in management and enforcement severely undermined the programme.

Forest clear-cutting in indigenous territories and the ensuing loss of biodiversity pose a threat to the security and cultural sovereignty of indigenous communities. Worryingly, incidents of IPs becoming victims of human-wildlife conflicts have surged in recent years (Faiz Zainuddin, 2022). In response, some Orang Asli have set up blockades and initiated legal actions against loggers and state authorities, alleging detrimental land-grabbing.

Despite these persistent issues and the lack of public disclosure of the review of the first phase, the programme will receive an injection of RM500 million under 12MP (MOF, 2020).

Carbon pricing and trading

Carbon pricing represents a concept where economic incentives are provided to emitters, encouraging them to transition to cleaner and more sustainable practices. This approach offers an opportunity to secure funding for forest conservation efforts and is an emerging tool for forest management.

Malaysia's NDCs recognise the forestry sector's vital role in mitigating GHG emissions, highlighting the significance of land use, land-use change, and forestry (LULUCF) as substantial carbon sinks (NRECC, 2021a). To leverage this potential, Malaysia has introduced the National REDD+ Strategy (NRS), aligning with the Cancun safeguards to address social, environmental, and governance considerations. Additionally, the establishment of the Malaysia Forest Fund (NRECC, 2021b) aims to generate funds through forest carbon credits and execute the REDD+ Finance Framework. Amendments to the laws now permit carbon capture, utilisation, and storage, providing opportunities to generate carbon credits (Umpang, 2022).

Given the novelty of carbon pricing and trading, key challenges have emerged that have severe repercussions if not addressed. There is an absence of a clear policy and regulatory framework to set carbon prices, regulate emissions, conduct robust data monitoring, verification, and reporting as well as to limit corruption. To establish carbon-offset projects, indigenous communities may also be displaced and their rights undermined, while negative environmental impacts may occur affecting biodiversity and ecosystem conservation.

The limited benefits of carbon pricing and trading may not always reach the intended beneficiaries such as IPs, granting further advantages instead to project proponents, governments or third-party intermediaries. Worse, if not implemented correctly, carbon trading may potentially create a perverse incentive structure, and widen the power asymmetry between the State and business, and communities.

Case Study 11

Planned carbon trading in Sabah

Forest-based carbon financing as a tool to mitigate climate change has become a big topic in Sabah.

In 2021, the Sabah government and Singapore-based firm Hoch Standard Pte Ltd, signed a Nature Conservation Agreement (NCA), a profit-sharing deal involving carbon trading and the monetisation of other non-carbon and natural capital from 2 million hectares of Sabah's forest reserves (Tan, 2021).

However, the absence of due diligence and transparency in the implementation of the NCA led the Sabah Attorney General to declare the project legally void (Free Malaysia Today, 2022a). The Attorney General listed nine outstanding matters to be resolved, including a due diligence report to prove the firm's credibility. Many reports also cited communities saying that they were not consulted despite FPIC being a requirement under the deal. According to Tan (2021), former Sabah Senator Adrian Lasimbang filed a suit over the NCA to obtain a copy of the agreement and other correspondence surrounding it.

In a separate case in 2022, the state subsidiary, Sabah Foundation, informed the public that the state government had made a deal on carbon offset credits involving 83,391 hectares of forest land in the Kuamut Rainforest Conservation Project. However, the payment made from the deal by a UK-based partner to the state government was not disclosed to the public due to "business considerations," raising questions of transparency and corporate accountability, and putting the project under intense scrutiny.

In light of these issues, Sabah set itself the task of developing an enactment on carbon exchange within a year (Free Malaysia Today, 2022b).

Priority area 3: Air pollution, waste management and plastic circularity

Air pollution

The EQA governs environmental and air quality regulations in Malaysia. The NRECC through the DOE, is the leading environmental authority alongside state environmental authorities in Sabah and Sarawak, including NREB and the Environmental Protection Department.

The EQA requires owners of stationary sources, like factories and industries, to reduce air pollutant emissions, prohibits open burning, and enforces vehicle emission standards based on the UNECE standards. These controls are executed by several regulations, such as the Environmental Quality (Clean Air) Regulations 2014 and the Environmental Quality (Control of Emissions and Diesel Engines) Regulations 1996.

Additionally, under the Kuala Lumpur Declaration on Environment and Health, Malaysia adopted the National Environmental Health Action Plan (2021) led by the Ministry of Health (MOH) to mainstream environmental health management including by requiring contingency readiness, environmental emergency plans, and climate change and health impact assessments.

Further, the Clean Air Action Plan aims to reduce air pollution by increasing public awareness and participation, establishing and implementing the "polluter pays" principle, and improving emission standards and inventory through self-regulation using ISO 14000 as a reference (DOE, 2010). It is important to note that Malaysia's air quality standards have not been updated to align with the 2021 guidelines by the World Health Organization (WHO) that establishes a strict criteria for air pollutants.

The steps undertaken have not been enough. In Malaysia, respiratory illnesses were the second leading cause of death (19.69 per cent) in MOH hospitals in 2020 (MOH, 2021) with particulate pollutants and toxic gases being the main contributors.

Water pollution

Water pollution in Malaysia remains a significant concern. Projections from hydrologists suggest the potential onset of a water crisis by 2025, highlighting the immediate necessity for sustainable water resource management. This is of particular importance given that rivers, accounting for 98 per cent of the community's raw water source, are affected by pollution.

Malaysia has 189 river basins: 89 in Peninsular Malaysia, 78 in Sabah, and 22 in Sarawak (Haliza Abdul Rahman, 2021). The data underscores the urgency to address the challenges associated with water pollution and resource management.

In the 12MP, the Water Sector Transformation 2040 was introduced to address water security effectively through economic, fiscal, and technological instruments, and building adaptative capacity through community participation.

Generally, conflicts in water resource management are resolved by coordination and consultation between agencies, but the lack of a central authority to manage all aspects of water resource management, coupled with overlapping inter-agency jurisdiction, has led to sectoral water management and competing objectives.

At present, the various water laws that address limited water resources and water supply are difficult to implement effectively as they are outdated, not comprehensive enough and too general in scope. Aside from water pollution and the lack of clean water, other issues include urban and rural flooding, the high costs of water treatment and environmental degradation around rivers or catchment areas. The sources of pollution include domestic and industrial sewerage from legal and illegal factories; effluent from livestock farms, manufacturing, and agro-based industries; suspended solids from mining, housing and road construction; logging and the clearing of forests; and heavy metals flowing from factories.

As a result of rapid economic growth and land development significantly impacting the environment, the water quality in urban river basins, such as in the Klang Valley and Langat Valley, is deteriorating. For example, in 2019, the Kim Kim River in Pasir Gudang was polluted by toxic chemicals, causing disruption to water supply for around 20,000 households. Additionally, during the COVID-19 Movement Control Order period in 2020, there were 160 reported cases of river pollution that required enforcement action.

Plastic circularity

In 2021, the government released the Malaysia Plastic Sustainability Roadmap 2021–2030 for a circular plastic economy with six national targets, including identifying and phasing out single-use plastics, achieving a 25 per cent recycling rate for post-consumer plastic packaging by 2025, and achieving 100 per cent recyclability of plastic packaging by 2030.

The roadmap also calls for building capacities, adopting new reprocessing and recycling technologies, and implementing Extended Producer Responsibility policies. The government continues to seek more participation from the private sector in multistakeholder processes as part of the implementation of the roadmap, but not much is known about its progress to date. Malaysia also participated in related negotiations on, and has committed to, global efforts to forge an international legally binding instrument to end plastic pollution, including through transforming the entire life cycle of plastic and tackling plastic waste disposal (International Institute for Sustainable Development, 2023).

However, the existing approach to addressing plastic pollution overlooks environmental justice and access to remedies, highlighting the need for a human rights-based approach. The plastic crisis is in fact a complex issue that affects human rights at every stage of the plastic lifecycle due to toxic pollution, exposure to toxic additives, waste mismanagement, and disinformation campaigns. Unsurprisingly, its social and environmental costs disproportionately affect vulnerable groups.

Government response

JULY 2023 - JUNE 2024

The Ministry of Housing and Local Government (KPKT) has been assisting NRECC (now NRES from December 2023) by providing inputs for the Intergovernmental Negotiating Committee on Plastic Pollution (INC).

KPKT now has a National Cleanliness Policy, which includes action plans for recycling initiatives, and continues to develop a more comprehensive policy that will promote circular economy growth with the goal of managing waste pollution including that of plastic.

Priority area 4: Climate change

With the ever-increasing rate of development and global concerns to reduce carbon emissions to mitigate climate change, it is imperative for Malaysia to harmonise its efforts on both economic growth and decarbonisation. This includes addressing challenges such as mounting electricity costs, particularly for households grappling with limited wages, inflation, and the aftermath of several years of the COVID-19 pandemic.

The government established the National Steering Committee on Climate Change and the Malaysia Climate Change Action Council to guide both its operational and policy decisions. Malaysia's principal policy for addressing climate change is the NPCC. Grounded in sustainable development principles, the policy emphasises coordinated action, broad participation, and the principle of common but differentiated responsibilities. The NPCC focuses on industry regulation through legislative measures, emissions reporting, standard-setting, and enhanced participation. It also encourages industrial transition by offering financial incentives and expert training.

As mentioned, Malaysia is also developing carbon pricing tools to meet its NDC targets, which include reducing emissions intensity by 45 per cent by 2030 and enhancing export competitiveness prior to the CBAM 2023 evaluation (European Council, 2022). The launch of Malaysia's voluntary carbon market, Bursa Carbon Exchange, in March 2023 was a key step in this direction. This carbon market, spearheaded by the NRECC and the MOF, stands as the sole market-based instrument currently in operation. While these carbon projects, including the exploratory REDD+ programme, recognise the significance of third-party audits, a discernible gap persists concerning statutory guidelines, particularly on reporting, community engagement, and consultations with indigenous groups (Carbon Disclosure Project, n.d.; Gold Standard, n.d.; Verra, n.d.).

In light of the forthcoming CBAM evaluation and building on Malaysia's ongoing initiatives, an impact assessment is currently underway to understand the mechanism's impact on sectors like cement, aluminium, energy, and fertiliser production, especially concerning financial risk and market competitiveness. As Malaysia steers its efforts towards emissions reduction, the nation is formulating its long-term low emissions development strategies to map both

immediate and future pathways guided by the 12MP's Net Zero by 2050 target. Concurrently, financial institutions like CIMB have begun imposing internal carbon pricing to maintain their competitive edge (Yee, 2022).

The energy sector, being the primary source of GHG emissions, is subject to rapid advancements in the government's emissions reduction strategies. To support these measures, the government has implemented several policies and legal instruments, as outlined below:

1. National Energy Policy 2022-2040 (NEP): Promotes ESG and nationwide GHG accounting standards for the private sector. The policy aims to increase export competitiveness and requires mandatory energy audits for large and medium industries, while SMEs are allowed to opt to certify their carbon emissions through third-party certification entities (Prime Minister's Department, 2022). The NEP will be reviewed every three years to align with international developments.

2. Energy Efficiency and Conservation Act: This proposed law seeks to regulate the NEP's implementation and sets minimum energy performance standards, mandatory energy audits, and penalties for non-compliance.

3. Renewable Energy Policy and Action Plan 2009: Implemented through the Renewable Energy Act 2011 (REA), it requires a consultative approach to decision-making and establishes clear standards and criteria for renewable energy expansion. However, the complaint mechanism under the action plan caters only to businesses and not those impacted by business practices. The REA regulates renewable energy expansion by establishing the Sustainable Energy Development Authority as the main administrative body and custodian of several market-based renewable energy instruments. Key provisions of the REA include implementing the feed-in tariff system, renewable energy PPAs, audits, compliance, and enforcement (REA, 2011).

Government response

JULY 2023 - JUNE 2024

The National Energy Transition Roadmap was launched in August 2023. The roadmap is designed to accelerate Malaysia's energy transition and help steer the country's shift "from a traditional fossil fuel-based economy to a high-value green economy" (Ministry of Economy, 2023).

In line with Malaysia's transition towards Net Zero 2050 (Prime Minister's Department, 2022), the Low Carbon Nations Aspiration 2040 sets nine GHG reduction targets across various sectors including in transportation. Mainstreaming electricity that is generated from renewables, the Energy Commission, established under the Energy Commission Act 2001, regulates the competitive bidding and licensing in the Malaysian electricity supply industry to ensure independence, credibility and transparency in procurement and to prevent monopolies specific to PPAs (Khem Thadani & Jasprit Kaur, 2021).

Although Malaysia has made considerable strides in mitigation, the National Adaptation Plan is still under development by the NRECC, with the aim of integrating climate change adaptation across the five key sectors below, as well as cross-cutting issues like gender and youth:

- Water and coastal resources.
- Agriculture and food security.
- Infrastructure, cities and energy.
- Forestry and biodiversity.
- Public health.

At the state level, climate governance is advancing more rapidly. Think City, a wholly owned subsidiary of the Malaysian government investment arm, Khazanah Nasional Berhad, obtained international funding for the Penang Nature-Based Climate Adaptation Programme (Adaptation Fund, 2022). The Selangor government has formed an adaptation council to manage climate effects via the Selangor Climate Change Action Plan (The Star, 2022), while Kuala Lumpur has created a fund dedicated to green technology investments (Farid Wahab, 2023). In the southern region, Johor has established the multi-party Climate Change and Disaster Management Committee (The Star, 2023).

Also in line with efforts to reduce emissions, the National Automotive Policy 2020, the 12MP, and the Low Carbon Nations Aspiration 2040 support the electric vehicle industry to reduce carbon emissions, while retaining market competitiveness and improving air quality.

To complement this, the National Green Technology Policy further focuses on reducing Malaysia's reliance on natural resources by encouraging companies to invest in verified green assets across energy, building, transportation, and waste management through incentives such as the Green Investment Tax Allowance and Income Tax Exemption.

Climate governance

During the consultations, civil society highlighted practical challenges in the implementation of policies and plans on the ground. They indicated the difficulties the country encounters in climate governance, particularly in the application of procedural approaches aligned with OHCHR's human rights framework. Specifically, they include:

- A poor data ecosystem: National data on climate risks are either inadequate, inconsistent or outdated. There is also a lack of climate education in public schools.

- Incoherent federal-state fiscal arrangements on flood mitigation: The federal government currently pays all mitigation costs, even while state activities that exacerbate flood risks continue with impunity.

- Limited public participation: Businesses are generally consulted in climate policymaking and Conference of the Parties negotiations; however, vulnerable groups and impacted communities often have limited opportunities to participate and be heard.

- Coordination issues: There is insufficient inter-agency and inter-ministerial cooperation on climate governance mainstreaming.

- Institutional capacity limitations: Local institutions remain ill-equipped to introduce and implement climate resilience at the local level. This is essential to enable effective localised adaptation planning, technical resources, and budgetary allocations.

- Inadequate laws and oversight: While the NPCC advocates for a systematic review and alignment of current legislation to address climate change, Malaysia's primary environmental statute, the EQA, does not categorise GHGs as pollutants. Furthermore, there are no specific regulations concerning environmental taxes, financial tagging, carbon pricing, fiscal adjustments, carbon emissions, or considerations linked to climate-induced calamities. However, a Climate Change Act is currently under development.

- Policy conflict: Despite the increasing policy push for energy transition, the fuel subsidy bill alone reportedly came up to RM28 billion, that is, 7 per cent of total government expenditure in 2022.

Climate finance

According to a 2022 study by the ISEAS Yusof Ishak Institute, while Malaysia is eligible for financial support from the UN Framework Convention on Climate Change's (UNFCCC) mechanisms for developing nations – including the Green Climate Fund, Adaptation Fund, Global Environment Facility, and the Special Climate Change Fund – our actual receipt of climate finance is modest. OECD data on climate finance provided to eight ASEAN countries (excluding Brunei and Singapore) between 2000 and 2019 shows that Malaysia received the least at USD141 million. For perspective, neighbouring Indonesia secured the highest at USD18,056 million during the same period, followed by Vietnam at USD13,383 million and the Philippines at USD12,217 million (Martinus & Qiu, 2022).

Given its urgent climate finance needs, Malaysia is tapping into market-based financing to meet the demands of the surge in net-zero emissions commitments. This has unlocked increased financial opportunities across various asset classes, including equity, loans, and bonds. Market regulations are expected to be implemented to enable the scaling of private finance, including disclosures and ESG reporting, towards attracting green foreign direct investment.

Yet, a challenge persists. As Malaysia does not practice climate budget tagging, it is difficult to monitor and assess the rollout of its climate-centric programmes. The overarching category of adaptation, and its overlap with mitigation, often muddles the clarity of budget allocations. For instance, while initiatives to enhance resilience to climate impacts like flooding are typically categorised as adaptation, those promoting renewable energy are labelled as mitigation. This dual nature of some budgetary items can obscure their main objectives.

With climate budget tagging, key stakeholders from governmental entities to civil society will be better positioned to assess the state of financing directed towards both mitigation and adaptation actions. This heightened financial transparency could serve as a foundation for policymakers, empowering them to design or refine policy mechanisms as necessary, thereby bolstering Malaysia's commitment to proactively address the multifaceted challenges of climate change.

Maladaptation

The Intergovernmental Panel on Climate Change (IPCC) report warns that measures that focus on short-term gains and do not address vulnerabilities with an inclusive and flexible approach could result in maladaptation, including a higher risk of insecurity and conflict, and increased inequality (UNFCCC, 2022).

Despite the heavier focus on mitigation compared to adaptation, Malaysia has developed infrastructure that features climate change adaptation measures. However, some aspects of these measures, including the planning of mega dams, land use, relocation and coastal reclamation, poor design of safeguards, and misalignment with SDG goals and other national targets, can contribute to maladaptation and lead to negative environmental and social consequences.

Additionally, a shallow understanding of reasons why communities are vulnerable, and a failure to engage equitably with affected populations have contributed to a limited recognition of the social impacts of adaptation. The absence of a robust rights-based framework in the development of a national adaptation plan, and related legislation on climate change, can exacerbate this. For example, stakeholders consulted for this report claimed that public consultations were not effectively conducted on the amendments to the Sarawak land code on carbon jurisdiction, raising concerns that new development projects claiming to be low-carbon and green may in reality, still operate as usual.

Climate disaster risks and management

One of Malaysia's most significant climate change impacts is water-related i.e. floods, with resultant threats to food security, public safety, health, settlements, and infrastructure.

On 26 August 2015, the Cabinet established the National Disaster Management Agency (NADMA) under the Prime Minister's Department, taking over the responsibility as the principal policymaking and coordinating body for disaster management from the National Security Council (NSC). While flood management is placed under the purview of the Department of Irrigation and Drainage, disaster response (including flood response), in general, is overseen by NADMA.

Numerous laws exist to support compliance with flood mitigation measures, regulating water supply, preventing flooding, protecting water catchment areas, and collecting contributions towards upgrades for drainage facilities. Key policy instruments, including the Integrated River Basin Management, the National Adaptation Water Framework and the Water Sector Transformation 2040, were also developed to strengthen water sector adaptation, and provide comprehensive assessments and strategies for managing water resources, water utility, and water-related disasters.

Figure 18: A house severely impacted by the 2021 flood in Hulu Langat, Selangor. Source: Jehan Wan Aziz.

Other notable initiatives include the National Flood Forecasting and Warning Programme that predicts floods and improves community response time; the National Water Balance Management System developed to assess water availability, demand, and management strategies; and the Malaysian Climate Change Knowledge Portal, also known as N-HyDaa (National Water Research Institute of Malaysia Hydroclimate Data Analysis Accelerator), that provides climate change and water-related data and simulation results.

Malaysia has also allocated substantial resources to mitigate water-related climate risks, including RM16 billion from the Flood Mitigation Projects funding under the 12MP. Water sources have been diversified and water supply margins have increased by implementing the Hybrid Off River Augmented Storage system and the Denai Sungai Kebangsaan programme to deter waste dumping.

Currently, while there is no specific legislation on DRR, existing laws such as the Land Conservation Act 1960, Environmental Protection Act 1990, TCPA, Drainage Works Act 1954, Uniform Building By-Laws 1984, and the Malaysia Civil Defence Force Act 1951, collectively form the legal framework for disaster management and risk reduction.

Further, efforts to develop a national legal framework for DRR and implement community-based disaster risk management (CBDRM) for enhancing community resilience and health are currently underway. Though flood disaster is a national issue requiring federal intervention, it still requires federal-state (and community) cooperation for effective management.

Government response

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The DRR policy is currently in the process of attaining Cabinet approval. This document will serve as a guide, and facilitate clearer and more structured coordination among stakeholders at all levels by fostering a shared objective in the implementation of activities or initiatives related to DRR.

The overarching goal is to strengthen community awareness, preparedness and resilience through a comprehensive and inclusive risk management framework.

Concerning CBDRM, a nationwide programme is being conducted year-round through strategic collaborations between NADMA and various government agencies, as well as NGOs and academia, targeting various community groups (e.g. community leaders, youth, women and children). A training of trainers manual was developed in 2012 to provide guidance on the conduct of CBDRM programmes. Currently, the CBDRM manual is being revised to suit Malaysia's current needs and context.

Although seen mainly as the responsibility of the federal government, nonetheless, DRR does not only operate under a particular government agency. DRR implementation cuts across all government and community levels and functions.

This is provided for under NSC Directive No. 20. All levels of government and community are essential to mitigation and recovery measures (before, during and after a disaster event), and the Directive further defines the roles of government agencies and departments, the private sector, NGOs or CSOs, and community leaders in a coordinated, top-down approach based on a disaster's risks and complexities. Operations are scaled across federal, state, and district levels.

Some gaps remain in rights protection for disaster victims

In line with developments in disaster management, HFA has advocated for a shift from relief and response to DRR, recognising that disasters can threaten global economic growth. The SFDRR in 2015 further advanced this concept by expressly referencing the protection of human rights in DRR.

In Malaysia, national disaster plans, and the NSC Directive No. 20, emphasise community empowerment in disaster management. This directive, supported by Standard Operating Procedures (SOPs) for disasters such as floods, forest fires, and industrial incidents, outlines the roles and responsibilities of relevant agencies within an integrated emergency management system.

These mechanisms acknowledge the crucial role of communities in disaster management, and thus attempt to incorporate human rights protection, ensuring assistance is provided to all based on specific needs and humanitarian principles. However, implementation can be markedly enhanced given the increasing complexities of DRR due to the frequency, scale and speed of climate-related events (The Straits Times, 2021).

Gaps in protection continue to manifest particularly for vulnerable groups such as women, youth and children, IPs, PWDs, older persons, migrant communities, and other marginalised peoples. At present, Malaysia's NDCs do not specifically cater to the adaptation requirements of these groups. While the development of a National Adaptation Plan is underway, the absence means ongoing initiatives for vulnerable communities will remain fragmented and uncoordinated. As documented in the 2021 floods, for example, unequal access to early warning systems, assistance, or primary goods and services undermine the effectiveness and efficiency of DRR management aimed at all impacted communities (Malay Mail, 2021).

Figure 19: A house is destroyed near Sungai Langat in the week after heavy rains that caused the massive 2021 flood in Hulu Langat, Selangor. Source: Jehan Wan Aziz.

Disasters also disproportionately affect the rural and urban poor. Environmental degradation and recurrent disasters exacerbate intersectional vulnerabilities of these groups, as they may lead to, or cause, the following:

- Pronounced safety and security risks.
- Loss and destruction of personal documentation, and difficulties to replace it.
- Unequal access to employment and livelihood opportunities.
- Forced relocation.
- Unsafe or involuntary return or resettlement of persons displaced by the disaster.
- Lack of property restitution and access to land.
- Gender-based violence.
- Inaccessible mental health aid.
- Abuse, neglect, and exploitation of children.
- Family separation.

Consultations with CSOs reveal that the operationalisation of human rights protection in DRR is not widely known, notably due to the lack of external reporting and public data. The absence of a publicly available national database detailing the impacts of climate change on vulnerable groups, coupled with the limited availability of disaggregated data and targeted policies, impedes the development of measures to climate-proof social protection.

Nevertheless, the government has acted urgently on occasion to mitigate negative climate impacts, such as in 2022 when the Ministry of Education implemented a policy allowing students to wear sportswear during a major heatwave and suspended all outdoor activities. However, the following year, there were isolated incidents of children suffering from heatstroke, with some fatalities. Urban heatwaves, a significant climate hazard in the region, will increasingly require urgent state attention on par with flood mitigation, particularly in terms of dedicated adaptation finance that is both comprehensive and inclusive.

Government response

JULY 2023 - JUNE 2024

In terms of early warning measures, various technologies and methods are utilized to deliver early warnings quickly and directly to the public, including by Short Message Service (SMS), and social media (WhatsApp, X, Facebook, and others), conventional media (radio and television), as well as by using sirens and blaring warnings over a loudspeaker on wheels in impacted areas. Emergency awareness and preparatory campaigns as well as materials are also made accessible to all by television, pamphlets, radio, social media, etc. not only by NADMA but also by other agencies and NGOs.

All these measures have a shared objective, which is to channel early information on impending disasters urgently and accurately to the community. As a last mile effort, authorities go door to door to warn the people.

In terms of assistance and access to primary goods and services, Malaysia has a whole-of-government and whole-of-society mechanism providing pre-, during, and post-disaster support. For example, at evacuation centres, evacuees are provided with basic necessities as well as access to health services based on need, and each family is provided with food kits to sustain them for several days on returning home. Similarly, those who are cut off due to the disaster event are provided with basic food rations in the immediate aftermath.

Post-disaster, the government offers various forms of assistance to those impacted. At the federal level, compassionate aid is provided under the National Disaster Relief Trust Fund (Kumpulan Wang Amanah Bantuan Bencana Negara [KWABBN]), while other support mechanisms are available based on eligibility for house repairs, reconstruction, as well as compensation for agricultural loss and damage.

Based on the study carried out by the Department of Irrigation and Drainage in 2012, 10.1 per cent of the country's total area is flood prone. In addition, according to a World Bank Report, the average annual natural hazard occurrence from 1980 to 20020 is 57.61 per cent compared to other hazards. Following the 2021/2022 monsoon flood, the country sustained a total of RM6.2 billion in loss.

As such, Malaysia prioritises flood mitigation and management in order to reduce losses and increase resilience; however, efforts to address other hazards, such as heatwaves, are not neglected and measures are put in place pending the severity of the disaster risk.

Under the 12MP, priority is given to low-carbon and climate-resilient socioeconomic development as well as the conservation of natural resources and ecosystems. Sustainability and resilience is enhanced by addressing climate change and pollution, reducing disaster risks, managing natural resources efficiently and strengthening the enabling environment for effective governance.

Strategies that are implemented include accelerating the country's transition to a circular economy, promoting green and resilient cities and townships, enhancing green mobility, augmenting low-carbon energy, extending producer responsibility as well as applying evidence-based and risk-informed actions. Emphasis is also placed on efforts to safeguard natural capital, ensure the sustainable utilisation of resources and benefit sharing, scaling-up green financing and instilling a sense of shared responsibility.

In addition, the Department of Social Welfare (JKM) also collects disaggregated disaster impact data of men, women, senior citizens (men and women), children (boys and girls), and infants (boys and girls) to further strengthen interventions.

Locus standi and environmental and climate litigation

In Malaysia, legal avenues to seek redress are paved with challenges. The state of the judicial process and legal procedures, limited access to remedies and environmental awareness, coupled with the lack of recognition of environmental human rights impede lawsuits (Maizatun Mustafa, 2020). To illustrate, the Bakun Dam case mentioned above taking a strict locus standi interpretation set a bad precedent for affected citizens wishing to mobilise a class action suit.

However, in the case of Malaysian Trade Union Congress & 13 Ors v. Menteri Tenaga, Air dan Komunikasi & Anor, the court held that the Malaysian Trade Union Congress had the locus standi to bring the action on the basis that the government is responsible for providing safe and affordable treated water. It found that, as water is a fundamental right to human existence and living, there should not be unreasonable profiteering by private companies, and there is a legitimate expectation for the government to always ensure affordable access to treated water for its people. A similar standing should apply across all environmental and climate cases.

Climate impacts such as floods have brought a new focus on litigation due to the urgent need for compensation. In the 2021 floods, 50 residents in Taman Sri Muda, Shah Alam, filed a suit against the government and nine others seeking more than RM3.7 million in damages. A group of lawyers and citizens of Kuala Lumpur also sued the Kuala Lumpur City Hall for its lack of effective flood plans. Complicating this further, several authorities have also taken legal action against those who criticised flood management and environmental degradation.

Currently, there is no climate and disaster legislation in place locally to establish grievance mechanisms and guarantee the protection of citizen rights. However, globally, we are seeing human rights law increasingly used in courts to hold governments and corporations accountable for the impacts

of climate change on peoples' fundamental rights.

Referencing another significant environmental issue in Malaysia, the health and economic costs of unhealthy levels of transboundary haze in Malaysia, occurring annually, have raised the prospect of legal action against polluters, particularly Malaysian and Indonesian companies conducting industrial activities in the region.

However, opaque and mismanaged supply chains, compliance loopholes, and the lack of substantiated health data hinder the development of a suitable legal action. Further, the complexities of transboundary laws and the voluntary nature of its adoption impede the justice process. The AATHP lacks enforcement measures or rules on state liability, making it extremely difficult to hold any corporation or entity outside Malaysia's jurisdiction responsible for causing chronic haze.

Priority area 5: Environmental justice — indigenous peoples, human rights defenders and SLAPPs

Indigenous peoples

The indigenous population of Malaysia, as defined by the Federal Constitution, are the aboriginal peoples of Peninsular Malaysia (Orang Asli Semenanjung Malaysia) and the natives of Sabah and Sarawak (Anak Negeri Sabah and Anak Negeri Sarawak). The oldest inhabitants of the land, Malaysia's indigenous are routinely cast aside in the rush for development, despite possessing special rights and entitlements under the Federal Constitution, including affirmative action.

The land rights of the Orang Asli in the Peninsular are outlined in the APA, under aboriginal areas (section 6) and aboriginal reserves (section 7). They refer to gazetted land for the occupation of the Orang Asli community. Land ownership of the gazetted aboriginal areas and aboriginal reserves is the responsibility of the state authority, with the controlling officer being the Director General of the Department of Orang Asli Development (Jabatan Kemajuan Orang Asli [JAKOA]) under the Ministry of Rural and Regional Development. The Orang Asli Village Development and Security Committee serves as a formal channel to mediate conflicts within the community.

In Sabah and Sarawak, the regulation of NCR is under the jurisdiction of the respective state laws and departments. Both states have native courts established to hear NCR matters, and other disputes relating to the traditional customs of the Orang Asal of the Borneo states.

Despite legal protections provided by law, there remain long-existing disputes between indigenous communities and the State and businesses over the appropriation and use of ancestral land. There is still no map of Malaysian indigenous land that has been agreed by IPs and drawn up as an official document recognised by the government. As such, when development plans are made, indigenous communities are at risk of losing their ancestral land and suffer displacement, among other grave economic and social loss.

Further, development activities such as timber extraction, the construction of mega dams, and mining and agribusiness conversion of NCR land by state governments and companies have resulted in "land grabs". These have been met with strong protests by communities and CSOs. The violations of NCR are the result of fundamental weaknesses and flaws in the governance and legal framework concerning land, forestry and conservation areas at both the federal and state levels.

SUHAKAM's Report of the National Inquiry into the Land Rights of Indigenous Peoples found and acknowledged violations of indigenous land rights beyond mere violations of statutory laws, as "the issues also evolved from the adoption of policies that give priority to approving lands for large-scale development projects over indigenous subsistence economy" (SUHAKAM, 2013, p. 164).

Primarily, there is an urgent need to address the absence of tenure security of indigenous land, as the laws continue to delegitimise indigenous land rights and treat indigenous communities as tenants with limited usufructuary rights. The SUHAKAM report contains numerous progressive recommendations on protecting indigenous land rights and for policy and administrative reform (SUHAKAM, 2013). However, very little has changed concerning NCR.

The higher courts have recognised that indigenous native lands are owned by indigenous communities as property under the Federal Constitution. Yet, compensations offered to these communities in cases of land dispossession is paltry and not commensurate with the land's market value. Communities assert that the State-business relationship continues to enable corporate encroachment and the denial of fair compensation for IPs. Jurisprudence based on past cases is often ignored to benefit economic actors.

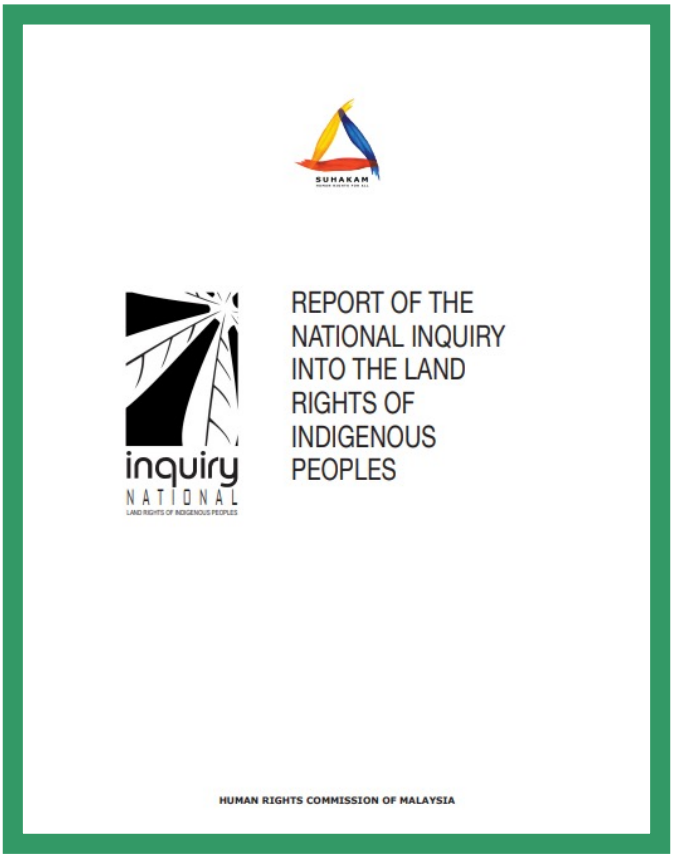

Figure 20: Report of the National Inquiry into the Land Rights of Indigenous Peoples. Source: SUHAKAM (2013).

Each time there is a native land possession case, fresh legal suits have to be filed. Proving ancestral land ownership in the courts is challenging. Communities have to show the tombstones of their ancestors, dig up old artefacts, call upon elderly village tribesmen to share their oral histories and have experts testify on their continuous occupation of the land. Court cases are then decided based on the evidence available, where a literal approach is employed over a comprehensive understanding based on indigenous context, resulting in IPs being summarily dismissed when the evidence is insufficient or does not take into account indigenous customs, for which written documents are rare. In one 2016 example, a community in Kelantan alleged bribery by a logging firm to operate logging activities on their customary land (Bernama, 2016). The MACC dismissed the case because the community did not have official proof of land ownership.

As many indigenous peoples cannot afford to sustain the laborious and complicated legal process, they are forced to abandon their claims. In 2016, an NCR land dispute between a community, three companies and the Sabah government was settled only after 15 years (The Star, 2016). Legal cases over land are resource intensive and costly, especially for marginalised rural communities.

Given the difficulties faced by IPs, the government recognises that there is a need to amend existing laws to strengthen legal protection for Malaysia's indigenous. However, these are still inadequate.

Government response

JULY 2023 - JUNE 2024

The government is now in the process of reviewing and amending the APA to empower and enhance it. This is being carried out through the Ministry of Rural and Regional Development and JAKOA. It is anticipated that the amendment review study will begin in 2024.

The APA underwent its last revision in 1974, having previously been amended in 1967.

Free, Prior and Informed Consent (FPIC)

The UNDRIP and ILO Indigenous and Tribal Peoples Convention 1989 (No. 169) – not presently ratified by Malaysia – states that FPIC is required before initiating any development project on or near IPs' territories. The MPOCC requires companies to ensure that the mapping of native customary lands is conducted through a participatory process, and that FPIC is used to resolve land disputes, as customary rights shall not be threatened or reduced (Malaysian Palm Oil Certification Council, 2022). Meanwhile, the MTCC interprets consent as "consensus", a safeguard that has not gained wide acceptance from IPs' organisations in Malaysia.

Current Malaysian laws such as the NFA, National Parks Act 1984 and Wildlife Conservation Act 2010 lack provisions on indigenous land rights or the need for consultation, notification, or FPIC in cases where deforestation or development rights are granted in indigenous areas. However, the FPIC principle has been adapted by the government in development programmes involving IPs.

Timber activities in Sabah and Sarawak are regulated through differing standards. In Sarawak, licensees are required to identify all native or indigenous communities with claims to the licensed area and obtain written agreements before logging operations. Sabah, on the other hand, does not require consent from local communities, although the state government plans to have all its oil palm operations RSPO-certified by 2025 using the Sabah FPIC guide (Tropical Forest Alliance, 2021).

As pointed out earlier, FPIC is easily circumvented given the absence of clarity and acknowledgment; there remains no legally binding map of indigenous ancestral lands in Malaysia that provides clear boundaries to be respected by companies, a situation that can be advantageous to them. With this knowledge unavailable (lending to assumptions), it is difficult to ascertain what areas constitute native customary land, until indigenous peoples themselves raise objections. Thus, apart from the essentiality of officially recognising ancestral lands, FPIC should also be made a mandatory requirement to be complied with in all development and other activities impacting native land rights.

Explanatory note: What does FPIC look like in practice?

Common concerns that have been raised include the following:

1. FPIC procedures during public consultations in an EIA are initiated too late in the project planning process to be meaningful. When a project appears to be a foregone conclusion, communities are less inclined to refuse it. Delayed timing tactics undermine FPIC fundamentals, which require genuine consent before a piece of land is appropriated. Approval for the project becomes a fait accompli even in the face of vehement community objection.

2. Project information is disseminated in a way that discourages meaningful community participation, with confusing details that intimidate readers with limited technical literacy. For example, technical data is presented to communities in a presentation, rather than through a consultation. When project representatives visit villages, they are ill-equipped to answer questions from the community, particularly regarding environmental and social impacts. Communication issues such as these undermine any good faith approach.

3. Community leaders like the Tok Batin (village headman) may be heavily influenced by the authorities, and not trusted as impartial or advocating on behalf of the community. Companies tactically engage them, rather than directly with the community or their chosen leaders. Essential information like agreements and meeting minutes are sometimes withheld from the larger community while complaints and records of dialogues and consultations held with IPs are not publicly shared, and the consent of a select few only are sought over others in the community. Those not aligned with the Tok Batin or agencies such as JAKOA are often ignored in the process, without any legal recourse or access to grievance mechanisms to support them.

4. Intermediaries from companies conducting consultations with the community are neither locals living in the area nor members of indigenous groups. They lack an understanding or appreciation for the customs and culture of the indigenous, and encounter language barriers. Common consultation practices do not conform with FPIC principles, and at times, risk escalating conflict. As they are not able to engage effectively with the community, they rely instead on gifts, "treats" and offers of future rewards as inducement or enticement for their acceptance or consent of the project.

In general, Malaysia's environmental policies prioritise economic development and thus industry, with peripheral consideration given to NCR or the complex matters of self-determination and cultural respect for rightsholders.

Centralised environmental policies such as the NPCC and NEP do not sufficiently address the struggle between the conservation of forests and the livelihoods of local communities who are dependent on them. For instance, the 2022 amendment to the NFA prohibits Orang Asli in Peninsular Malaysia from extracting forest produce for commercial purposes, leading to tensions with the communities.

Even with a growing body of evidence that land managed by local and indigenous communities is less prone to degradation than land under industrial management, this has been consistently disregarded by the State and commercially minded stakeholders. In another example, in opposition to Samling's representations regarding its certified timber extractions, the Penan communities in the Suling-Sela'an Forest Management Unit (FMU) have been defending their forests against logging while advocating for the establishment of the Baram Peace Park.

Through the park, they aim to protect the environment, preserve their culture and create sustainable incomes together with the Kenyah Jamok communities. The local communities created a biodiversity database of Baram that showcases the richness of forests managed by them (Baram Peace Park, n.d.). However, these types of conservation attempts by local communities have not been a key part of national conservation strategies.

Environmental Human Rights Defenders (EHRDs)

In Malaysia, EHRDs and CSOs expressing concern and advocating on behalf of indigenous communities are often at the receiving end of SLAPPs. Current laws do not offer any protection against such suits.

Court actions only allow victims of environmental harm to sue violators through a narrow common law action under negligence or nuisance. Judicial remedies take too long; a decision may only come after no less than a year if there are no interlocutory applications or appeals. No civil remedies are available for victims to compel wrongdoers to undertake remediation actions for damage caused to the environment.

Similarly, SUHAKAM has no mandate or power to order such actions, and there is no environmental rights ombudsman in place to enforce remedies. In the absence of effective grievance mechanisms, affected communities can only seek assistance from environmental groups who are able to access regulatory authorities and the press (or other media) to draw attention to the plight of the communities. When this happens, both the messenger and the community become targets to be silenced.

The UNHRC adopted a resolution on 21 March 2019 (UNHRC, 2019) recognising the important work of EHRDs, and urging governments to draft domestic action plans to promote HRDD by businesses in a meaningful and inclusive way. It also called on governments to share best practices for addressing adverse human rights impacts, including those expressed by EHRDs, using publicly accessible frameworks.

EHRDs in Malaysia, however, face seemingly insurmountable challenges as illustrated by MTCC's award of two FMU certificates to the Samling Timber Malaysia group of companies in Sarawak. An FMU is a government-granted concession that uses funds from timber production in parts of the concession, to conserve forests in other parts of the concession. The Penan and Kenyah indigenous communities claim that Samling operates on their ancestral lands and that their FPIC was not obtained, with key documents such as impact assessment reports withheld. The communities also raised objections that due process was not observed by the certification body, SIRIM QAS International Sdn. Bhd., even after they had written in to inform the body that they had not been sufficiently consulted.

The communities then lodged official complaints with the MTCC (Gerenai Community Rights Action Committee, 2021), which convened a dispute resolution committee to resolve the matter. As a result, there were attempts at mediation between the parties. However, in mid-July 2021, Samling Plywood (Miri) Sdn. Bhd. and Samling Plywood (Baramas) Sdn. Bhd. filed a RM5 million defamation lawsuit against SAVE Rivers, the environmental rights group representing the communities, alleging that SAVE Rivers' repeated public statements on the communities' complaints were baseless and inaccurate (Keeton-Olsen, 2021).

Samling stated the suit was filed as a last resort as attempts at negotiations had failed and the time limitation for court action was going to set in (Samling Group, 2021). In response, more than a hundred NGOs signed a letter demanding that Samling drop the SLAPP lawsuit (ICCA Consortium, 2021). For reasons of the ongoing case, Samling requested the MTCC dispute resolution committee to defer its decision, and then

subsequently withdrew from the complaints process (MTCC, 2021).

Whether court action is taken as a tactical step is to be deliberated on a case-by-case basis. However, it appears – whether rightly or wrongly – that the entire MTCC dispute resolution process was derailed due to the lawsuit. Observers noted that the suit against SAVE Rivers for defamation did not impact the certificates granted under the MTCS. Additionally, case disposal takes time with various tiers of appeals, and any decision in this case will not cancel nor affirm the FMU certificates already awarded. There is no issue of sub judice involved. In fact, MTCC is duty-bound to see through the internal process it has set out for, and represented to, stakeholders and rightsholders.

Whether the court decides in favour of Samling or otherwise, the question whether the certificates were granted in full compliance with the necessary requirements remains unanswered. As it is now, with pending legal action, Samling has effectively ended the discourse on substantive matters raised by the communities. The communities' complaints are thus left unresolved, while their native land rights, encompassing protections for their homes, families, livelihood, and culture, are held in abeyance indefinitely.

III. What should Malaysia's NAPBHR contain?

In this section, we make key recommendations that should be undertaken by the State and businesses on environmental issues. We have segmented our proposals into the three pillars of the UNGPs as follows.

Pillar 1: State duty to protect human rights

The State should take the following measures:

General recommendations

1. Provide for a constitutional and legal right to a clean, safe, healthy and sustainable environment.

2. Review the existing legal framework and update environmental laws to align with international standards, while addressing all major gaps in laws and regulations.

3. Introduce and apply polluter pays principles (such as through a carbon tax) and precautionary principles. Precautionary principles should encompass five key elements to prevent irreversible harm to people and nature: anticipatory action, the right to know, alternatives assessment, full cost accounting, and a participatory decision-making process. These elements require taking action to prevent harm, providing complete information to the public, examining a full range of alternatives, considering all foreseeable costs, and involving the public in decision-making based on the best available information.

Government response

JULY 2023 - JUNE 2024

In phase two of the upcoming amendment to the EQA, the government will be addressing emerging issues, including by introducing the polluter pays principle as a key deterrent against environmental pollution. This amendment is expected to be finalised in 2025.

4. Enact a Climate Change Act that includes the following:

   a. A provision to establish a National Climate Change Commission tasked to oversee the coordination, monitoring, and evaluation of initiatives for climate mitigation, adaptation, and DRR across all sectors and levels of governance.

   b. Legally binding targets for both short- and long-term action to achieve Net Zero 2050 and for the implementation of Article 6 of the Paris Agreement on carbon markets (especially on community safeguards against business misconduct).

   c. Mechanisms for judicial review to empower citizens to bring the government to court if the law is breached.

   d. Strong element of public participation in decision-making processes. This can be achieved by ensuring stakeholder engagements are inclusive and meaningful, and refining consultation methods with civil society and

impacted communities. Participatory processes must align with international human rights standards and draw insights from best practices – such as the Aarhus Convention – to enhance on-the-ground implementation and reduce the risks of maladaptation.

e. Transparency measures and mandatory disclosures around climate risks to encourage companies to evaluate corporate risks holistically, and ensure that consumers and users receive accurate information, thereby limiting greenwashing practices.

f. Periodic assessments and enhancements of climate-related policies, regulations and reporting mechanisms.

5. Reform the law to ensure full transparency related to Net Zero 2050 interventions and progression vis-à-vis defining its pathways, identifying the categories of the measures they require, and determining the avoided units of carbon dioxide emissions of each measure. National emissions data must be easily accessible and available to the public.

6. Develop a legal framework on transboundary requirements to address matters of extraterritorial human rights jurisdiction by enabling actions against companies or entities responsible for air pollution affecting Malaysia from abroad.

7. Evaluate AATHP as it is the sole international legal document available to Malaysia in dealing with the transboundary haze crisis, and that concerns control and enforcement measures based on international law principles of state liability and responsibility.

Government response

JULY 2023 - JUNE 2024

At the domestic level, NRES will be holding engagement sessions with environmental advisory and consultation panels, legal and professional experts, and relevant stakeholders to establish short- and long-term measures such as effective mechanisms and legal instruments that can address the issue of transboundary haze holistically.

Regionally, issues or disputes are addressed amicably through ASEAN in line with the existing AATHP since 2002, without resorting to punitive action.

NRES is currently assessing this approach and proposals will be presented in the upcoming ASEAN meetings on transboundary haze.

8. Review the Environmental Quality (Clean Air) Regulations 2014 to incorporate setting realistic emissions limits and the adoption of sectoral targets based on a weighted approach. For example, apply more stringent limits for areas already facing significant pollution levels (e.g. Klang Valley and Pasir Gudang) than in areas where pollution levels are lower.

9. Regulate greenwashing by penalising companies, including PLCs, that make generic or unsubstantiated claims about their environmental practices. For example, product sustainability labels must be verified by a third-

party or public authority. At present, potential avenues for regulating greenwashing is the Trade Descriptions Act 1972 or the Consumer Protection Act 1999.

Government response

JULY 2023 - JUNE 2024

DOE is currently finalising the draft amendments to the Environmental Quality (Clean Air) Regulations 2014 which include a revision of emissions limits, the addition of new parameters, and proposed new elements to compounds and environmental charges.

The amendments are based upon findings from the completed "Study on the Determination of Environmental Charges for Contravention License for the Emission of Air Pollutants" under the EQA.

10. Develop safeguards and legal provisions related to the full life cycle of plastics and its impact on human rights, not only as a process but as a standard of conduct for companies (which can be linked to accountability and liability regimes aligned with Extended Producer Responsibility principles).

Government response

JULY 2023 - JUNE 2024

The government, through the Plastics Sustainability Roadmap 2021-2030 (MPSR) action plan, aims to establish circularity for the full life cycle of plastics, in line with the Extended Producer Responsibility policy approach.

The process requires further engagement with stakeholders to determine the feasibility of its implementation on plastic products.

11. Revise the CA to include provisions for non-compliance measures targeting pollution and polluting activities, prescribing effective penalties such as strong fines and revoking business licenses.

12. Institutionalise public participation and enhance data accessibility guided by the Aarhus Convention, the most authoritative legally binding instrument that embodies global best practices for environmental democracy. Although Malaysia has not formally adopted the Convention, it is crucial to proactively align with its principles for robust environmental governance and global resonance. Core tenets of the Convention are as follows:

- Merging environmental and human rights: Highlighting their interconnected nature.
- Intergenerational justice: Emphasising our duty to bequeath a sustainable environment to succeeding generations.
- Inclusive sustainable development: Emphasising that holistic and sustainable development is only possible through comprehensive stakeholder involvement.
- Promoting transparent governance: Combining government accountability in environmental protection with an emphasis on interactions between the public and authorities within a democratic framework.

On the EIA process

13. These recommendations seek improvements to the EIA process through procedural, methodological, and technical approaches as follows:

    a. Appoint independent EIA consultants. The DOE should delink EIA consultants from project proponents, requiring instead that proponents contribute financial resources to a central repository or fund, from which consultants are paid.

    b. Ensure that all EIA reports are made publicly available in full and online, at no financial cost. EIA consultants and project proponents should also facilitate public consultations and make the general feedback process easy and accessible.

    c. Enhance the public consultation process and redesign participatory decision-making to ensure inclusivity and integrity. The following ought to be taken into account:

- Public consultations should take place at the start of the project design phase, not at the end of the planning stage.
- Impacted communities should be granted access to all relevant documents and given an appropriate and fair amount of time to review them.
- Project information should be widely publicised through all appropriate communication channels and presented in a palatable manner with technical data simplified for non-expert consumption.
- Guarantee public hearings that allow for verbal feedback for those who cannot provide them in writing.
- Decisions made following any public feedback session should be well-grounded and accompanied by explanations on how all objections raised have been considered.
- Establish anti-SLAPP safeguards for communities and EHRDs when companies fail to comply with the EIA approval processes, or initiate land reconnaissance without EIA approval.
- Conduct reviews to ensure alignment with the Guideline on Public Consultation Procedures (Malaysia Productivity Corporation et al., 2014).

d. Incorporate EIAs as part of the mHREDD process, and ensure businesses carry out human rights and environmental due diligence, audit their operations and disclose all necessary information, guided by the UNGPs.

e. Enforce compliance on environmental matters by strengthening the DOE and NREB's capacity to ensure financial due diligence is conducted, and increase penalties for breaches.

f. In view of the opening of the carbon market in Malaysia, safeguards must be established for forest carbon offset projects, either through mandatory disclosures or by including them in the EIA schedule.

g. Standardise EIA and SIA processes across all states in Malaysia. DOE and NREB should work collaboratively and in tandem to avoid duplication of authority.

h. In Sarawak, the state EIA Order must be reviewed to incorporate a public participation model and integrate effective public consultations.

Increasing resources and capacity for implementation and enforcement

14. Enhance the financial and human resources of DOE – as the body in charge of environmental enforcement – and other relevant federal and state agencies and departments by increasing the national budget for recruitment and capacity within the agencies. This is to ensure that they are well-equipped to uphold the integrity of Malaysia's environmental laws and compliance procedures.

Government response

JULY 2023 - JUNE 2024

DOE is currently revising its human resource capacity needs, with the aim to establish "1 District, 1 DOE".

Policy coherence and aligning national targets

15. Realign and harmonise sectoral targets by effectively using frameworks like the SDGs, and begin implementing related UN treaties and conventions without delay to honour Malaysia's commitments to environmental rights. Further, take concrete steps to identify risks, investigate sources, and, where applicable, punish and redress abuse through environmental laws, policies, instruments and the judicial system.

16. Develop a national guideline that clearly exemplifies precautionary principles to ensure their consistent application in safeguarding both public health and the environment. Decision-makers should not only weave this principle into legislation but also extend its application holistically across all key sectors.

Forest conservation and compensation frameworks

17. Refine Malaysia's 50 per cent forest cover target by concentrating on parameters such as forest conditions, legal status, and ecosystem types. Malaysia should advance this nuanced approach to conservation as it will not only better inform policy decisions but also improve the design, transparency and disbursement of Ecological Fiscal Transfers. Concurrently, it is essential that states, particularly those prioritising the conservation of primary forests and key biodiversity areas while advancing local community rights, receive enhanced compensation. This is to encourage and reward sustainable practices at the state level.

18. Set clear targets, alongside robust plans and incentives, to promote long-term behavioural shift in aiding the business sector's transition to environmental sustainability.

Government response

JULY 2023 - JUNE 2024

The government is fully committed to the implementation of SFM, which is in line with Malaysia's commitment to international conventions and treaties.

SFM addresses forest degradation while increasing direct benefits to people and the environment through forest management certification initiatives, annual allowable coupes, adopting best practices in selective logging, and enhancing the enforcement of forest laws. SFM also contributes to livelihoods, income generation and employment.

Forest ecosystems contribute to ecological balance, providing habitation for wildlife and supporting essential ecological processes. Additionally, Malaysia's forests serve to absorb carbon to reduce the concentration of greenhouse gases in the atmosphere, mitigating the greenhouse effect responsible for global warming and reducing the impact of climate change.

Efforts to protect and conserve biological diversity and forest ecosystem services require continuous support and commitment from various stakeholders, particularly from state governments, to strengthen forest management and development, and to maintain existing forest land areas to enhance forest carbon stocks.

Target 17 of the NPBD 2022-2030 states that by 2030, there is a "significant increase in funds and financial incentives for biodiversity conservation from both government and non-government sources". Under this target, Malaysia will pursue the following actions:

> Action 17.1: Increase public funds available for biodiversity conservation.
> Action 17.2: Mobilise green conservation financing from the private sector.

As a developing country, Malaysia strives for a good balance between economic development and sustaining its natural resources. Therefore, the government's commitment to maintaining 50 per cent of its land area as forests and tree cover is relevant as forests play a crucial role in Malaysia's environmental and economic well-being.

Developing mHREDD obligations

19. Malaysia should develop national mHREDD obligations to advance corporate sustainability and address adverse environmental and human rights impacts, guided by effective BHR legislation or complementary legal frameworks. The obligations should:

    a. Ensure companies conduct independent social (human rights) due diligence and environmental risk and impact assessments, and act on their findings while committing to transparency.

    b. Enable companies to face strong penalties when the law is breached.

    c. Be aligned with disclosure directives set by the SC, Bursa and BNM within existing policy frameworks, such as the Climate Change Act, NDC roadmap, other long-term low emissions development strategies, and domestic emissions trading schemes.

    d. Be subjected to a review and verification process every five years, aligned with the 12MP.

20. mHREDD should be introduced in phases for key industries such as energy, agricommodities and water,

which contribute to specific categories of pollution. The criteria of requirements for due diligence, as to company size, listing status, and worldwide turnover, should be prioritised to ensure SMEs are considered, and receive the compliance support needed.

21. In terms of mHREDD disclosures, elements should include, at minimum:

    a. Any human rights risks and abuses that are linked to indigenous and local communities' rights, violations of FPIC, adverse impacts on local livelihoods and modes of sustainable production, threats against EHRDs, and the unfair removal of peoples from their traditional territories.

    b. Transparency related to the value and investment chain, which includes taking stock of the location of operations, supply chain and financing. These disclosures are necessary as the public should be aware if a business operating in their locality is linked to environmental and social risks and harms.

    c. Complaints or grievances received directly or indirectly, demonstrating whether a business' environmental and associated human rights claims are upheld in practice beyond company statements.

    d. Lobbying activities in which companies oppose or resist specific proposed laws or regulations that aim to better protect communities and the environment as a whole.

    e. Detailed account of environmental impacts where companies make known both their potential and actual harms. Businesses must demonstrate they recognise and value environmental performance as they do financial performance.

Government response

JULY 2023 - JUNE 2024

Presently, the Listing Requirements do not regulate this matter. Going forward, Bursa Malaysia may assess and consider the appropriateness of the recommendations made. Any new policies, approaches or requirements to be introduced will be subject to consultation with other regulators like the SC and the public.

Social protection instruments and local institutional capacity regarding DRR and maladaptation

22. DRR policies, strategies and programmes should target issues of inequality and exclusion and apply a human rights-based approach. This approach links development goals to human rights standards, focuses on the recovery needs of groups with multiple vulnerabilities, centres community empowerment and resilience, and holds governments accountable, obliging them to provide the necessary support before, during and after a disaster event.

23. Ensure non-discrimination in adaptation plans to improve overall economic productivity, social cohesion, and health, as impoverished and marginalised communities face the double burden of inequality: unequal development and climate change. Community-based adaptation must directly address the needs of the poor, placing them at the centre of decision-making and financial support. To design and implement appropriate adaptation responses for vulnerable rural communities, trade-offs between differing values, goals, and interests must be considered. This complexity can be tempered with early planning, participatory approaches, conflict resolution practices, and decision analysis methods to promote fair and equitable outcomes.

24. Ensure regular cash transfers, including for public works programmes, which can help smooth consumption, build and maintain assets, and develop human capital to better cope with natural hazards. Disaster risk management systems should be linked to social protection programmes to trigger a safety net response in times of emergencies.

25. Community-driven development initiatives could provide a useful platform for social protection programming that responds to disasters and builds long-term resilience. The focus should be on understanding the impacts of climate change on people's rights, especially the most vulnerable, and facilitating adaptation through law-making, policy development, and implementation of adaptation regulations related to infrastructure and associated services. Responses should derive from the rights-based discourse on maladaptation, DRR, and sustainable development.

26. Reconstruction and recovery efforts must promote durable solutions by addressing the long-term needs and concerns of communities, including mitigating the risks of future disasters. All State and non-State actors in Malaysia involved in all phases of disaster management – preparedness, relief, and recovery – should implement these recommendations, and ensure the respect, protection, and fulfilment of the human rights of all affected persons and communities, as stipulated by international human rights and humanitarian law.

27. Social protection systems should be "climate smart" to support climate adaptation and mitigation, for example, through shock and weather-indexed insurance schemes, economic inclusion programmes, and temporary social assistance linked to skills training for vulnerable workers. The nexus of DRR and social protection should aim to go beyond the environmental scope and must be grounded in upholding human rights and enhancing community resilience.

28. Technical resources and budgetary allocations should be targeted towards developing state-level institutional capacities to enable effective localised adaptation planning, while ensuring interventions are economically and socially equitable. Utilising technology to share better information, as part of early warning systems for disaster-prone communities, significantly improves DRR response at the local level. In the same vein, disaggregated data and vulnerability assessments must be embedded in preparedness planning. Non-technical opportunities are also essential to consider (such as promoting non-discrimination or navigating power relations), given that there is a wide range of potential outcomes linked to maladaptation with cultural, social, and political dimensions.

Government response

JULY 2023 - JUNE 2024

Malaysia has adopted the SFDRR and has legal obligations under the AADMER. All elements of human rights are observed under both frameworks. These are in turn translated into relevant national policies and documents relating to disaster management and risk reduction.

NADMA is currently exploring initiatives with the insurance industry to insure disaster victims. Among the challenges is to find the most appropriate and customised insurance product in order to protect government allocations in the event of a disaster spike, and efficiently manage the insurance risk exposure.

NADMA has yet to formally adopt a national plan for post-humanitarian crisis and post-disaster recovery and reconstruction. The NSC Directive No. 20 is the main guideline for disaster management in Malaysia, encompassing the entire disaster management cycle. Additionally, the "Build Back Better" approach is already incorporated and implemented in DRR.

Under the 12MP, this approach will be further pursued to facilitate affected communities recover from the aftermath of disasters. Alternative sources of income will be identified to allow the communities to sustain their livelihoods. In addition, community counselling services will be enhanced to help them cope with the trauma associated with disaster events. These efforts are expected to improve the adaptive capacity of affected communities to recover more quickly.

Building capacity and resources for businesses

29. Strengthen environmental rights and human rights awareness in the business community by ramping up measures such as technical assistance, capacity building, awareness-raising and incentivising SMEs to transition to ESG frameworks, including reporting and disclosures, utilising platforms such as Bursa Sustain.

30. Allocate appropriate funds to SMEs, while matching them with local expertise and capacities to implement due diligence processes. Most importantly, it would be helpful to better understand the extent to which ESG (or similar) initiatives have been successful for businesses in order that third-party experts and observers can offer further insights into how they can accelerate their transition.

Climate finance

31. Adopt and integrate climate budget tagging within the budgeting framework for more effective targeting of financial resources for climate-centric programmes. Further, a comprehensive set of indicators should be introduced to distinguish between allocations used for climate mitigation and adaptation. This is necessary for both transparency and effective resource allocation.

Government response

JULY 2023 - JUNE 2024

The government, under MOF, encourages the proposal to incorporate climate budget tagging for enhanced precision in directing financial resources toward its climate-centric initiatives. However, the determination of the feasibility of adopting measures for budget tagging falls within the purview of the National Budget Office (NBO). It is essential to ascertain whether such an undertaking is viable or not.

Currently, NBO has already incorporated SDG tagging into the budget framework. There will be a need to determine whether or not the current framework can be further expanded to incorporate climate-centric projects, or whether there will be a need to develop an additional framework specifically for climate.

Furthermore, the establishment of a comprehensive set of indicators to differentiate between allocations designated for climate mitigation and those earmarked for adaptation requires clarification from NRES during their annual budget tagging collaboration with MOF. It is pertinent to note that MOF's primary responsibility is to allocate funds to the ministries, and the identification of allocations for mitigation or adaptation lies within the purview of the respective entities involved.

32. Intensify efforts to secure international climate financing by broadening adaptation strategies beyond the existing scope, such as flood infrastructure, and focusing on gender-responsive climate finance, among others. This approach promotes equitable and comprehensive climate financing, contributing to Malaysia's overall climate resilience.

35. Integrate UNDRIP into Malaysia's laws and policy frameworks and ratify the ILO Indigenous and Tribal Peoples Convention 1989 to recognise the IPs' position as rightsholders and the need to accept and implement the core principles of FPIC.

36. Develop a standalone national guideline on FPIC and

Government response

JULY 2023 - JUNE 2024

MOF concurs with the need for Malaysia to intensify efforts in securing international climate financing. Since Malaysia is classified as an advanced developing country, there is limited eligibility for Malaysia to receive grants over loans. This circumstance opposes Malaysia's preference to avoid borrowing, given the national economy's prevailing debt. However, it is essential that NRES' comments and analysis are sought on such proposals as they currently coordinate all international climate finance engagements.

Presently, MOF neither receives nor maintains any record of aid specifically designated for climate change initiatives. It must also be noted that there seems to be limited funding options internationally for both adaptation and loss and damage, and Malaysia's status makes it more difficult to access these already limited funds. Further, it must be highlighted that flood mitigation measures will continue to be essential in ensuring Malaysia's overall climate resilience, given the categories of climate risk Malaysia is exposed to.

MOF has enforced the Government Green Procurement Policy since 2014 by introducing Treasury Circular on Government Green Procurement 1.9 (GGP 1.9), with the latest amendment on 29 November 2022.

The Circular mandates agencies to fully integrate (100 per cent) GGP for nine types of products or services. The Circular also requires federal agencies to implement green procurement by at least 50 per cent for another seven products.

At the same time, the Government Procurement Act is being drafted and will be presented in Parliament in 2024 with some key legislative measures, and importantly, also takes into account these developments of the GGP initiative.

33. Include climate-related financing as a component in the Government Procurement Act currently being developed. These elements should also be harmonised with the Government Green Procurement initiative, which integrates environmental standards and criteria in government procurement processes to better reflect fiscal responsibility.

FPIC

34. Adopt and incorporate recommendations from SUHAKAM's Report of the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia (2013).

enact legislation to standardise FPIC at the federal level. At present, FPIC only appears in law under the Access to Biological Resources and Benefit Sharing Act 2017. The guideline should be governed by an institutionalised body aligned with international standards, as provided in UNDRIP, with a mandate of regulating and standardising FPIC protocols nationwide, monitoring and reviewing implementation, receiving complaints from IPs, and improving community safeguards in all development plans. A template should be drawn up for the protocol to be easily incorporated as part of accreditation and certification schemes.

37. Relevant government agencies and ministries must enhance internal capacities and know-how on the FPIC process, such as addressing the power imbalance between parties and implementing remedies to protect the integrity of FPIC. The government must clarify and ensure the security of native land before implementing new development policies and targets, including emissions reduction projects, as well as to secure commitments from enterprises to respect IPs' rights. The government should also be prepared to introduce severe penalties for any breach of trust.

38. Develop a voluntary Community Protocol or a Native Engagement Plan on FPIC for indigenous communities, as part of a safeguard and empowerment framework, that is aligned with international standards and best practices, and be scalable using a bottom-up approach. The protocol must empower local and indigenous communities to apply FPIC and insist that any consultation process, including the sharing of information, is grounded in the right to say no. Further, IPs should be allowed (under the framework) to freely engage private and independent financial and legal advisors who can protect their interests, and support them to assert their right to ensure that prospective investors or project proponents fulfil their obligations meaningfully.

The protocol must empower local and indigenous communities to apply FPIC and insist that any consultation process, including the sharing of information, is grounded in the right to say no.

Government response

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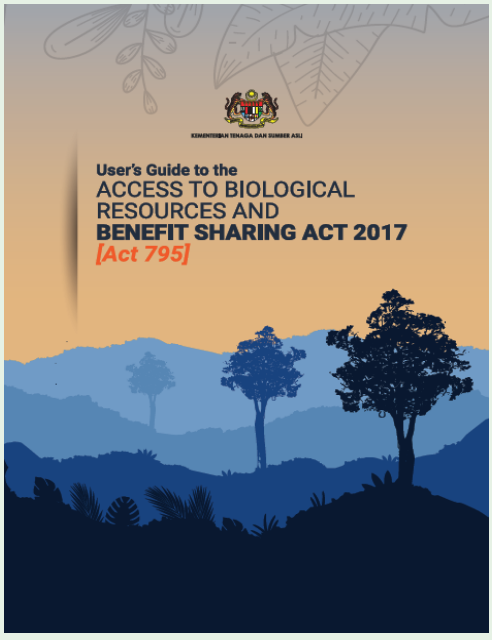

The Access to Biological Resources and Benefit Sharing Act 2017 regulates access to biological resources and traditional knowledge associated with biological resources and the sharing of benefits arising from their utilisation within Malaysia for research and development.

Specifically, section 23 expresses the requirement for prior and informed consent (PIC), and mutually agreed terms with the relevant indigenous and local community to be obtained for any access to:

- biological resource on land to which such indigenous and local community have a right established by law; and,
- traditional knowledge associated with biological resource that is held by the indigenous community.

The standard protocol for the PIC has been proposed in the User's Guide to the Access to Biological Resources and Benefit Sharing Act 2017.

Pillar 2: Corporate responsibility to respect human rights

Corporate commitment

1. Define and incorporate environmental human rights within their operations. Businesses should adopt a human rights charter that is aligned with international standards and best practices (including the UNGPs), approved and acknowledged by their highest management and guided by the most up-to-date expert advice. The charter should also set clear expectations for all personnel, business partners and other parties relevant to the business.

2. Adopt holistic policies that commit businesses towards mitigating GHG emissions and addressing climate-related human rights risks and impacts. Such policies should be drafted with the input of all stakeholders, especially affected communities, and be made publicly available.

Procurement policies

3. Refine procurement policies to emphasise climate and environmental dimensions, and the need for due diligence. Business' procurement practices should be aligned with recognised international benchmarks to ensure consistency and credibility. Periodic policy revisions are equally crucial and must be conducted meaningfully to ensure procurement practices stay relevant and contribute positively to equity and sustainability objectives.

Moving from voluntary to mandatory commitments on reporting and disclosures

4. Malaysian PLCs must publicly disclose their carbon emissions information in full to enable an examination of their compliance with national regulations and targets.

5. Strengthen and improve voluntary carbon emissions disclosure mechanisms as part of the transition to a mandatory framework. Studies from other jurisdictions have demonstrated the correlation between carbon emission disclosures and better sustainable business practices (Lee, 2022; Neelam Singh & Longendyke, 2015). Yet, mandatory carbon emissions disclosures will only be effective if there is a standardised and uniform framework for measuring emissions which can be independently audited and verified. Studies on the market response to disclosures and voluntary/mandatory measures would also be highly beneficial.

6. Review and update environmental standards on the worst polluting industries in line with the latest guidelines by WHO and other expert bodies. These standards should be made legally binding, time-bound, and enforceable.

Recognition and respect for the rights of EHRDs and IPs

7. Corporate Malaysia should publicly commit to recognising and respecting the human rights of EHRDs and IPs, whether Malaysian law provides for those rights or otherwise, and act consistently with their commitments. Due diligence including environmental, social, cultural, and other human rights impact assessments should be regularly conducted and integrated internally at all working levels. FPIC requirements should also be fulfilled.

8. Investors should require the companies they invest in to conduct and act on due diligence assessments, and where this is not the case, engage with their clients to adopt and implement due diligence and obligate that impacted communities be kept informed on the progress of their engagements.

9. Include indigenous communities in the FPIC process by consulting them on the due diligence process, seeking their comments and verification of results from the due diligence and impact assessments, incorporating community-level information, working with indigenous CSOs and independent information sources, and providing the communities a platform and the power to influence decisions.

10. Increase staff capacity and improve their skills in implementing participatory decision-making, especially related to EIAs and compensation mechanisms. When engaging with communities, staff must identify and select local intermediaries who understand local customs and language. Where necessary, businesses should also consider community protocols and the local management system employed by the native community.

Greenwashing

11. Businesses must proactively take steps to prevent the misrepresentation of environmental efforts in their reporting and disclosures. The following recommendations should be considered:

    a. Strengthen supply chain management processes to achieve genuine sustainability. An integral component is to understand the breadth of human rights risks linked to climate change and environmental

impacts across the entire business supply chain. Businesses must have clear methods for data collection and evaluation to enhance transparency and accuracy. This also involves disclosing their direct and indirect emissions (i.e. Scope 1, 2, and 3).

b. Ensure effective communications by regularly sharing both the company's achievements and areas where improvements are necessary with their stakeholders and rightholders. This approach can foster mutual trust and pave the way for meaningful and constructive feedback.

c. Apply third-party verification and assurance measures for their disclosures including engaging with CSOs. Collaborative engagements with sustainability initiatives and trade associations, such as the Science Based Targets Initiative (SBTi), Carbon Disclosure Project (CDP), Business Council for Sustainable Development (BCSD), and Malaysia Platform for Business and Biodiversity (MPBB) are also encouraged.

Pillar 3: Access to remedy

For the State

1. Introduce anti-SLAPP legislation to discourage SLAPPs, guided by best practices and learnings from its introduction in other jurisdictions.

2. Establish the Public Ombudsman office and enhance the WBA.

3. Establish specialised bodies such as a tribunal, tasked with adjudicating environment-based litigation that can deliver time-sensitive decisions, promote rightsholders' ability to hold duty-bearers accountable, and facilitate effective access to remedy. This single point of authority should also monitor and create a national database recording land conflicts and disputes and their outcomes.

4. Establish an internal grievance mechanism at the project design stage that follows international best practices, and normalises third-party verifications supervised by a trusted human rights body. To illustrate, in big development projects, businesses can set up an independent body composed of experts, NGOs, and academia to monitor projects that already have EIA approval.

5. The proposed guideline on FPIC must clearly and expressly stipulate access to grievance mechanisms and remediation, as well as financial aid to communities who seek judicial redress. It should be supported by anti-SLAPP requirements which, if breached, signals a clear violation of FPIC principles.

For businesses

6. Establish or enhance business-led grievance mechanisms, with a specific focus on addressing environmental human rights issues. These mechanisms must be:

   - Accessible: Ensure all stakeholders, especially EHRDs and IPs, can easily find and use the mechanism, at no cost.
   - Accountable: There must be proper follow-through on grievances to ensure resolutions made are implemented swiftly.
   - Transparent: Information about grievances, and their processing, monitoring, review, and resolutions must be available at all stages and open to scrutiny.

7. Ensure that grievance mechanisms are adaptive, allowing for corrective measures based on feedback and continuous engagements.

8. Encourage proactivity in identifying and addressing adverse human rights and environmental issues. Information on these issues and the progress of actions taken to address them should be shared both internally and externally with stakeholders, rightsholders, and affected communities.

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CHAPTER 4

SPECIAL ISSUES

During the consultations, several themes emerged repeatedly to warrant documentation in a separate chapter. Many of these are cross-cutting and overlap with the issues identified in the previous chapters. Their inclusion here is to complement the three main areas of this report and ensure they remain part of the narrative of the NAPBHR.

I. Gender issues

Women and girls experience direct and indirect adverse human rights impacts caused by businesses and are exposed to various forms of discrimination. Gender equality is a crucial component of all the 17 SDGs, and is reflected in 45 targets and 54 indicators. The importance of gender is further acknowledged in the UNGPs, under Principle 7 and as commentary to Principles 3, 12, and 20. The UNGPs (OHCHR, 2011) state the following:

> *"These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations who may be at heightened risk of becoming vulnerable or marginalised, and with due regard to the different risks that may be faced by women and men".*

Malaysia acceded to the CEDAW in 1995 with several reservations, and is cognisant of its obligations under the Beijing Declaration and Platform for Action. Malaysia has also ratified the ILO Equal Remuneration Convention 1951 which includes the principle of equal remuneration established without sex discrimination.

Since Malaysia's accession to the CEDAW, the word "gender" has been added to Article 8(2) of the Federal Constitution as an attempt to eliminate gender-based discrimination in law. The government has stated, in its Sixth Periodic CEDAW Report (2022), that it is studying the enactment of an Anti-Discrimination Against Women law to domesticate its obligations. At present, there are elements of gender equality that exist in several laws, such as the EA, Domestic Violence Act 1994, Penal Code, Child Act 2001, Sexual Offences Against Children Act 2017, Pension Act 1980, and Land (Group Settlement Areas) Act 1960.

Gender discrimination and inequality

Malaysia acknowledges, and has taken steps to address, the challenges concerning gender discrimination. Upholding the principles of Article 8(2) of the Federal Constitution, the government has made amendments to the EA to include provisions relating to discrimination. In 2022, section 69F was inserted into the EA, giving the authority to the Director General to inquire into, and decide on, any disputes between an employee and their employer concerning discrimination in employment, without the limitation of a salary cap. These amendments aimed to promote equal opportunity and treatment in the workplace, ensuring that all individuals have fair access to employment and are not subjected to discriminatory practices.

However, a survey by the Women's Aid Organisation (WAO) showed that 56 per cent of Malaysian women have experienced gender discrimination in the workplace (WAO, 2020). They were questioned on their ability to perform certain tasks, asked to do more work than their male peers and even assigned tasks not asked of men. Another study conducted by Ipsos (2023) found that many Malaysians have witnessed gender discrimination and acts of sexual harassment against women.

Part XVA of the EA addresses sexual harassment at work but fails to specify the harasser's liabilities or the survivor's rights. Separately, the Code of Practice on the Prevention of and Eradication of Sexual Harassment in the Work Place 1999 (1999 Practice Code) was introduced by MOHR to address issues of sexual harassment in the workplace. However, it merely serves as a guideline to advise the employer on what amounts to sexual conduct and does not provide an avenue for victims and survivors to act against the perpetrator.

Malaysia Gender Gap Index (MGGI)

The World Economic Forum (2023) released the Global Gender Gap Index for the year 2022, ranking Malaysia 102 out of 146 countries, moving one rank up from the previous year. At the national level, the Malaysia Gender Gap Index (MGGI) is produced based on the Global Gender Gap Index, and shows the magnitude of gender disparity in the country on four themes, namely: economic participation and opportunity, educational attainment, health and survival, and political empowerment.

The MGGI considers data published by DOSM and other ministries and agencies in Malaysia, with a score of 1.0 representing complete equality between men and women.

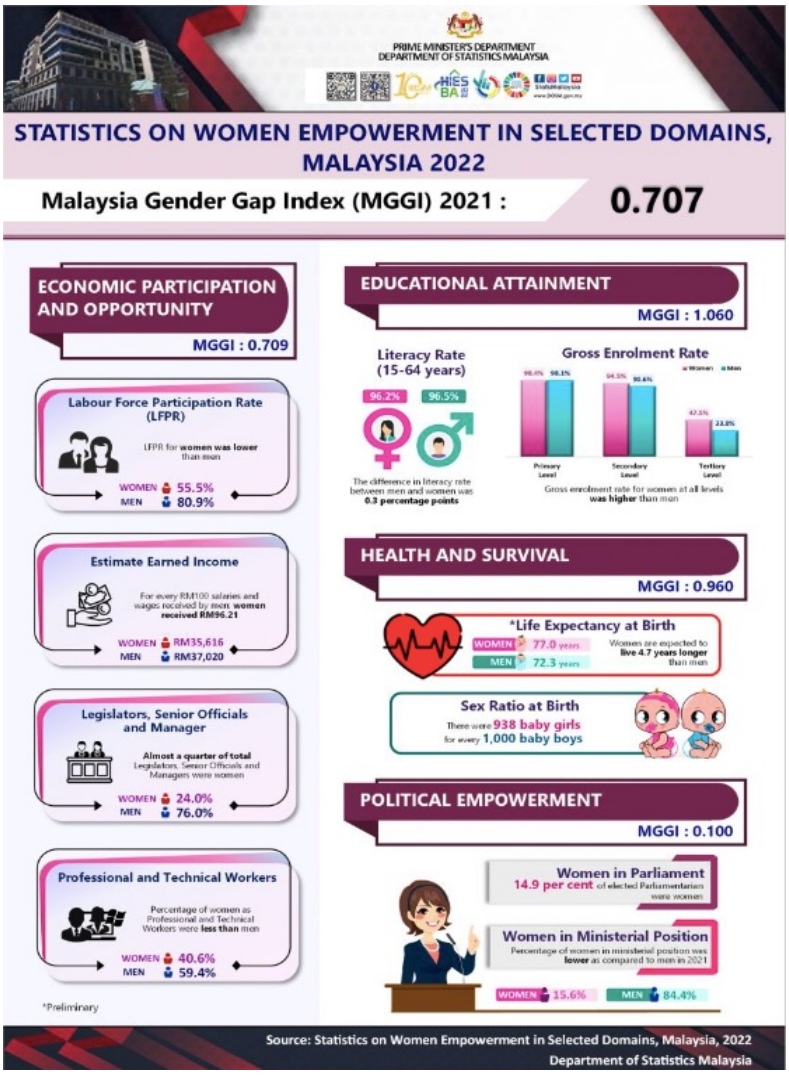


Figure 21: Malaysia Gender Gap Index 2021. Source: DOSM (2022).

While the 2022 index* is yet to be made available at the time of writing, the MGGI for the year 2021 is 0.707 (taking into account the base population). Equality was achieved for the educational attainment sub-index where the score of 1.060 meant women's literacy and enrolment rate surpassed that of men's. Gender inequality was most prevalent in the political empowerment sub-index, with a score of 0.100, while another area of improvement is the participation of, and opportunities available to, women in roles as legislators, senior officials, and managers, where the percentage point is two times lower than that of men.

The 10th Malaysia Plan (2011-2015) introduced a policy to increase women's participation in decision-making roles; this was also included as one of the strategies in the 12MP. Women holding senior leadership positions in Malaysia surpassed the 30 per cent mark in 2021, at 37 per cent (Syafiqah Salim, 2021). Women's political and labour force participation, however, remains low (Lee, 2022; Yeap, 2023). According to the Institute of Strategic and International Studies (ISIS), women face structural inequalities and inequities such as the gender pay gap, and this was further compounded by COVID-19 (Cheng, 2020). This is notwithstanding the cultural norms on gender roles and women's exit from the labour force due to unpaid care duties and housework, among others (DOSM, 2019; Sharifah Nabilah Syed Salleh & Norma Mansor, 2022; Teoh, 2023).

Importantly, gender issues cut across all areas of economic, social, and environmental interests. While Malaysia continues to show progress related to gender equality, there remains obstacles and challenges faced by women that require further attention and subsequent initiatives by both the government and businesses.

*Editor's note: The latest MGGI report for 2022 was released by DOSM on 13 December 2023.

II. Digital rights

Digital rights revolve around the fundamental rights to privacy and safety, freedom of expression, and equality. Some of these fundamental rights are expressly provided for in the Federal Constitution.

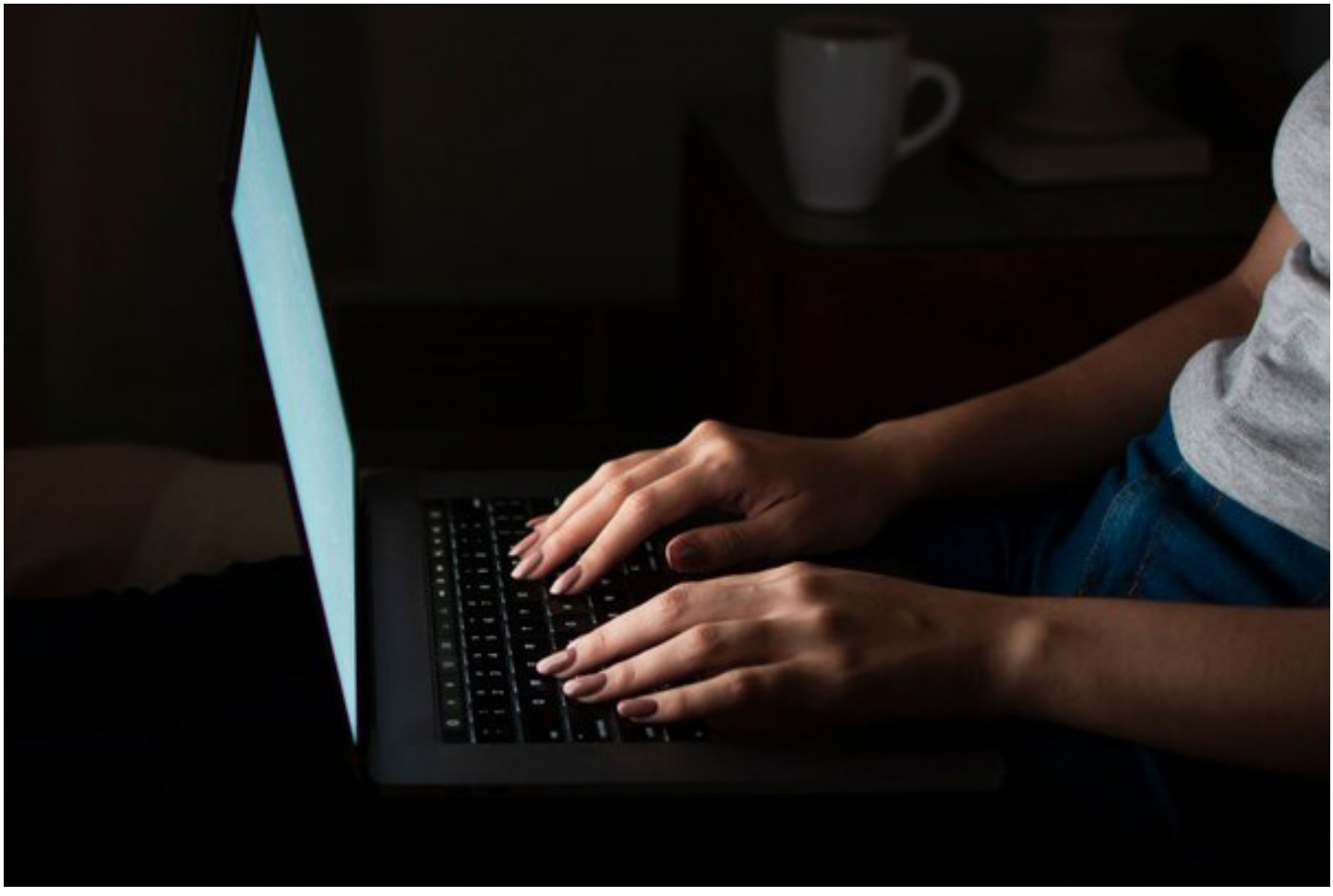
Right to privacy

Many businesses rely on the collection and processing of personal data, especially on the online and offline behaviours of individuals. This data is often used to create highly sophisticated profiles for commercial purposes such as advertising, but has also been used to track individuals. This has raised concerns of privacy, freedom of expression and equality.

The right to privacy is recognised by the courts under the right to personal liberty accorded by the Federal Constitution. This is the case in Sivarasa Rasiah v. Badan Peguam Malaysia & Anor. where the Federal Court held that the right to personal liberty under Article 5(1) of the Federal Constitution included the right to privacy.

There is, however, no specific law to protect personal privacy in Malaysia except for the PDPA. The PDPA regulates the processing of personal data in commercial transactions. When compared against the UNGPs, the PDPA provides a minimum standard of protection for personal data processed in Malaysia, but it requires further updating to keep pace with advancing technologies and its uses.

One significant limitation is that the law only applies to data used for commercial purposes and not data provided to the government. The PDPA also does not apply to personal data processed outside of Malaysia, leaving Malaysians abroad dependent on the personal data protection laws of whichever countries are housing the data.



Government response

JULY 2023 - JUNE 2024

Currently, Malaysia has not signed on to the Open Data Charter (ODC) community. There are six ODC principles that have been developed in 2015: Open By Default, Timely and Comprehensive, Accessible and Usable, Comparable and Interoperable, For Improved Governance and Citizen Engagement, and For Inclusive Development and Innovation.

However, starting in 2014, the Ministry of Digital (through the National Digital Department) initiated Malaysia's Open Data (OD) platform which aimed to share all open data of public sector agencies to data users. A circular related to the implementation of the open data initiative has been issued for reference and guidance by public sector agencies in implementing the open data initiative.

Comparing the ODC and Malaysia's OD principles, all the ODC principles have been met, with the exception of the "Open By Default" principle which requires a mandate from the government's top leadership regarding the direction and appropriateness for Malaysia to comply with this principle. Further, Malaysia is guided by the principles applied in international frameworks, namely the United Nations Electronic Government Index (UNEGDI) which evaluates open data initiatives in UN member countries.

In general, Malaysia's open data initiative has complied with all global best practice principles, ensuring that data that can be accessed by the public is not manipulated for any purpose that may affect the fundamental rights of any party, yet still subject to laws in force such as the SA, CMA and Printing Presses and Publications Act 1984.

Thus, creating a strategic governance mechanism involving the government, industry and non-government bodies must be executed in an orderly and clear way, since it involves various stakeholders and requires refinement throughout the development of the agenda.

Significantly, the Ministry of Digital, through the Personal Data Protection Department (JPDP), has presented amendments to the PDPA for tabling in Parliament in July 2024, following Cabinet approval. The amendment to this Act is the first to be made after it has been in force for a decade.

The proposed amendments to the Act have taken into account the inputs and views of various stakeholders, obtained by JPDP during intensive engagement sessions. Up until 28 December 2023, JPDP carried out a total of 37 engagement sessions with 708 stakeholders, consisting of the public sector, private sector, regulatory bodies, industry players, industry associations, local government authorities, and other relevant parties.

These amendments need to be implemented to ensure that the Act remains relevant and is in line with the development of technology, the digital economy as well as privacy legislation at the international level.

The Ministry of Digital is committed to continuing to strengthen the protection of personal data through the improvement of related policies and legislation as well as aspects of enforcement, especially in dealing with issues of data leakages and the misuse of personal data. In addition, advocacy efforts are also carried out regularly and continuously to increase the awareness of data users and individuals on the importance of protecting personal data.

III. Children's rights

Children in Malaysia have benefitted from economic and social progress that has resulted in better access to healthcare, education, clean water and sanitation. However, children continue to face systemic challenges, especially those with intersecting vulnerabilities, including indigenous and minority, refugee, asylum-seeking, irregular migrant, stateless, and undocumented children.

Malaysia ratified the CRC in 1995 and domesticated the Convention into national policy as the Child Act 2001. The Act was amended in 2016 to include the restructuring of the National Council for Children that is responsible for advising and making recommendations to the government on issues related to children's rights. Other laws to protect children and the rights of children include the Sexual Offences Against Children Act 2017, Children and Young Persons (Employment) Act 1966 and Education Act 1966. Further, Malaysia also ratified the Optional Protocols to the CRC on the involvement of children in armed conflict, and the sale of children, child prostitution and child pornography, both in 2012. National laws prohibit the production, sale, and consumption of child pornography, however, internet service providers are not required to report such instances, which hampers enforcement efforts to combat the problem.

Children's rights, in the context of BHR, must be seen beyond the "traditional" focus on child labour. Business practices that reinforce the vulnerabilities and undermine the rights of children can have long-lasting adverse impacts on the development and well-being of children and young persons. This is either through their operations, procurement, development of products, providing of services or even through the exertion of their influence on communities (UNICEF, n.d.-a).

Highlighted below are some of the issues in the context of children's rights that should be considered when developing the NAPBHR. They are not exhaustive.

Convention on the Rights of the Child :1753	Signature: NA, Ratification/Accession: 1995	✓
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict :1753	Signature: NA, Ratification/Accession: 2012	✓
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography :1753	Signature: NA, Ratification/Accession: 2012	✓
Optional Protocol to the Convention on the Rights of the Child on a communications procedure :1753	Signature: NA, Ratification/Accession: NA	

Figure 22: Malaysia's status of ratification related to children's rights instruments. Source: OHCHR Status of Ratification (Interactive Dashboard) for Malaysia.

Business practices that reinforce the vulnerabilities and undermine the rights of children can have long-lasting adverse impacts on the development and well-being of children and young persons.

Product safety

Product safety in Malaysia is regulated by the Consumer Protection Act 1999 and its subsidiary legislations such as the Consumer Protection (Safety Standards for Toys) Regulations 2009, which have provisions covering the safety of children's products. However, death rates from injuries caused by product use and mortality rates from poisoning are reported to be significant in Malaysia (UNICEF, n.d.-b; Iqdam Abdulmaged Alwan et al., 2022).

Further, in early 2023, liquid and gel nicotine were exempted from the controlled substances schedule under the Poisons Act 1952, which implies that children now have legal access to nicotine. As it is, the use of vapes and e-cigarettes are already unregulated and unrestricted, putting public health, especially those of children, at risk. The National Health and Morbidity Survey 2022 saw a shift in the use of vapes or e-cigarettes from conventional cigarettes, with an increase of e-cigarette users from 9.8 per cent in 2017 to 14.9 per cent in 2022 (Institute for Public Health, 2022).

On the basis of protecting the right to health, the government and businesses must take the necessary steps, grounded in scientific evidence, to ensure that product safety standards and regulations are enhanced, with a special focus on child safety and health.

Environmental protection

Business activities such as mining, deforestation, water and wastewater management, and others that contribute to air pollution, water pollution and land degradation have adverse impacts on children's health, well-being, and overall development.

In Malaysia, children are also significantly impacted by haze pollution and monsoon floods, which impede their access to education (when schools are forced to close), and their right to health (through direct and indirect outcomes). A crucial example is the illegal dumping of chemical waste in the Kim Kim River in 2019. Children were exposed to the secondary effects of the dumping and over 400 schools were closed (Toh, 2020; Yiswaree Palansamy et al., 2019).

Vulnerable children

Children from vulnerable and marginalised groups, especially children of migrant workers, refugees, asylum-seekers, and stateless persons, face enormous challenges in accessing public healthcare services in a timely and adequate manner. This is coupled with the lack of availability of, and accessibility to, healthcare services, particularly in rural and isolated areas (SUHAKAM, n.d.; Free Malaysia Today, 2022) despite notable efforts such as the mission led by the Sabah Department of Health together with UNICEF to provide health services to those residing in hard-to-reach areas in Sabah (UNICEF, 2023).

The relationship between gender and migration, as well as elements of statelessness and non-recognition of refugees, further compound existing challenges and protection risks (UN Committee on the Elimination of Discrimination Against Women, 2014). It was reported that indigenous communities without identification documents are charged the same prices charged to foreigners when accessing public healthcare facilities (SUHAKAM, n.d.). The same applies to children of migrant workers, both documented and undocumented, as well as stateless and refugee children. In addition to this issue of affordability, language barriers and the fear of being arrested and detained by authorities also greatly impede the children's access to basic healthcare.

Many children from these communities lack access to formal education. Asylum-seeking and refugee children are only able to access education informally through alternative learning centres, which may follow an international curriculum or the curriculum of their countries of origin. These schools are funded and operated by their own communities and administered by NGOs. In a report by IDEAS and UNICEF (2022), challenges in this context include security concerns outside of school, especially following the rise of xenophobia during the pandemic, funding shortages faced by the alternative learning centres that impact the quality of teachers and learning environment, and geographical barriers hindering access to the centres.

The Births and Deaths Registration Act 1957, Registration of Births and Deaths Ordinance 1948 (Sabah Cap. 123) and the Registration of Births and Deaths Ordinance 1951 (Sarawak Cap. 10) stipulate that the birth of every child born in Malaysia shall be registered by JPN. All births in Malaysia are registered free of charge regardless of the citizenship or marital status of the parents. Despite this, many children in Sabah and Sarawak still remain unregistered as their indigenous parents married in accordance with customary laws (Bernama, 2023). In a policy brief by UNICEF (2022), participants of a study shared that the registration process was "convoluted and there was a lack of clarity about what documentation was required". Such inconsistent and

bureaucratic systems and processes will eventually become major obstacles to formal employment for these children, ultimately contributing to economic hardship for them, their families and their communities.

IV. SLAPPs

As mentioned in the previous chapter, SLAPP is a form of legal action by the State and businesses used to intimidate or silence their critics. Through SLAPPs, the courts are moved in a way that deters individuals and groups from exercising their right to freedom of expression on matters of public interest. SLAPPs are often filed by powerful parties against weaker actors such as community leaders, journalists, CSOs, and EHRDs.

SLAPPs are used to deploy the judicial system by masquerading as legitimate legal claims. Defamation claims are abused to target valid and protected speech or protest. Such tactics can be effective in gagging critics not only because of the length of time it can take and the financial costs, but also given the prison sentences that may result. There are also threatening and harmful emotional and psychological impacts. This has a chilling effect on free expression and disrupts legitimate collective action to defend the rights of workers and communities.

The work of HRDs and EHRDs to expose harms by businesses has never been more important, and SLAPPs have become a key barrier to rights-based progress. HRDs speak up for fairness and sustainable practices that ultimately also benefits industry; yet, rather than listen and act on the information HRDs share, businesses turn to file lawsuits to harass and silence those who criticise them.

HRDs speak up for fairness and sustainable practices that ultimately also benefits industry.

V. Indigenous peoples

The lives and livelihoods of Malaysia's IPs living in remote areas are often challenged by inadequate access to essential amenities like power, clean water, and other social and welfare services, but are also disrupted by the adverse impacts of major development projects. Government regulations, the lack of identity documents, and physical remoteness further hinder their access to healthcare facilities.

IPs face other critical risks, including having unregistered and dangerous births, high school dropout rates and a compounded vulnerability to diseases. The latter is caused by malnutrition and poverty which have been major issues among the indigenous communities (Reuters, 2020; Chew et al., 2022).

The incidence of extreme poverty among indigenous communities is influenced by two main factors: their preferred practice of subsistence economic activities, and the existing method of measuring poverty through the poverty line income or poverty line income per capita. The government is currently in the midst of developing a multi-dimensional poverty index method that could reflect the true poverty level of the country's indigenous peoples, which will have a considerable bearing on formulating effective social policy.

VI. Refugees and asylum-seekers

Malaysia does not legally recognise refugees and asylum-seekers. Though UNHCR registers and issues a number of asylum-seekers with UNHCR identification cards, the cards do not provide them with legal status in the country. As of March 2020, there were 179,520 refugees and asylum-seekers registered with UNHCR in Malaysia (UNHCR, n.d.).

Presently, refugees are prohibited from working in any sector of the economy. Many refugees are therefore employed without proper documents, leaving them vulnerable to exploitation. Women and girls are also particularly vulnerable to exploitation, harassment, and violence by employers and labour agents for purposes of sexual exploitation, forced labour or forced marriage (UN Committee on the Elimination of Discrimination Against Women, 2008).

Further, although refugees and asylum-seekers in Malaysia are allowed access to public and private healthcare services, the cost of treatment, their fear of moving around in public, language and communication issues and, for some, physical remoteness, are distinct barriers to basic healthcare services.

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Malaysia is not a signatory to the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees. Refugees and asylum-seekers cannot claim any rights or privileges as provided by both these international instruments. Permission for refugees and asylum-seekers to stay in the country is temporary before they return to their country of origin or are resettled in a third country.

For humanitarian reasons, the government has enabled interventions such as reducing medical fees by 50 per cent of the fees charged to foreign nationals and providing facilities to obtain education at alternative learning centres. The government is also in the process of granting work permits that will be developed in line with the improvement of the management of refugees and asylum-seekers in Malaysia as outlined in NSC Directive No. 23: Policies and Mechanisms for the Management of Refugees and Asylum Applicants.

The NSC is aware that the preparation of this report is based on references to various studies and recommendations from various parties. Therefore, any further discussions involving the issue of rights related to refugees and asylum-seekers, and the role of supporting the lives of this group, should be carried out jointly with civil society (including NGOs and CSOs) and other relevant stakeholders, with the responsibility placed on all, and not solely with the government.

The NSC acknowledges the need to preserve the human rights of every individual in the country. All policies, legislation, programmes and actions implemented for refugees are to help them, based on humanitarian principles, to gain basic skills, health and education in order for them to be referred to a third country or return to their countries of origin, and not for them to continue to remain in Malaysia indefinitely.

VII. Malaysia's extraterritorial obligations

One of the main challenges today is the regulation of businesses in the context of the global economy. Like many countries, Malaysia regards human rights obligations as only applicable within its borders. This creates gaps in human rights protection beyond the country's territories.

Extraterritorial obligations (ETOs) require that the State is not only responsible to realise the human rights of its inhabitants within their territory, but also to universally protect people outside of its territorial jurisdiction.

The non-binding Maastricht Principles on ETOs in the area of Economic, Social and Cultural Rights (Maastricht Principles) clarify that the ETOs of the State is based on existing international law, and parties may hold the State accountable for violating the human rights of people outside their territories. This is especially relevant in the context of BHR where the business operations of MNCs and transnational corporations can gravely impact people and communities irrespective of borders and outside the businesses' countries of origin or residence.

It is noted that Malaysia has extended its jurisdiction for the courts to adjudicate over certain offences committed outside our borders. These are limited to very serious crimes and would not specifically cover BHR-type complaints. The relevant laws are found in section 4 of the Penal Code, section 2 of the Extra-Territorial Offences Act 1976 and section 9 of the Computer Crimes Act 1997.

Malaysia should consider legislating ETOs expressly to regulate the operations of Malaysian GLCs and PLCs abroad to ensure greater human rights and environmental rights accountability in line with the Maastricht Principles.

Government response

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The Attorney General's Chambers (AGC) notes the issues highlighted in the subtopic of Malaysia's ETOs, which is a challenge faced by many countries, including Malaysia, to protect and comply with human rights obligations beyond their territories. In this regard, the report emphasised the importance of Malaysia to follow the Maastricht Principles for the universal protection against human rights violations.

It is noted that the Maastricht Principles is a document explaining international expert opinion, and restating human rights law on ETOs. The Principles was issued on 28 September 2011 by 40 international law experts from all regions of the world.

It is also noted that the Principles does not purport to establish new elements of human rights law. Rather, they clarify ETOs of States on the basis of standing international law.

It is further noted that the Principles outlines the experts' views on States' ETOs based on existing international law, emphasising the general obligation to respect the rights of persons within and outside their territories. It is viewed that it was intended to serve only as a mere guideline, and was never intended to be a document stating the standards to be imposed on any sovereign states. At this juncture, AGC is of the view that Malaysia is not obliged to abide by this document, particularly the ETOs, and Malaysia will continue to respect and provide for the protection of basic human rights standards and fundamental liberties to all persons in accordance with the Federal Constitution and its applicable domestic legal framework and treaty obligations.

In addition, AGC wishes to emphasise that, as a dualist country, Malaysia's ETOs under existing international law, if any and there are none currently applicable, are subject to the particular treaty to which Malaysia is a party. For a particular treaty to be operative in Malaysia, legislation passed by Parliament is a must. In other words, treaties have no legal effect domestically unless the Legislature passes a law to give them effect.

This principle has been decided in precedent cases as follows:

- Sundra Rajoo a/l Nadarajah v. Menteri Luar Negeri, Malaysia & Ors.
- Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors.
- AirAsia Bhd v. Rafizah Shima bt. Mohamed Aris.
- Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal.

Therefore, any exercise of extra-territorial rights related to BHR must be based on enabling domestic law. Among the provisions of domestic law which have been regulated to extend Malaysia's ETOs are as follows:

- Section 4 of the Penal Code, which defines the extension of the Code to extraterritorial offences.
- Section 2 of the Extra-Territorial Offences Act 1976, which defines the extra-territorial effect of offences committed outside Malaysia.
- Section 9 of the Computer Crimes Act 1997, which defines the territorial scope of offences under the Act.

Further, BHEUU, Prime Minister's Department must also obtain inputs from all relevant ministries and agencies to ensure that the respective parties can comply with any actions proposed or taken with regard to the adoption of the NAPBHR.

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Concluding remarks

Figure 23: Members of the Working Group NAPBHR and NBA expert team. Source: UNDP Malaysia.

This NBA report, written by a Malaysian expert team in consultation with the Malaysian government and its agencies, addresses the following questions: What is the relationship between BHR? What is the level of compliance by the Malaysian government and Corporate Malaysia with the UNGPs? What are the recommended actions the government and companies should take moving forward?

Adopted in 2011 as the most authoritative global framework on BHR, the UNGPs are designed to address human rights and environmental impacts of business activities. The principles aim to enhance the roles and responsibilities of both the State and businesses in respecting, promoting and protecting human rights.

The UNGPs' three pillars are as follows:

1. State duty to **PROTECT** human rights. This pillar emphasises the State's duty to protect human rights through legislation, regulation, and policy. Governments must ensure that businesses do not infringe on human rights and that there are mechanisms to address grievances and remedy harms.

2. Corporate responsibility to **RESPECT** human rights. This pillar outlines the responsibility of businesses to respect human rights. Companies must avoid infringing on the rights of people and address any adverse impacts they cause or contribute to. This includes conducting human rights due diligence (HRDD) to identify, prevent, and mitigate negative impacts.

3. Access to **REMEDY.** This pillar focuses on ensuring effective remedies are available for survivors and victims

of business-related human rights abuses. It requires both the State and businesses to provide access to grievance mechanisms and other forms of redress for affected individuals and communities.

Being the first-ever Malaysian NBA report, it analyses human rights of three priority areas: governance, labour and the environment. For over a year from mid-2022, the expert team gathered information and heard from key stakeholders, including governmental agencies, companies, industry associations, civil society organisations, and impacted communities. More than 20 consultations and focus group discussions were held, reaching over 400 participants and informants.

This report outlines the major issues, gaps, and challenges in implementing BHR principles in Malaysia. Problematic areas are addressed and assessed, and recommendations are made. The concerns of groups and communities in marginalised and vulnerable situations are raised here for attention.

Between July 2023 and June 2024, the draft NBA report (earlier submitted to the government) underwent a thorough government review process, including written comments from the various ministries and agencies. In-person meetings were also conducted. As a result, the report was further edited and refined, with clarifications and updates highlighted in summary boxes documenting the government's response to parts of the report.

This collaborative effort between the independent expert team and governmental agencies enhances the report's accuracy and credibility, which can now be used as a foundation for further conversations, advocacy and policy formulation on BHR in Malaysia.

The key recommendations of this report include the following:

- updating our laws to expressly recognise human rights and environmental rights so that the affected citizens and groups can take court action against the entities violating human rights;
- introducing a new law on modern slavery that provides survivors and victims of forced and child labour and other forms of labour exploitation direct access to the court to sue their employers;
- integrating and mainstreaming human rights into our public administration and governance by legislating a new Human Rights Act or BHR Act, and establishing a new Ministry of Human Rights and Justice (MHRJ);
- imposing mandatory HRDD on businesses for them to proactively assess and address the impacts of their operations (and those of their value chain) on human rights and environmental rights;
- for businesses to establish non-State grievance mechanisms that are legitimate, effective and accessible to address complaints and provide remedies for human rights and environmental rights abuses; and,
- refrain from using Strategic Lawsuits Against Public Participation (SLAPPs) as a method to silence and persecute human rights defenders and indigenous communities for raising legitimate human rights and environmental rights concerns.

This NBA report is required reading for anyone interested in human rights, good governance, and the rule of law, as well as for those who wish to have a template to drive Malaysia towards greater human rights socialisation and compliance by the government and businesses alike.