



**STRATEGIC FRAMEWORK ON A NATIONAL  
ACTION PLAN ON BUSINESS AND HUMAN  
RIGHTS FOR MALAYSIA**

**Human Rights Commission of Malaysia  
March 2015**

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## GLOSSARY

ADB	Asian Development Bank
AGC	Attorney-General's Chambers
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
Bursa Malaysia	Bursa Malaysia Berhad (an exchange holding company under the purview of the Securities Commission and the Ministry of Finance)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
The Commission	The Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia)
The Government	The Government of Malaysia
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
ESG	Environmental, Social and Governance
ESIA	Environmental and Social Impact Assessment
EU	European Union
FCO	Foreign & Commonwealth Office, United Kingdom
FDI	Foreign Direct Investment
GLC	Government-Linked Company (Malaysia's equivalent of a State-owned or controlled enterprise)
GRI	Global Reporting Initiative
Guiding Principles	United Nations Guiding Principles on Business and Human Rights

ICMM	International Council on Mining and Metals
ILO	International Labour Organisation
IOE	International Organisation of Employers
IPIECA	A global oil and gas industry association for environmental and social issues
ISO	International Standards Organisation
IFC	International Finance Corporation
MACC	Malaysian Anti-Corruption Commission
MDB	Multilateral Development Bank
MITI	Ministry of International Trade and Industry
MOFA	Ministry of Foreign Affairs
MOHA	Ministry of Home Affairs
MOSTI	Ministry of Science, Technology and Innovation
NACRA	National Annual Corporate Report Awards of Malaysia
NAP	National Action Plan
NCP	National Contact Point
NHRAP	National Human Rights Action Plan
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development
RSPO	Roundtable on Sustainable Palm Oil
SDGs	Sustainable Development Goals

SEANF	South East Asia National Human Rights Institutions Forum
SSM	Companies Commission of Malaysia
TPP	Trans-Pacific Partnership
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCT	United Nations Country Team
UN 'Protect, Respect and Remedy' Framework	United Nations 'Protect, Respect and Remedy' Framework' on business and human rights
UN Working Group	United Nations Working Group on Business and Human Rights
UNDP	United Nations Development Programme
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UPR	Universal Periodic Review
WBG	World Bank Group
WTO	World Trade Organisation



## PREFACE

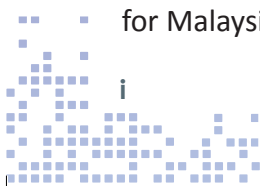
The Human Rights Commission of Malaysia (the Commission) started to formally look into the area of business and human rights in 2010. Prior to that, the Commission's involvement in the issue of business of human rights was rather incidental through, among others, addressing complaints involving allegation of infringements of a wide range of human rights related to business operations, including on gender discrimination in employment, exploitation of migrant workers, forced labour, employment, indigenous peoples' rights and environmental rights.

Since 2010, the Commission has given greater attention and priority to the area of business and human rights and has carried out a number of activities which focussed specifically on this issue including a series of forum and roundtable discussions with stakeholders on Business and Human Rights; research; the National Inquiry on the Land Rights of Indigenous People in Malaysia and investigating allegations of infringements of rights impacted by business activities.

One key finding from the Commission's activities on business and human rights is the lack of awareness and recognition of the role and obligation of business entities to ensure that their operations do not in any way lead to human rights abuses. In addition, the Commission observes that while the business entities are accustomed to the concept of Corporate Social Responsibility (CSR), many were not very familiar with the United Nations Guiding Principles on Business and Human Rights (Guiding Principles), which is undoubtedly an important and useful document to promote corporate responsibility to respect human rights. The Commission further notes that the Government plays a significant role in driving the business entities to respect human rights. The Government as the custodian of human rights is in the position to formulate a clear direction for business entities to incorporate human rights in their business activities. Such a clear direction will ensure that business entities respect human rights in conducting their business activities. And in cases where business activities have resulted in infringement of rights, the Government and the business entities should ensure the availability of effective remedial mechanisms for the victims of business-related rights infringement.

Prompted by these findings, the Commission notes the need to create awareness on areas of business and human rights and opines that one of the best measures is to recommend that the Government formulate a National Action Plan on Business and Human Rights. Section 4(1) of the Human Rights Commission of Malaysia Act 1999 encapsulates the functions of the Commissions which include, *to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken.*

Acting under this mandate, the Commission in 2014, in partnership with the United Nations Country Team (UNCT) in Malaysia succeeded in a bid for a grant from the Foreign and Commonwealth Office (FCO) to undertake a project focussing on business and human rights. The objective of the project, which commenced in July 2014, is to formulate and propose a framework for a national plan of action towards the adoption and implementation of the Guiding Principles by both State and non-State actors in Malaysia. The Strategic Framework on a National Action Plan (NAP) on Business and Human Rights for Malaysia is the output of the project.





# STRATEGIC FRAMEWORK ON A NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS FOR MALAYSIA



This Strategic Framework on an NAP on Business and Human Rights is presented to the Government of Malaysia to provide a policy direction for the formulation of an NAP on Business and Human Rights for Malaysia towards promoting greater respect for human rights by the State and non- State actors including businesses, civil society and individuals and groups affected by adverse business- related human rights impacts.



## I. EXECUTIVE SUMMARY

1. This Strategic Framework both explains the rationale and provides an outline for the development of an NAP to ensure business conduct that respects human rights. The objective of the NAP would be to address the challenge of properly managing the adverse impacts of business activities on human rights, to ensure that Malaysia's transformation into a fully developed country is undertaken in a sustainable manner. The strategy recommended is to use all areas of the Government's regulation of and interactions with business and economic activities as avenues for ensuring corporate respect for human rights. It identifies what these areas are and, for each area, proposes concrete and achievable actions that can be taken.
2. To move forward with this bold effort, unity in purpose and commitment across a range of government departments is needed. The increasing urgency of meeting Vision 2020's goal of becoming a fully developed nation by 2020, the looming milestone of ASEAN economic integration by 2015 and the unveiling of the post-2015 Sustainable Development Goals (SDGs) in the same year present an unprecedented convergence of forces and a focal goal for driving and uniting this cross-governmental endeavour.
3. The Strategic Framework and its recommendations are based on the following understandings:
  - That the State and the business sector have complementary but differentiated roles with regard to human rights. Corporate respect for human rights requires the independent action of businesses themselves. At the same time, the State should provide an appropriate regulatory and policy environment to foster corporate respect for human rights.
  - That a root cause of the prevalence of business-related human rights abuses around the world has been the siloing by governments of their processes for regulating human rights compliance away from or at the periphery of their processes for regulating business and economic activities. The integration of both these types of processes is needed.
  - That while it is governments that have the legitimacy, capacities and resources to make the difficult balancing decisions required to reconcile competing societal needs, the occurrence of business-related human rights abuses signals that more needs to be done to get the balance right.
  - That it is essential for a process to develop an NAP on business and human rights to be Government-owned and led, and that the NAP be formulated based on adequate, informed and inclusive stakeholder consultations.
4. The Strategic Framework recommends that the NAP use the Guiding Principles as its foundational reference. The culmination of six years of in-depth research, extensive multi-stakeholder consultations and practical road-testing, the Guiding Principles provide practical guidance on how States can provide the appropriate policy and regulatory environment to foster corporate respect for human rights. The Guiding Principles identify the different areas where States interact with businesses and articulate how these areas can be used as avenues for ensuring corporate respect for human rights. They also draw attention to a wide range of regulatory tools that governments



have at their disposal to operationalise human rights in the regulation of business and economic activities.

5. Translating the Guiding Principles into Malaysia's context, the Strategic Framework articulates a set of policy objectives and related recommendations that the Government should consider when developing its NAP on business and human rights. It is hoped that translating the Guiding Principles into concrete objectives and recommendations specific to Malaysia will provide entry points for obtaining the commitment of Government and non-governmental stakeholders to develop an NAP, and begin the process of obtaining the stakeholder input needed to formulate the NAP's action points. The Strategic Framework also serves as a resource document for accelerating understanding of how the Guiding Principles may be used and implemented.
6. The movement towards ensuring corporate respect and accountability for human rights is gaining prominence and will continue to progress. The Commission is confident that the continued fostering of corporate respect for human rights in Malaysia and ASEAN will boost Malaysia's efforts to become a fully developed nation and help achieve the successful implementation of sustainable development.



## II. OBJECTIVES, RATIONALE & METHODOLOGY

7. The objective of the Commission's business and human rights efforts, and this Strategic Framework, is to secure the prevention and remedy of adverse business-related human rights impacts. Doing so responds to the challenges faced in fulfilling Malaysia's vision of becoming a fully developed nation.
8. For a nation striding towards developed nation status, safeguarding the social and environmental well-being of Malaysia's people in the midst of economic growth is a national priority. A developed nation, according to Malaysia's Vision 2020, is certainly not defined solely by its economic growth and productivity. A fully developed Malaysia must also have a moral, ethical, caring and economically just and equitable society.<sup>1</sup> Achieving this priority requires ensuring that business conduct respects human rights. Business conduct that is respectful of human rights will also boost businesses' reputation for doing good business and strengthen Malaysia's international economic competitiveness. In that regard, Malaysia's Vision 2020 rightly recognises that privatisation must go hand in hand with social responsibility.<sup>2</sup>
9. Ensuring that business conduct respects human rights is challenging. We see from around the world no shortage of examples of the negative impacts that economic forces and actors have had on societies. From large-scale human rights abuses caused by the oil and gas operations of transnational corporations, to workers' deaths in deplorable factory conditions, to the poisoning of whole communities due to the operations of chemical plants and mining companies – the adverse human rights impacts of economic and business activities are a global problem.
10. Malaysia is no exception. Malaysia has faced allegations that child labour and forced labour are prevalent in its palm oil and electronics sectors respectively,<sup>3</sup> with one high profile report finding that one in three migrant workers in Malaysia are in conditions of forced labour.<sup>4</sup> The downgrading of Malaysia to Tier 3 in the U.S. State Department's 2014 Trafficking in Persons Report, the lowest category possible, has also sparked domestic and international concern over companies in Malaysia being sites of "modern day slavery."<sup>5</sup>
11. The adverse impacts of businesses on human rights have also emerged as a recurring theme in the Commission's scope of activities, even though the Commission's initial work areas did not specifically address private sector impacts. Examples of these adverse business-related human rights impacts include the abuse and exploitation of migrant workers, the environmental and social impacts of hydropower and other development projects on indigenous peoples, the human rights risks and challenges posed by the plantations sector, sexual harassment in the workplace, gender discrimination in private sector wages, and the low rate of employment of persons with disabilities.
12. Malaysia can do better. Business conduct that contributes to rather than undermines Malaysia's moral, ethical and caring society, requires the prevention and remedy of the adverse human rights impacts of business and economic activities. Boosting the reputation of Malaysia as a country that



ensures corporate respect for human rights will also provide reassurance about doing business in Malaysia and with Malaysian businesses, and promote economic growth.

13. The Commission recognises that it is the Government that has the legitimacy, capacities and resources to make the difficult balancing decisions required to reconcile competing societal needs. However, the occurrence of business-related human rights abuses in Malaysia and by Malaysian companies signals that the Government should do more to get the balance right.
14. An NAP on business and human rights that is based on the Guiding Principles will:
  - (a) Be a much needed driver of action. Civil society actors and victims are calling for more effective prevention and remedy for business-related human rights abuses. Business participants at the Commission's roundtable discussions have expressed the need for the Government to provide them with clearer expectations and standards on how to respect human rights. Business-related human rights abuses, such as in relation to migrant workers and trafficking, negatively impact the reputation of Malaysia and Malaysian companies. Effective action is needed to minimise the exposure of society to business-related human rights abuses and the exposure of businesses to reputational and operational risks.
  - (b) Provide a common platform for cross-governmental policy coordination and coherence. Businesses interact with the Government in multiple and diverse regulatory areas. Providing an appropriate policy and regulatory environment to foster corporate respect for human rights requires cross-governmental involvement.
  - (c) Activate the private sector to contribute to fulfilling Malaysia's development goals, including Vision 2020; and the post-2015 SDGs to be adopted by UN Member States in September 2015. Noting that the private sector may be harnessed to ensure the successful implementation of the SDGs, Chairpersons of the UN human rights treaty bodies have jointly called on UN Member States to ensure accountability of the private sector and the full application of the Guiding Principles.<sup>6</sup> Further, global civil society has called for the SDGs to be built on human rights, and universal values of equality, justice and security.<sup>7</sup> Indeed, the fulfillment by the private sector of their corporate responsibility to respect human rights, and the State's provision of an appropriate regulatory and policy environment for the private sector to do so, will be an important means of fulfilling the SDGs. The Guiding Principles are crucial in this regard, as they identify "the differentiated, but complementary roles of States and companies with regard to human rights."<sup>8</sup>
  - (d) Foster Malaysia's international business competitiveness. Integrating human rights principles into the workplace helps maximise productivity, and helps a company stay competitive.<sup>9</sup> Further, corporate respect for human rights is becoming a key criterion for competing internationally. For example, in today's globalised palm oil and electronics supply chains, corporations abroad are taking concrete steps to ensure that their Malaysian palm oil and electronics suppliers respect human and environmental rights in their operations.<sup>10</sup> Countries such as the United States, the United Kingdom, and others in the European Union, are adopting responsible



business regulations that impact on their businesses' supply chain activities and outward investments with the intention of creating a level playing field internationally.<sup>11</sup> Countries such as Colombia and Tanzania are making responsible business conduct a priority by developing NAPs on business and human rights.<sup>12</sup> An NAP on business and human rights will enable Malaysian companies and Malaysia to stay competitive in the changing global marketplace.

- (e) Demonstrate Malaysia's leadership of ASEAN as Chair of ASEAN in 2015. Especially with the ASEAN Economic Community as the goal of regional economic integration by 2015, achieving sustainable economic development by reconciling economic goals with human rights protection will require regional cooperation and action. Integrating business and human rights into ASEAN's agenda will ensure that regional economic integration advances the ASEAN Charter's purposes of alleviating poverty, enhancing good governance and the rule of law, promoting and protecting human rights and fundamental freedoms, promoting sustainable development, and providing equitable access to opportunities for human development and justice.<sup>13</sup> Notably, Myanmar, Philippines and Indonesia may also develop NAPs on business and human rights.<sup>14</sup>
- (f) Place Malaysia among the leading wave of countries that have developed NAPs on business and human rights and that are in the process of doing so. Five governments have issued official NAPs on business and human rights.<sup>15</sup> The first of these was issued by the United Kingdom in 2013. An estimated twenty-two other governments have made a commitment to develop NAPs for business and human rights, at least nine of which, including the United States, have taken concrete steps to fulfill their commitment.<sup>16</sup>
15. There should be an NAP on business and human rights that is separate and distinct from a National Human Rights Action Plan (NHRAP). First, business and human rights issues are unique and can be complex, and it would be difficult to meet the specific needs of the task if it is confined within the processes and mechanisms of a broader NHRAP. In that regard, the Guiding Principles have developed a distinct and specific problem-solving approach that is tailored to the particular challenges posed by economic and business activities. Implementing the Guiding Principles hence requires a process of its own. Second, businesses are essential and central stakeholders for an NAP on business and human rights, but this is generally not the case for an NHRAP. Subsuming business and human rights within a broader NHRAP will likely pose difficulties for obtaining and managing the participation of businesses.
16. While the development of an NAP requires the investment of resources, the Commission respectfully submits that the importance of reconciling economic interests with human rights protection justify the allocation of these resources. Businesses and non-governmental initiatives, such as those interested in advocating for responsible business conduct and levelling the playing field internationally, may also be willing to contribute resources to the NAP process and support its implementation.

17. The Strategic Framework was formulated based on information and knowledge gained in the Commission's business and human rights-related activities. These include:
- a series of roundtable discussions on business and human rights held over the years since 2010, involving stakeholders from the Government, businesses and civil society
  - the National Inquiry into the Land rights of Indigenous Peoples;
  - the Report on the Murum Hydroelectric Project and its Impact Towards the Economic, Social and Cultural Rights of the Affected Indigenous Peoples in Sarawak;
  - a study on the corporate social responsibilities of logging and plantation companies in Sarawak;
  - engagement with the Ministry of International Trade and Industry (MITI) on the human rights impacts in Malaysia of the Trans-Pacific Partnership Agreement (TPP Agreement);
  - complaints received regarding business-related human rights abuses, many of which relate to the abuse and exploitation of migrant workers; and
  - A literature review of international and domestic frameworks, standards and initiatives relevant to business and human rights and corporate social responsibility.



### III. USING THE STRATEGIC FRAMEWORK

18. The Strategic Framework is directed at assisting the Government to provide an appropriate policy and regulatory environment to foster business respect for human rights and accountability for businesses' adverse impacts on society. The Guiding Principles provide an authoritative global framework for doing so, and the Strategic Framework translates this globally applicable blueprint into Malaysia's unique context.
19. The Guiding Principles seek to integrate human rights considerations into business-related policy-making and business operations. This strategy responds directly to the problem's root cause: the development of economic institutions, actors and norms without a corresponding development in capacities to manage their adverse impacts on society.<sup>17</sup> The Guiding Principles are the culmination of six years of in-depth research, extensive multi-stakeholder consultations and practical road-testing.<sup>18</sup>
20. The Guiding Principles do not reinvent the wheel. They build on existing institutions, mechanisms, processes, regulatory tools etc. and do not necessarily require the creation of new ones, although doing so is not precluded. For example, corporate governance reporting measures, which conventionally require the disclosure of information that affects a company's financial bottom line, may be redefined to increase corporate transparency in relation to the businesses' human rights risks and impacts. Existing corporate risk management processes may be built upon to establish systems that manage not only risks to the company's financial bottom line, but also risks posed by business operations to the rights of individuals and communities. Public procurement criteria may be expanded to include human rights criteria. These are but a few examples. Notably, stakeholders consulted by the Commission have observed that the measures proposed by the Guiding Principles are not foreign to them.<sup>19</sup>
21. The Strategic Framework uses the Guiding Principles to articulate a set of policy objectives specific to Malaysia's context. In the Commission's view, these policy objectives should be achieved in order to ensure that Malaysia has an appropriate policy and regulatory environment for fostering corporate respect and accountability for human rights. This set of policy objectives is not exhaustive. Further, the Commission recognises that the Guiding Principles provide a minimum standard for action and do not foreclose further developments.<sup>20</sup>
22. It is essential for a process to develop an NAP on business and human rights to be Government-owned and led. It is also essential that the NAP be formulated based on adequate, informed and inclusive stakeholder consultations. Currently, however, awareness of the Guiding Principles must be increased among Government and non-governmental stakeholders. The Strategic Framework has been formulated with these considerations in mind.



23. The range of policy objectives articulated in the Strategic Framework are entry points for obtaining the commitment of Government and non-governmental stakeholders to develop an NAP. The Strategic Framework also serves as a resource document for accelerating understanding of how the Guiding Principles may be used and implemented.
24. **Recommendations:** Towards developing an NAP on business and human rights, the Commission recommends that the Strategic Framework be used in the following practical ways: -
- (a) Government
- i. That the set of policy objectives identified in the Strategic Framework be used to identify and engage relevant ministries and agencies to participate in a cross-governmental effort to develop the NAP; and
  - ii. Recognising that an initial NAP may not be able to address all the policy objectives identified, that the set of policy objectives in the Strategic Framework nevertheless be presented for stakeholder consultations and given full consideration before selecting the policy areas to address in the initial NAP
- (b) Non-Governmental Actors (including businesses, civil society and individuals and groups affected by adverse business-related human rights impacts)
- i. That non-governmental actors use the Strategic Framework and the Guiding Principles as reference points for action, including by identifying the policy objectives that are relevant to their interests and experience, providing input that will add to and improve the policy recommendations made, and raising additional policy objectives that are relevant to Malaysia; and
  - ii. That non-governmental actors support efforts to develop an NAP for business and human rights.



#### IV. MALAYSIA'S CURRENT INTEGRATION OF HUMAN RIGHTS IN BUSINESS

25. The integration of human rights in economic and business activities in Malaysia has certainly begun. Over fifty Malaysian companies, including small and medium enterprises, are participants of the UN Global Compact, and thereby commit to adhere to the UN Global Compact's Ten Principles, which include human rights.<sup>21</sup> Over a hundred and twenty Malaysian companies are members of the Roundtable on Sustainable Palm Oil (RSPO) and thereby commit to follow the UN Universal Declaration on Human Rights.<sup>22</sup> Fourteen of these Malaysian RSPO members are certified against the RSPO principles and criteria, which require them to respect human rights and have a human rights policy statement.<sup>23</sup>
26. The Commission welcomes the steps taken by the Government to foster the integration of human rights in business activities by supporting good corporate governance. These steps include the following:
- (a) Bursa Malaysia has in December 2014 launched the FTSE4Good Bursa Malaysia Index, which requires companies to achieve a specified FTSE4Good ESG Rating in order to be included in the index.<sup>24</sup> The FTSE4Good ESG Rating includes human rights criteria.<sup>25</sup> To date, twenty-four Malaysian firms have been selected for inclusion in the FTSE4Good Bursa Malaysia Index.<sup>26</sup>
  - (b) The Companies Commission of Malaysia (SSM) has, through its best practice circular on corporate responsibility disclosure and reporting, highlighted international corporate governance standards and tools that have human rights principles and performance indicators, such as the Global Reporting Initiative (GRI) Sustainability Reporting Framework, the ISO 26000, the UN Global Compact and UNICEF's Children's Rights and Business Principles.<sup>27</sup>
  - (c) Bursa Malaysia's sustainability guide for directors recommends the integration of human rights in businesses' sustainability strategies for their operations.<sup>28</sup>
  - (d) Bursa Malaysia's corporate governance guide for listed companies recommends that businesses require employees to report human rights abuses in their internal whistle-blowing policies, and draws attention to how environmental, social and governance reports are increasingly focused on, among other things, human rights.<sup>29</sup>
27. The Commission also welcomes the steps taken by the Government to integrate human rights into its international economic activities. During negotiations on the TPP Agreement, and prompted by NGO advocacy, MITI consulted the Commission on human rights issues arising from the proposed agreement.
28. Non-governmental organisations (NGOs) have also played an important role. Civil society activism and public pressure have shone the spotlight on the human rights impacts of business activities. The Commission has received complaints regarding human rights abuses that implicate companies. Complaints have also been made regarding the operations in Malaysia of foreign transnational corporations or their Malaysian subsidiaries to the OECD National Contact Points (NCPs) of their home countries.<sup>30</sup> These NCPs apply the OECD Guidelines on Multinational Enterprises (OECD Guidelines), which include a chapter on human rights standards.<sup>31</sup>



29. Various business and civil society initiatives have sought to raise awareness among businesses in Malaysia of business and human rights. A roundtable on corporate respect for human rights organised in 2011 by the Global Business Initiative in partnership with, among others, the Business Council for Sustainable Development Malaysia and the Global Compact Network Malaysia, saw the participation of over ninety business representatives.<sup>32</sup> The Commission has from 2010 to date organised roundtables on business and human rights for government, businesses and civil society. The Malaysian Bar Council included a session on business and human rights during its 2014 International Malaysia Law Conference.
  
30. While the Commission positively regards the steps taken by the Government and non-governmental actors to integrate human rights in business activities, there is more to be done. Business-related human rights impacts span a wide range of policy domains and efforts need to move beyond the domain of corporate governance. Further, the expectation that businesses should integrate human rights in their operations has only been given brief mention in non-binding corporate governance guidance. CSR reports by listed companies still relate mainly to philanthropic activities.<sup>33</sup> There is a lack of information and guidance on how businesses can integrate human rights in their operations in practice. A lot more can and should be done to set and enforce the Government's expectation that businesses respect human rights.



## V. DEVELOPING AN NAP ON BUSINESS AND HUMAN RIGHTS

### A. ESSENTIAL ELEMENTS

31. There are a number of essential criteria that the development process and content of an NAP on business and human rights should meet. In proposing the following essential criteria, the Commission has relied on an authoritative guidance document issued by the UN Working Group on business and human rights on how States should develop NAPs on business and human rights.<sup>34</sup> The Commission's recommendations have also been informed by input from a resource document produced by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable on developing NAPs on business and human rights, and lessons learned from the experiences of other countries.<sup>35</sup>
  
32. **Recommendations:** The Commission recommends that the Government ensure that the development of Malaysia's NAP on business and human rights meets the following essential criteria: -
  - i. That the Government commit to the goal of effectively responding to Malaysia's business and human rights challenges. This means that all commitments in the NAP should be directed towards preventing, mitigating and remedying current actual and potential human rights impacts.
  - ii. That the Government use the Guiding Principles as the foundational reference point for formulating the NAP
  - iii. That the Government ensure that there is adequate cross-governmental involvement in the development of the NAP from the outset
  - iv. That the Government ensure that there are adequate resources allocated to the NAP process from the outset
  - v. That the Government formulate the NAP's action points based on credible evidence and information and inclusive stakeholder input
  - vi. That the Government ensure transparency in the process of developing and implementing the NAP including by publicly disclosing research findings, stakeholder submissions, outcomes of stakeholder consultations, and information on the progress of implementation
  - vii. That the Government ensure that there is inclusive and informed participation of all relevant stakeholders, including affected and vulnerable persons, groups and communities, in developing and implementing the NAP
  - viii. That the Government establish effective mechanisms to monitor the implementation of the NAP
  - ix. That the Government commit to an open-ended process of regularly reviewing and updating the NAP

## B. FORMULATING ACTION POINTS

33. **Recommendations:** To assist in the formulation of the NAP's action points, the Commission has the following further recommendations:
- i. That the Government consider all the policy objectives identified in this Strategic Framework, and all the policy domains addressed by the Guiding Principles
  - ii. That the Government select priorities in consultation with stakeholders and based on the severity of the adverse human rights impacts in question
  - iii. That the action points should identify the Government actor(s) in charge of implementation and follow-up
  - iv. That the action points should be achievable and have prescribed timelines



## VI. POLICY OBJECTIVES FOR AN NAP ON BUSINESS AND HUMAN RIGHTS

### A. PILLAR I – STATE DUTY TO PROTECT

#### FOUNDATIONAL PRINCIPLES

##### GUIDING PRINCIPLE 1

*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.*

##### GUIDING PRINCIPLE 2

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

#### (1) Prioritise actions to address specific domestic and overseas business and human rights challenges affecting Malaysia and ASEAN

34. Malaysia's NAP on business and human rights should include effective action to prevent and remedy adverse business-related human rights impacts that arise in relation to specific thematic issues and sectors. Examples of thematic issues that have been in the spotlight in Malaysia include the abuse and exploitation of migrant workers, human trafficking, child labour, forced labour, infringements of indigenous peoples' rights and environmental rights. Examples of sectors with known human rights challenges include the electronics, hydropower and the plantations (e.g. palm oil and timber) sectors. A notable issue cutting across these themes and sectors is that of managing human rights risks and impacts along supply chains. These examples are not exhaustive and there may be other key business and human rights challenges. It is important to note that the intention here is not to single out sectors or industries to name and shame, but to identify areas that require the efforts of these industries and other relevant stakeholders to problem-solve.
35. Effective action should be based on an adequate understanding of the nature and causes of these specific business and human rights challenges. For example, the Commission has found that in the hydropower and plantation sectors, adverse human rights impacts have arisen due to poor community engagement and inadequate environmental and social impact assessments.<sup>36</sup> Adequate monitoring and effective enforcement is required to ensure that environmental and social impact assessments (ESIAs) are conducted and are adequate. Better training of company officers is likely required to ensure adequate community engagement. Importantly, to adequately understand the nature and causes of the problems, affected stakeholders should be consulted for their input.
36. The overseas human rights impacts of Malaysian companies, especially in countries known for weak governance, also deserves attention. Malaysia's FDI outflows were in 2011 the fifth largest in Asia at US\$15 billion.<sup>37</sup> (This increased to US\$17 billion in 2012 and were at US\$13.6 billion in 2013.)<sup>38</sup> Malaysia was the source country with the second highest FDI inflows into Cambodia in



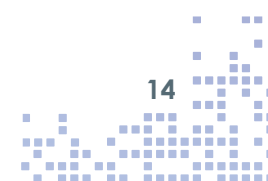
2014.<sup>39</sup> Cases where the overseas human rights impacts of Malaysian companies have attracted controversy include the involvement of Malaysian companies in development projects in other ASEAN countries that are causing or contributing to adverse human rights impacts,<sup>40</sup> the role of Malaysian palm oil companies in contributing to the region's transboundary haze pollution,<sup>41</sup> and the activities of Malaysian companies in conflict-affected areas.<sup>42</sup> As explained, the overseas human rights impacts of companies operating in ASEAN are especially significant given the formation of the ASEAN Economic Community.

37. The Guiding Principles provide a useful operational framework for determining the appropriate policy and regulatory measures to use. For example, the operational Guiding Principles draw attention to the following measures that could potentially be used to address inadequate ESIA and poor community engagement in relation to development projects (the list is not exhaustive):

- Plug gaps in legislation and law enforcement that may be permitting these problems to occur (*Guiding Principle 3a*)
- Disseminate effective guidance to companies on how to conduct ESIA and community engagement (*Guiding Principle 3c*), for example, by promoting the use of international guidance such as the International Finance Corporation's (IFC) Good Practice Handbook on Stakeholder Engagement and the World Bank's Involuntary Resettlement Sourcebook on planning and implementing development projects<sup>43</sup>
- State-linked agencies that finance and provide other support to development projects could require robust environmental and social due diligence, including the conduct of prior and informed community consultations, as a condition of their provision of financing and support (*Guiding Principle 4*)
- Government-linked companies (GLCs) engaged in development projects may set a good example to other businesses by benchmarking their practices against international standards such as the IFC Performance Standards (*Guiding Principle 4*)
- The Government may encourage multilateral development banks (MDBs) of which it is a member to ensure that the development projects they finance conduct adequate environmental and social due diligence and adequate prior and informed consultations with affected communities (*Guiding Principle 10*)
- The Government may also require or encourage companies involved in development projects to establish operational-level grievance mechanisms to address grievances of affected communities (*Guiding Principles 28 and 29*).

38. As another example, the operational Guiding Principles draw attention to the following measures that could potentially be used to address child labour and forced labour (the list is not exhaustive):

- Strengthen legislation and law enforcement (*Guiding Principle 3a*)
- Require companies to report on the due diligence measures they are taking to ensure that their activities and supply chains are not involved in child labour and forced labour (*Guiding Principle 3d*)
- Government agencies conducting public procurement may include in their tender specifications requirements for suppliers to demonstrate that they have systems in place to prevent the use of child labour and forced labour in their operations and supply chains (*Guiding Principle 6*)





- Ensure that migrant workers who are victims of forced labour have access to effective judicial remedy (*Guiding Principle 26*) and provide effective administrative complaints processes to facilitate their claims (*Guiding Principle 27*)
39. States have also used regulatory innovations to address the overseas human rights impacts of their businesses. Examples of the regulatory tools used include:
- Enacting extraterritorial legislation penalising certain corporate conduct even when conducted overseas (*Guiding Principle 3a*). For example, Singapore’s 2014 Transboundary Haze Pollution Act applies to entities whose conduct causes or contributes to transboundary haze pollution in Singapore, regardless of whether these entities have a connection to Singapore<sup>44</sup>
  - Requiring businesses to report on their overseas human rights impacts, including that of their overseas subsidiaries (*Guiding Principle 3d*)<sup>45</sup>
  - Including business and human rights in the agendas of overseas missions, including trade missions, by, for example, encouraging these missions to brief businesses and government ministers on the human rights implications of business operations. This is a form of fostering policy coherence (*Guiding Principle 8*).<sup>46</sup>
40. Access to remedies should be an essential issue to be included in any effort to address specific business and human rights challenges.
41. In addressing these specific business and human rights challenges, the Government should also collaborate with and support relevant multi-stakeholder, private sector and non-governmental initiatives. In relation to the palm oil sector, for example, the Government has been promoting and providing support to the RSPO. It could also encourage Malaysian palm oil companies to use recently-issued civil society guidance on fair labour and human rights in the palm oil sector,<sup>47</sup> or publicise good practice examples by companies, such as a “sustainability dashboard” by the world’s largest palm oil trader that lists the names and locations of its palm oil suppliers in Malaysia and Indonesia.<sup>48</sup>
42. Addressing adverse business-related human rights impacts in relation to thematic issues and sectors is a significant endeavour. The government should consider establishing a cross-governmental and/or multi-stakeholder working group to address individual thematic issues and sectors included in the NAP.
43. The Strategic Framework does not identify the priority thematic issues and sectors that the NAP should address. These should be identified through a Government-led process of assessment and broad-based multi-stakeholder consultations.
44. **Recommendation:** The Commission therefore recommends that a Malaysian NAP on business and human rights should identify and take action in relation to specific thematic issues and sectors, considering both domestic and overseas impacts. These actions should be based on an adequate understanding of the nature and causes of the relevant adverse human rights impacts, with input



from affected stakeholders. In determining the appropriate policy and regulatory measures to adopt, the full range of operational Guiding Principles should be considered. Ensuring access to effective remedy should be a key component of all such efforts. The Government should consider the roles of multi-stakeholder and non-governmental initiatives. The Government should consider establishing a cross-governmental and/or multi-stakeholder working group to formulate actions for each thematic issue and sector.

***Relevant federal and state government bodies may include and are not limited to the following:***

- Prime Minister's Department
- Migrant workers and forced labour: Ministry of Human Resources (MOHR), Ministry of Foreign Affairs (MOFA) and Ministry of Home Affairs (MOHA)
- Trafficking: MOHA and Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO)
- Gender discrimination and child labour: Ministry of Women, Family and Community Development (MWFCD)
- Plantations sector: Ministry of Agriculture and Agro-based Industry, Ministry of Energy, Green Technology and Water, Ministry of Science, Technology and Innovation. Also: Malaysian Palm Oil Board (for issues relating to the palm oil sector)
- Land and environmental rights: Ministry of Natural Resources and the Environment (MNRE), the Ministry of Transport (where physical transport infrastructure is involved) and relevant state-level land authorities
- Overseas human rights impacts of Malaysian companies: Ministry of International Trade and Industry (MITI), Malaysian Investment Development Authority (MIDA), Ministry of Domestic Trade, Co-operatives and Consumerism

**(2) Actively implement and monitor corporate compliance with international standards for responsible business conduct by adhering to the OECD Guidelines for Multinational Enterprises**

45. In Malaysia, despite mandatory CSR reporting by listed companies and non-binding regulatory guidance on sustainability and corporate responsibility, many companies still define corporate responsibility as philanthropy. Fostering corporate respect for human rights among Malaysian companies will require measures more robust than voluntary self-regulation. However, more interventionist regulation such as legislating standards for responsible business conduct may at this time impose unrealistic burdens on companies.
46. The OECD Guidelines strike a unique balance between purely voluntary self-regulation and a more interventionist regulatory approach. They are the only standard requiring adhering governments to implement them by establishing a National Contact Point. The NCP is required to promote the OECD Guidelines, encourage compliance and provide a mechanism for complaints regarding corporate misconduct.
47. Hence, the OECD Guidelines are an important instrument for Malaysia's context, even as Malaysia is translating the ISO 26000 into a national standard. The OECD Guidelines and the ISO 26000 both provide non-binding and fairly detailed standards for responsible business conduct, are



both internationally recognised, and both have human rights chapters. However, the ISO 26000 provides only non-binding guidance and has no certification mechanism.

48. In addition, the OECD Guidelines apply to Malaysian companies that operate internationally, and complaints may be brought to a Malaysian NCP for a Malaysian company's overseas human rights impacts. As mentioned above, overseas investment by Malaysian companies is increasing, including in countries known for weak governance. Complaints have been made to overseas grievance mechanisms regarding the domestic and overseas adverse human rights impacts of Malaysian enterprises.<sup>49</sup>
49. Adhering to the OECD Guidelines will therefore have the advantages of (i) moving beyond voluntary self-regulation to a more active approach to fostering corporate respect for human rights, and (ii) providing a Malaysian mechanism for overseeing the domestic and overseas human rights impacts of Malaysia's multinational enterprises and addressing complaints regarding these impacts.
50. **Recommendation:** The Commission therefore recommends that the Government adhere to the OECD Guidelines for Multinational Enterprises in order to more actively promote corporate respect for human rights and to provide a non-judicial grievance mechanism for domestic and overseas business-related human rights impacts.

**Relevant Government bodies:** MITI

## OPERATIONAL PRINCIPLES

### GUIDING PRINCIPLE 3

*In meeting their duty to protect, States should:*

*(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;*

*(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;*

*(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;*

*(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.*

### (3) Prioritise the strengthening of law enforcement capacity and anti-corruption measures

51. Challenges in law enforcement have reportedly caused or contributed to Malaysia's business and human rights issues. For example, in relation to the abuse of migrant workers, one apparent contributing factor is the serious shortage of labour inspectors and insufficient number of labour inspections conducted to ensure that businesses comply with safeguards in labour laws.<sup>50</sup> As another example, in relation to logging activities, findings by authorities that EIA reports were not submitted when required indicate gaps in enforcement of EIA requirements.<sup>51</sup> In addition,

the Commission's National Inquiry on the Land Rights of Indigenous Peoples noted allegations of abuse of power and conflicts of interest in relation to land offices, which caused or contributed to alleged adverse business-related impacts on indigenous peoples' land rights.<sup>52</sup> It is worth noting that according to the World Bank's Worldwide Governance Indicators, in 2013, Malaysia's percentile rank in terms of the rule of law was 64.5,<sup>53</sup> and its percentile rank in terms of control of corruption was 68.4.<sup>54</sup>

52. With regard to controlling corruption, the Commission commends the Malaysian Anti-Corruption Commission (MACC) for spearheading the Government's National Key Results Area on Fighting Corruption, and for advocating and soliciting the pro-active role of the private sector in supporting the agenda, including through the signing of the Corporate Integrity Pledge (CIP) and the appointment of Integrity Officers. However, as of January 2015, only 512 organisations (90 from the public sector, 405 from the private sector, and 17 NGOs) have signed on to the CIP, thus demonstrating an urgent need for stronger emphasis to be placed on non-voluntary measures, frameworks and approaches to signify seriousness in addressing the agenda.

53. **Recommendation:** The Commission therefore recommends that:

- i. The Government, when addressing specific business and human rights issues, identify challenges to law enforcement that are causing or contributing to the adverse human rights impacts in question, and take effective steps to address these challenges, such as by allocating adequate resources, building enforcement capacity and strengthening anti-corruption measures.
- iii. To enable and strengthen a transparent and accountable relationship between the Government and the private sector, and towards a reduction of corrupt practices, the Government should table an inclusion of a corporate liability provision in national law, whereby companies are liable when corrupt practices are proven in the court of law to have been conducted as part of its business transactions and operational activities. As Malaysia is a State Party to the UN Convention against Corruption (UNCAC), the Government is also encouraged to fully explore the variety of measures outlined in Articles 12.2 and 12.3 of the UNCAC that State Parties may undertake to fulfill their obligation to prevent private sector corruption and enhance auditing and accounting standards in the private sector.

**Relevant federal and state government bodies:** MACC. Other relevant line ministries and enforcement bodies may be involved depending on the specific thematic issues or sectors the NAP will address.

(4) **Improve mechanisms for responding to regulatory gaps identified during the Universal Periodic Review (UPR), the processes of international human rights treaty bodies, and by regional and national human rights institutions**

54. The UPR and international human rights treaty body monitoring mechanisms are useful avenues for States to effectively respond to business and human rights issues. They provide a credible



process for identifying relevant human rights issues, for States to commit to addressing these human rights issues, and for States to demonstrate their compliance with these commitments.

55. Also, international, regional and national human rights institutions help to identify the regulatory gaps that may permit or contribute to adverse business-related human rights impacts. For example, during the UPR, recommendations were made regarding business-related human rights issues, such as the negative impacts that the TPP Agreement could have on access to medicines.<sup>55</sup> Also, the Commission's independent report on Malaysia's compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) identifies legislative and potential regulatory gaps relating to the private sector and women's rights, such as workplace sexual harassment.<sup>56</sup>
56. Accordingly, ratification by the Government of other international human rights treaties will increase the avenues in place for the credible identification of regulatory gaps that are permitting or contributing to business-related human rights abuses in Malaysia. It is recommended that the Government ratify and/or accede to the remaining international human rights conventions that embody the range of human rights impacted by business activities.
57. The ministries tasked with effectively responding to the recommendations of these international, regional and national human rights bodies should do so through transparent and consultative processes, including disclosing their action plans and timelines. Further, the recommendations of these human rights bodies, particularly the UPR process, tend to be framed in general terms that relate to but do not specifically identify business and human rights issues. For example, during the UPR process, broad recommendations were made regarding promoting the rights of women and gender equality, and protecting the rights of migrant workers and indigenous peoples.<sup>57</sup> Notwithstanding the broad framing of these recommendations, the relationship between these issues and the corporate responsibility to respect human rights are important to note.
58. **Recommendations:** With the goal of improving the identification of and Government responses to regulatory gaps, the Commission recommends that:
  - i. The Government include business and human rights issues in its reporting to the UPR and the treaty body processes.
  - ii. The Government improve the effectiveness, transparency and inclusiveness of its mechanisms for responding to recommendations by international, regional and national human rights bodies regarding business and human rights-related regulatory gaps. This should include specifically considering the role of the private sector in addressing the human rights challenges identified.
  - iii. The Government accede to the core international human rights conventions to which Malaysia has yet to become party, namely, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination, Convention Against Torture and other



forms of Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, International Convention for the Protection of All Persons from Enforced Disappearance, and their optional protocols

- iv. The Government sign and ratify the ILO core conventions Malaysia has not ratified, namely, Convention 87 on freedom of association and protection of rights to organise, Convention 105 on the abolition of forced labour, and Convention 111 on discrimination in respect of employment and occupation

**Relevant Government bodies:** MOFA, Attorney-General's Chambers (AGC) and the involvement of other ministries through inter-ministerial or cross-governmental consultations.

**(5) Promote corporate reporting and disclosure of human rights due diligence and human rights risks and impacts**

59. Requiring and encouraging companies to be transparent about their human rights risks and impacts, and the due diligence measures they are taking to address them, will help build a regulatory environment that fosters corporate accountability for human rights impacts. This is highly relevant to Malaysia's achievement of the SDGs. At the June 2012 UN Conference on Sustainable Development, governments affirmed that corporate sustainability reporting plays an important role in sustainable development, as it "creates the enabling conditions for the business sector to contribute to sustainable development."<sup>58</sup>
60. Corporate sustainability or CSR reporting has been defined to include the reporting of information on human rights-related due diligence, risks and impacts. For example:
  - (a) A 2008 amendment to the Danish Financial Statements Act obliges all large companies to disclose in their annual reports their CSR policies, how these policies are translated into action (including any systems or procedures used), and what the company has achieved as a result and any future expectations.<sup>59</sup> In 2013, new legislation was introduced making it mandatory for businesses to expressly account for their policies for respecting human rights and reducing their climate impact.<sup>60</sup>
  - (b) A recent amendment to the French Commercial Code strengthens existing requirements for companies to, in their annual reports, report on the social and environmental consequences of their activities. The amendment "increases the amount of information required" in accordance with the ISO 26000, the Global Compact principles, the Guiding Principles, the OECD Guidelines and the GRI.<sup>61</sup> Notably, all the above mentioned international standards have express human rights criteria.
  - (c) The European Commission has, as described in a report by the Institute for Human Rights and Business, proposed legislation that would make it mandatory for large companies to, through a 'comply or explain' approach, report "relevant and material information on policies, results, risks, and risk management efforts pertaining to respect for human rights, as well as other environmental, social, and governance issues."<sup>62</sup>



61. Efforts by Bursa Malaysia and the SSM to require and encourage CSR and sustainability reporting are positive steps. However, it is the Commission's view that these reporting measures need to be significantly strengthened. Companies have a wide margin of discretion to determine what information to report:
- (a) Bursa Malaysia's listing requirements require issuers to include in their annual reports a statement describing their CSR activities or practices, as well as those of their subsidiaries; if there are none, they are to issue a statement to that effect.<sup>63</sup> However, there are no binding requirements or non-binding guidance on the content of the CSR statement. Bursa Malaysia has evaluated the corporate governance disclosures of listed issuers to monitor the level and quality of compliance; this was done using a sample of 300 issuers and a benchmark based on the principles in the Malaysian Code of Corporate Governance. Findings of the evaluation were publicly disclosed;<sup>64</sup>
  - (b) Malaysia's National Annual Corporate Report Awards (NACRA) serve to incentivise more robust CSR reporting. The NACRA criteria for corporate social responsibility reports encourages reporting on issues that may be relevant to preventing and mitigating human rights risks and impacts, such as providing information on a company's risk analysis/management framework, non-compliance with laws, regulations and codes, structured engagement with all stakeholders, health and safety management system and environmental impact assessments.<sup>65</sup> However, the criteria does not make clear the linkages between these issues and corporate human rights risks and impacts.
  - (c) Bursa Malaysia strongly encourages listed issuers to include a separate statement on management discussion and analysis in their annual reports. Bursa Malaysia's corporate disclosure guide recommends that this statement include, among other things, information on "significant features of regulatory, environmental, social and governance issues that could affect the performance of the group," and the approach or action taken by the listed company in dealing with the effects or outcome of such matters on its business activities.<sup>66</sup> However, no examples of these issues or information were given.
  - (d) The SSM's best practice circular on corporate responsibility disclosure and reporting has highlighted international reporting standards and tools that have human rights principles and performance indicators.<sup>67</sup> However, the extent to which Malaysian companies have taken up these international standards and tools is unclear.
  - (e) The SSM has included a non-financial reporting provision in its 2013 draft Companies Bill. This provision takes the lead from the U.K. Companies Act. The latter imposes a mandatory duty on directors of certain companies to produce a strategic report that includes information about environmental matters (including the impact of the company's business on the environment), the company's employees, and social, community and human rights issues (to the extent necessary for an understanding of the development, performance or position of the company's business).<sup>68</sup> Unlike the U.K. legislation, the reporting proposed in the draft Companies Bill appears purely discretionary for all companies and omits any reference to human rights issues.<sup>69</sup>
  - (f) Notably, Malaysian issuers have generally used their CSR statements to report on philanthropic activities.<sup>70</sup>



62. Suggestions raised during the Commission's roundtable discussions have include that businesses be required to report specifically on their operations and compliance with human rights principles, and be encouraged to conduct independent human rights compliance assessments of their operations and disclose findings in their annual corporate reports.<sup>71</sup>
63. **Recommendations:** To promote corporate transparency and accountability in relation to the human rights risks and impacts of business operations, the Commission recommends that:
- i. The Government revise existing and proposed corporate reporting requirements to make clear that the report or disclosure must include information on the company's policies and processes for respecting human rights as well as the company's human rights risks and impacts (whether or not these have a "human rights" label). Whether these requirements are mandatory or voluntary would depend on the company's size and structure.
  - ii. The Government promote the use by all companies of international non-financial reporting frameworks that include human rights criteria, such as the GRI Sustainability Reporting Framework and the UN Guiding Principles Reporting Framework
  - iii. The Government take effective measures to ensure compliance with the improved reporting requirements

**Relevant Government bodies:** SSM, Securities Commission and Bursa Malaysia

#### (6) Develop standards and guidance for business conduct that respects human rights

64. Business participants consulted by the Commission have raised the need for the Government to articulate clear standards and expectations for what respecting human rights means for businesses. To do so, the Government may promote existing international standards, strengthen existing domestic standards, or develop new ones.
65. Notably, the Government is developing a Malaysian Standard on Social Responsibility based on the ISO 26000. The said Standard will also, like the ISO 26000, include a human rights chapter.
66. **Recommendations.** The Commission therefore recommends that:
- i. The Government strengthen ongoing initiatives to promote the adherence of businesses to international standards on responsible business conduct that have human rights criteria, such as the OECD Guidelines and the Global Compact principles.
  - ii. The Government ensure that the Malaysian Standard on Social Responsibility, particularly its human rights chapter, provides adequate and effective guidance to businesses on how to



respect human rights throughout their operations.

- iii. The Government build on existing standards and guidance. For example, the Government could revise the Malaysian Code of Corporate Governance 2012 to introduce human rights criteria in line with the Guiding Principles. The Government could also build on Bursa Malaysia's Guide for Directors on Business Sustainability, which recommends that companies integrate human rights into their sustainability strategies, by issuing more specific and concrete guidance on how businesses can do so.

**Relevant Government bodies include:** MOSTI, Securities Commission, and Bursa Malaysia

#### **GUIDING PRINCIPLE 4**

*States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.*

#### **(7) Ensure that GLCs lead by example and respect and promote corporate respect for human rights**

67. Malaysia's GLC Transformation Program demonstrates the important and unique role that GLCs play in driving Malaysia's development. As enterprises that are owned, and in some cases, managed by the Government, GLCs also set standards for other companies in Malaysia to follow.
68. GLCs often operate in contexts with significant human rights risks. GLCs are often directly or indirectly involved in economic development projects, which may pose greater human rights risks when they leave a large physical imprint. GLCs also operate in industries that by their nature have significant human rights challenges, such as the extractives sector. Some GLCs also operate in conflict-affected areas or have business activities that link them to armed conflict. It should be noted that while these contexts perhaps present more significant human rights risks than others, human rights risks occur across all operational contexts.
69. These challenges are opportunities for action. GLCs can demonstrate leadership in respecting human rights through the measures they take to address their human rights risks and impacts, such as:
  - Implementing human rights due diligence, including human rights impact assessments (*Guiding Principle 17*)
  - Reporting on their human rights policies and processes, and human rights risks and impacts (*Guiding Principle 21*). Notably, other countries have legislated for their State-owned enterprises to report on social and human rights issues, whether or not these enterprises are listed companies.<sup>72</sup>
  - Establishing operational-level grievance mechanisms to address business-related human rights abuses arising from their operations (*Guiding Principles 22 and 29*)
  - Adhering to internationally recognised standards for responsible business conduct, such as the Guiding Principles, the OECD Guidelines and the UN Global Compact
  - Participating in multi-stakeholder or non-governmental initiatives, including those relating to their specific industries, that aim to promote corporate respect for human rights



70. GLCs can also use their influence, leverage and resources to promote corporate respect for human rights, such as by ensuring respect for human rights in:
- Business activities they provide support and services to (*Guiding Principle 4*)
  - Their supply chains and procurement practices (*Guiding Principle 6*)
71. The GLC Transformation Manual, which sets out non-binding policy guidelines for GLCs, contains the Silver Book and the Red Book. The Silver Book requires GLCs to make contributions to society. The Red Book relates to procurement, and requires, among other things, that GLCs enhance transparency and eradicate corruption in their procurement practices. These are initiatives that the Government should build on to ensure that GLCs respect human rights.
72. **Recommendations:** The Commission therefore recommends that the Government incorporate guidelines on implementing the corporate responsibility to respect human rights in the Silver Book, and guidelines on socially responsible procurement in the Red Book. The Government should provide for measures to ensure adequate compliance with these guidelines. The Government should also consider using other regulatory tools to require or encourage GLCs to respect human rights.

**Relevant Government bodies include:** Prime Minister's Department, Ministry of Finance, and MOSTI

**(8) Ensure respect for human rights in the business activities the Government provides support and services to**

73. The Government should reserve in the NAP a role for its agencies that provide support and services to businesses. Examples of such agencies include Agro Bank Malaysia, the EXIM Bank and other Malaysian development finance institutions. These State-linked agencies have important economic leverage enabling them to ensure that the businesses they support respect for human rights. Moreover, their financial relationships would render them directly linked to business-related human rights abuses that arise in the business activities they support, exposing them to reputational and operational risks.
74. Around the world, similar agencies have adopted various measures to prevent and remedy adverse human rights impacts linked to the business activities they support. The U.S. Overseas Private Investment Corporation, the Japan Bank for International Cooperation and the Japan International Cooperation Agency are examples of the national agencies that have done so.<sup>73</sup> Further, the OECD "Common Approaches" relating to States' export credit agencies request member States to undertake their own due diligence before supporting companies with export credits.<sup>74</sup> The measures adopted include:
- implementing environmental and social safeguard policies requiring officers to conduct due diligence and impact assessments when screening, approving and monitoring the activities of businesses that request for its support, and
  - establishing citizen-driven grievance mechanisms to address complaints by persons or communities harmed by business activities linked to the agency's support.



75. The relevant State-linked agencies should consider benchmarking their safeguard policies against international standards such as the IFC Performance Standards and the Equator Principles. In that regard, the updated OECD “Common Approaches” relating to States’ export credit agencies requests member States to benchmark their due diligence against either the World Bank Safeguard Policies or the IFC Performance Standards.<sup>75</sup>
76. **Recommendation:** The Commission therefore recommends that the Government study ways in which its State-linked agencies can ensure respect for human rights in the business activities they support, and adopt effective regulatory measures to do so.

**Relevant bodies include:** State-linked agencies, such as Bank Negara Malaysia

#### GUIDING PRINCIPLE 5

*States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.*

#### (9) Ensure that private enterprises and public-private partnerships (PPPs) that deliver public services respect human rights in their operations

77. Many public services, such as healthcare, education and public utilities like water and energy, can have direct impacts on the human rights of service users. Examples of human rights abuses arising from the privatisation of public services in other countries are reportedly very prevalent in relation to issues such as water and health.<sup>76</sup> Notably, participants at the Commission’s roundtable discussions on human rights expressed concern over whether the Government and businesses are taking adequate responsibility for protecting human rights in the private delivery of such public services.
78. **Recommendation:** The Commission therefore recommends that the Government study the human rights risks and impacts of the delivery of public services by private enterprises and PPPs, and adopt effective regulatory measures to address these risks and impacts. The Government should consider using human rights due diligence, including human rights impact assessments, in privatisation and the private delivery of public services.

#### GUIDING PRINCIPLE 6

*States should promote respect for human rights by business enterprises with which they conduct commercial transactions.*

#### (10) Ensure respect for human rights in public procurement at the federal and state levels

79. The Government is an important consumer of goods and services. Public procurement gives the Government significant economic leverage in relation to business activities. Indeed, the Government Green Procurement recognises the importance of public procurement as a driver of

private sector development.

80. The Commission commends the Government for its current public procurement principles of public accountability, transparency, value for money, open and fair competition and fair dealing.<sup>77</sup> However, respect for human rights in public procurement should also be included among the Government's public procurement principles. Some examples of initiatives by other States that have taken measures to ensure respect for human rights in public procurement among others include the following :
- The Netherlands has included social criteria based on the ILO Core Conventions in its public procurement<sup>78</sup>
  - The U.S. Ending Trafficking in Government Contracting Act 2013 prohibits in all federal contracts acts that directly support human trafficking, and requires compliance and certification measures to help prevent trafficking and related acts<sup>79</sup>
  - Denmark's NAP on business and human rights commits to publishing guidelines on responsible procurement in the public sector<sup>80</sup>
  - Finland's NAP on business and human rights commits to amending national legislation on public contracts to take into consideration social criteria in public procurement.<sup>81</sup>
81. Other measures that States may adopt to integrate human rights into their public procurement practices include:
- Issuing guidance on responsible procurement to government agencies at the federal and state levels,
  - including social and human rights criteria in tender specifications and contract award criteria,<sup>82</sup>
  - including social and human rights considerations in contractual terms relating to obligations of sub-contractors and the termination, contractual penalties and termination of the contract,
  - requiring government agencies to assess and report on the sustainability of their supply chains, which in turn prompts suppliers to report on their environmental and social impacts,<sup>83</sup> and
  - excluding companies or their bids on human rights grounds. For example, U.K. public procurement rules allow public bodies to exclude tenderers from bidding where there is information showing grave misconduct by the company in the course of its business or profession, which might arise where there are breaches of human rights.<sup>84</sup>
82. **Recommendation:** The Commission therefore recommends that the Government study the ways in which it can effectively ensure respect for human rights in public procurement, and adopt effective measures to do so.

#### GUIDING PRINCIPLE 7

*Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:*

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;*
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;*
- (c) Denying access to public support and services for a business enterprise that is involved*



*with gross human rights abuses and refuses to cooperate in addressing the situation;*  
*(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.*

**(11) Ensure respect for human rights in business activities in conflict-affected areas**

83. The extent to which Malaysian companies are operating in conflict-affected areas is unclear. There have been reports of Malaysian companies being implicated in or potentially linked to human rights abuses in conflict-affected and high risk areas.<sup>85</sup>
84. Some countries have taken steps to encourage companies whose business activities may link them to conflict to exercise due diligence to ensure respect for human rights. For example, the U.S. government has enacted legislation requiring certain listed companies to disclose their connections to conflict minerals, and assess their supply chains to determine whether the minerals supplied originated from the Democratic Republic of Congo or adjoining countries.<sup>86</sup> Also, in 2014, the European Commission proposed an EU system of self-certification for importers of certain metals and their ores that would encourage these importers to conduct due diligence in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas.<sup>87</sup> Ensuring respect for human rights in the provision of security services in conflict-affected areas is also a relevant issue. The U.K. NAP on business and human rights contains measures for ensuring that private security providers respect human rights. Other relevant instruments include the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Providers.
85. **Recommendation:** The Commission recommends that the Government consider including business activities in conflict-affected areas as a thematic issue in the NAP.

**Relevant Government bodies:** Ministry of Domestic Trade, Co-operatives and Consumerism and MITI

**GUIDING PRINCIPLE 8**

*States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.*

**(12) Ensure policy coherence regarding business and human rights across government departments at the federal and state levels**

86. As observed in the UN 'Protect, Respect and Remedy' Framework, States generally tend to regulate human rights compliance through processes that are separate from or peripheral to the regulation of business and economic activities.<sup>88</sup> Keeping human rights compliance siloed in its own conceptual and institutional 'box' is a governance gap that contributes to the occurrence of business-related human rights abuses.

87. The Government should therefore ensure policy coherence with regard to business and human rights. This means including human rights compliance as an essential policy consideration in all

aspects of its interactions with businesses.

88. **Recommendation:** The Commission therefore recommends that the Government ensure that all Government departments at the federal and state levels are equipped to act in a manner compatible with the Government's international human rights obligations when regulating and interacting with businesses. This could be done through workshops and training on the Guiding Principles and business and human rights, and ensuring effective knowledge management within Government departments. The NAP process should be used to increase cross-governmental awareness of the Guiding Principles and the range of ways in which the Government can fulfill its duty to protect against business-related human rights abuses.

**Relevant Government bodies include:** Prime Minister's Department and related Government agencies at both federal and state levels.

#### GUIDING PRINCIPLE 9

*States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.*

- (13) **Ensure that Malaysia's investment and trade agreements do not have adverse impacts on human rights**
89. The Commission welcomes MITI's engagement with the Commission on the potential human rights impacts of the proposed TPP Agreement. The Commission notes that State obligations under trade and investment agreements may result in restrictions on or requirements affecting a State's exercise of its domestic regulatory powers. For example, a State's obligations to provide patent protection under the WTO Agreement on Trade-Related aspects of Intellectual Property Rights may have an adverse impact on human rights, by, for example, limiting affordable access to medicines.<sup>89</sup> Also, investors have used States' obligations to provide investor protections under international investment agreements and investor-State contracts to sue States for taking regulatory measures that may be regarded as necessary for the fulfilment of human rights, such as affirmative action measures in favour of historically disadvantaged citizens,<sup>90</sup> emergency fiscal measures to ensure affordable access to public utilities,<sup>91</sup> and bans on the sale and use of certain harmful chemicals on public health grounds.<sup>92</sup>
90. As States cannot ignore their human rights obligations in the conclusion of trade or investment agreements, it is important to ensure that Malaysia's trade and investment agreements do not have adverse human rights impacts. Various proposals have been put forward for how States should do so, such as conducting prior human rights impact assessments on trade and investment agreements,<sup>93</sup> ensuring that stabilisation clauses in investment agreements do not constrain a government's policy space to implement legislation to improve corporate respect for human rights,<sup>94</sup> and using guidance supported by the former UN Special Representative on business and human rights on how State-investor contract negotiators can integrate human rights risk management into their negotiations.<sup>95</sup>



91. **Recommendations.** The Commission therefore recommends that:
- i. The Government undertake the development of solutions for ensuring that its trade and investment agreements do not adversely impact human rights. This could involve participating in ongoing stakeholder dialogues on the issue.
  - ii. The Government review existing policies on trade and investment and adopt appropriate reform
  - iii. The Government account to the public on how it is addressing human rights risks and impacts during negotiations on trade and investment agreements, including through transparency measures and stakeholder consultations

**Relevant Government bodies:** MITI

**GUIDING PRINCIPLE 10**

*States, when acting as members of multilateral institutions that deal with business-related issues, should:*

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;*
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;*
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.*

**(14) Integrate business and human rights considerations in the activities of multilateral institutions that deal with business-related issues, such as the ASEAN institution and MDBs like the Asian Infrastructure Investment Bank (AIIB)**

92. Malaysia is a member of a range of multilateral institutions that deal with business-related issues, such as ASEAN, the Organisation of the Islamic Conference, the WTO and MDBs. The Government should implement Guiding Principle 10 in relation to all these institutions.

93. Crucially, business and human rights should be a priority issue for ASEAN. Efforts towards regional economic integration and the ASEAN Economic Community by 2015 mean that business-related human rights impacts will increasingly have regional implications. Increasing intra-ASEAN flow of goods, services, labour and capital, the integration of industries across the region to promote regional sourcing and the inter-relatedness of the economic policies of ASEAN countries mean that business and human rights issues will have regional impacts, be shaped by regional forces and require regional cooperation and action.<sup>96</sup> This can already be seen from existing regional challenges such as human trafficking, migrant labour and transboundary haze pollution.

94. Business and human rights should be integrated in the ASEAN Community's Post-2015 Vision.





Sustainable development requires the fulfillment by the private sector of their corporate responsibility to respect human rights, and the State's provision of an appropriate regulatory and policy environment for the private sector to do so.

95. Also of regional relevance are MDBs that have operations in ASEAN. Malaysia is a member State of the World Bank Group (WBG) and the Asian Development Bank (ADB), and has recently signed on to join the newly established Asian Infrastructure Investment Bank (AIIB). The WBG and ADB are providing, and the AIIB will likely provide, financing and support for development and investment projects and other business-related activities in ASEAN.
96. MDBs may be linked to adverse business-related human rights impacts through their support for economic development projects. Accordingly, MDBs such as the WBG, the ADB, the European Bank for Reconstruction and Development, the African Development Bank and the Inter-American Development Bank have binding environmental and social safeguard policies and an independent accountability mechanism to address environmental and social risks and harm caused by the projects they fund. Member States of MDBs, given their role as shareholders of these MDBs, have a duty to ensure that MDBs exercise due diligence to prevent and remedy adverse human rights impacts connected to the projects they support.
97. **Recommendations.** The Commission therefore recommends that:
  - i. The Government take steps to implement Guiding Principle 10 through its membership in multilateral institutions that deal with business-related issues
  - ii. The Government, especially in its role as Chair of ASEAN in 2015, demonstrate leadership in integrating business and human rights into the ASEAN agenda, including by (i) endorsing the Guiding Principles and encouraging other ASEAN Member States to do likewise, (ii) developing an NAP that implements the Guiding Principles on business and human rights and encouraging other ASEAN Member States to do likewise, (iii) including action points based on the Guiding Principles in the ASEAN Community's Post-2015 Vision, and (iv) developing regional mechanisms to address business and human rights issues with regional implications.
  - iii. The Government commit to ensuring respect for human rights in the activities of the MDBs it is a member of, and take effective steps to do so. Importantly, the Government should ensure that the AIIB has adequate environmental and social safeguards and an accountability mechanism, in line with the best practices of other MDBs, especially in view of concerns that the AIIB will have diluted environmental and social safeguards.<sup>97</sup>

***Relevant Government bodies include:*** MOFA, MITI



## B. PILLAR II – CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

98. The corporate responsibility to respect human rights is, simply put, a responsibility to ‘do no harm.’<sup>98</sup> According to the Guiding Principles, this means that business enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.<sup>99</sup> While this responsibility is not an international legal obligation that is imposed on companies, it stems from the Universal Declaration of Human Rights, which calls on “every organ” of society to contribute to realising human rights for all.<sup>100</sup> With the endorsement of the Guiding Principles by the UN Human Rights Council, this responsibility has been affirmed by the UN Member States.<sup>101</sup>
99. According to the Guiding Principles, the corporate responsibility to respect human rights requires businesses to address the following ways in which their activities may be connected to adverse human rights impacts:<sup>102</sup>
- (a) A business may *cause* adverse human rights impacts through its own activities, if, for example, its failure to provide a healthy and safe working environment for its workers results in personal injury
  - (a) A business may *contribute* to adverse human rights impacts if, for example, it provides financing to a development project that fails to conduct adequate ESIA and prior and informed consultation with affected groups, resulting in harm to affected communities
  - (b) A business may be *directly linked* to adverse human rights impacts if, for example, one of its suppliers uses child or forced labour
100. All business enterprises have the same responsibility to respect human rights, regardless of their size, sector, operational context, ownership and structure, although the means by which they should meet this responsibility may vary.<sup>103</sup> Notably, the SSM has affirmed that corporate responsibility “is applicable to all types of companies regardless of their types (public or private companies), size of operations, nature of businesses carried out, and whether listed or otherwise ... [and] is also applicable to other forms of carrying out business in Malaysia such as sole proprietorship, partnership, or limited liability partnership.”<sup>104</sup> It is all the more so that no enterprise is exempted from its responsibility to respect human rights.
101. In articulating how businesses may implement their responsibility to respect human rights, the Guiding Principles highlight that they should have in place policies and processes appropriate to their size and circumstances, including:<sup>105</sup>
- (a) A policy commitment to meet their responsibility to respect human rights;
  - (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
  - (c) Processes to enable the remediation of any adverse human rights impacts that they cause or contribute to.





102. Companies the world over have acknowledged their responsibility to respect human rights in their operations. Scores of companies worldwide have issued formal human rights policy statements embodying their commitment to respect human rights.<sup>106</sup> Business enterprises have formed their own private initiatives to discuss ways to implement their corporate responsibility to respect human rights, such as the Thun Group of Banks and the Global Corporate Community of Practice.<sup>107</sup> The world's largest business associations across industry sectors, such as the International Organization of Employers (IOE), IPIECA (the global oil and gas industry association for environmental and social issues), the International Council on Mining and Metals (ICMM) and the International Bar Association, have engaged in activities to provide their members with the means to respect human rights.
103. While companies are acknowledging their responsibility to respect human rights in their operations, they may not have in place the means to do so. Hence, standards, tools and guidance with human rights criteria have been developed for companies of different sizes and from different sectors to use in implementing their responsibility to respect human rights. Examples include the UN Global Compact's Business and Human Rights Learning Tool, the International Business Leaders Forum and UN Global Compact's Guide to Human Rights Impact Assessment and Management and the GRI Sustainability Reporting Framework, the ICMM's guidance on integrating human rights due diligence in corporate risk management processes, and the European Commission's Guide on Human Rights and Small and Medium Enterprises.
104. The Government should assist businesses by facilitating access to information on their responsibility to respect human rights and available tools and resources on how they may implement this responsibility in practice. In that regard, business participants at the Commission's roundtable discussions have observed that they need guidance from the Government on how to respect human rights.
105. **Recommendations:** The Commission therefore recommends that the Government assist companies in implementing their responsibility to respect human rights by promoting corporate uptake of the Guiding Principles and facilitating their access to relevant tools and resources. The Government should explore all ways of doing so, including the following:
- Establishing a resource centre, committee and/or web portal on business and human rights
  - Requiring business regulatory agencies such as the SSM and Bursa Malaysia to undertake initiatives to promote and implement the Guiding Principles
  - Encouraging and supporting existing institutions, committees, networks and other bodies that work on corporate social responsibility to promote and implement the Guiding Principles
  - Supporting and collaborating with industry, multi-stakeholder and other non-governmental initiatives, whether at the domestic, regional or international levels, that seek to promote and implement the Guiding Principles



## C. PILLAR III – ACCESS TO REMEDY

### FOUNDATIONAL PRINCIPLE

#### GUIDING PRINCIPLE 25

*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*

### OPERATIONAL PRINCIPLES

#### GUIDING PRINCIPLE 26

*States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.*

#### GUIDING PRINCIPLE 27

*States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.*

#### GUIDING PRINCIPLE 28

*States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.*

#### GUIDING PRINCIPLE 29

*To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.*

#### GUIDING PRINCIPLE 30

*Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.*

#### GUIDING PRINCIPLE 31

*In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:*

*(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;*

*(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;*

*(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;*

*(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;*

*(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;*

*(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;*

*(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;*

*Operational-level mechanisms should also be:*

*(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.*

106. A broad-based and strong system for remedy is needed to deal with the daily occurrence of business-related human rights abuses impacting individuals and communities. As recognised by Guiding Principles 26 to 30, the following types of grievance mechanisms together comprise a system for remedy:

(a) Judicial mechanisms

(b) State-based non-judicial mechanisms, which include:

- administrative complaints processes
- parliamentary officials
- national human rights institutions
- the country's OECD NCP
- accountability mechanisms of State-linked institutions that provide support and services to businesses
- accountability mechanisms to address complaints related to State-owned or controlled enterprises

(c) Non-State-based mechanisms, which include:

- businesses' operational-level grievance mechanisms, which could operate at a company level or project level, and includes mechanisms to internally address employment-related complaints and mechanisms to resolve disputes with affected communities
- complaints processes of multi-stakeholder initiatives, such as the RSPO's Grievance Process
- accountability mechanisms of MDBs, such as the World Bank Inspection Panel, the IFC's Compliance Advisor Ombudsman and the ADB's Accountability Mechanism

**(15) Effectively address the underlying knowledge, capacity and power imbalances that pose barriers to effective remedy for victims of business-related human rights abuses, especially vulnerable and marginalised groups**

107. The key barriers to remedy that those affected by business-related human rights abuses face, regardless of the type of remedy sought or grievance mechanism used, are those that arise from underlying knowledge, capacity and power imbalances. These key barriers are:



- (a) Lack of information. Individuals and communities affected by adverse business-related human rights impacts often lack information about (i) their legal rights and human rights and the legal and human rights obligations of those responsible for the adverse impacts, (ii) the facts surrounding and giving rise to the adverse human rights impacts, including information about the business actors and activities involved, and in relation to the impacts of development projects, the purpose and requirements for ESIA's and other project-related information, (iii) the grievance mechanisms available to them, and (iv) how to access and use available grievance mechanisms.
- (b) Lack of capacity. Affected individuals and communities often lack the financial and technical resources to bring claims and complaints to formal grievance mechanisms.
- (c) Risks of reprisals and intimidation. Affected individuals and communities, their representatives, advocates and human rights defenders, have often faced reprisals, threats and intimidation intended to deter them from pursuing claims and raising complaints.

108. To address the lack of information and capacity, the Government should consider conducting awareness-raising and capacity-building activities with all relevant stakeholders, such as affected persons, NGOs and journalists. The pool of relevant stakeholders differs depending on the business and human rights issue in question. For example, in relation to migrant workers, the Government should strengthen its ongoing efforts to collaborate with embassies on such activities.

109. Non-State-based non-judicial grievance mechanisms tend to be overlooked. Such mechanisms include OECD NCPs and the accountability mechanisms of MDBs and other international finance institutions that support development and investment projects in Malaysia. The Government should help raise awareness of these non-State-based non-judicial grievance mechanisms.

110. To address risks of retaliation, the Whistleblower Protection Act 2010 may provide protection to victims, advocates, human rights defenders and journalists that raise grievances. The Government should consider raising awareness of the Whistleblower Protection Act 2010, and other existing victim protection mechanisms.

111. Vulnerable and marginalised individuals and groups are additionally disadvantaged by social, economic and political power imbalances. For example, indigenous communities consulted by the Commission report that their complaints on business-related human rights impacts have often gone unheeded by relevant government departments and agencies, the police, as well as parliamentary members.<sup>108</sup> As another example, migrant workers face serious practical barriers to remedy in bringing complaints to the Labour Department and Industrial Relations Department, and in staying in the country in order to pursue administrative claims and litigation.<sup>109</sup>

112. **Recommendations:**

- i. That the Government take effective measures, both generally and in relation to specific

business and human rights issues, to address the key underlying barriers to remedy of lack of information, lack of capacity and risks of reprisals. Such measures could include strengthening and raising awareness about existing legislation relating to whistleblower protection.

- ii. That when addressing barriers to remedy, the Government devote efforts to identifying and addressing the particular barriers faced by affected vulnerable and marginalised individuals and groups. In particular, the Government should ensure that the principle of free, prior and informed consent set out in the UN Declaration on the Rights of Indigenous Peoples is adhered to, and assess whether the Native Courts are providing adequate access to effective remedy for indigenous communities.

**Potentially relevant Government bodies include:** MACC and AGC

(16) **Effectively address legal and administrative gaps that pose barriers to access to effective judicial remedy**

113. As the core of Malaysia's system for remedy, the courts are tasked with upholding access to justice and are backed by enforcement powers. An effective and independent judicial system provides the greatest legitimacy, finality and momentum for any needed systemic change.

114. Examples of legal gaps that may pose barriers to effective judicial remedy include:

- Absence of a legal basis (i.e. cause of action) for obtaining remedy for the particular wrongful conduct or harm suffered
- Even where there is a potential legal basis, the relevant legal provisions are too narrow in scope
- Legal limitations on imposing civil liability on a corporate entity. It may in some cases be necessary to sue a corporate entity rather than an individual company director or officer or other related person, when the latter has little assets. Even where a corporate entity can be criminally liable for the wrongful conduct in question, legal basis for liability for civil remedy may be absent or limited, and the criminal sanctions may be inadequate to meet the victims' needs.

115. Generally, examples of administrative gaps that may pose barriers to effective judicial remedy include lengthy court processes due to a backlog of cases and challenges to enforcement of judgments.

116. **Recommendation:** That the Government identify and effectively address the legal and administrative gaps that pose barriers to effective judicial remedy both generally and in relation to specific business and human rights issues. In doing so, the Government should consider all relevant judicial mechanisms, such as the Industrial Court, Labour Court and Specialised Construction Courts, as well as judicial mechanisms at both federal and state levels.

**Relevant Government bodies include:** The Judiciary



**(17) Provide effective State-based non-judicial grievance mechanisms to complement and supplement judicial mechanisms in providing effective remedy for business-related human rights abuses**

117. Non-judicial mechanisms, both State-based and non-State-based, are an important complement and supplement to judicial mechanisms. As noted by the commentary to the Guiding Principles, “judicial remedy is not always required; nor is it always the favoured approach by claimants.”<sup>110</sup> Non-judicial mechanisms can be a much needed alternative where gaps in access to effective judicial remedy exist. They may also have benefits that judicial mechanisms may not have, such as early recourse and prevention, opportunity for creativity and flexibility in remediation options, lower costs and more speedy resolution. Moreover, they help alleviate the burden on the judicial machinery.

118. The Government should consider expanding the mandates of existing State-based non-judicial mechanisms to fill gaps in the provision of remedy for business-related human rights abuses. The commentary to the Guiding Principles notes that NHRIs have “a particularly important role to play in this regard.”<sup>111</sup> As mentioned above, the Commission has received complaints regarding business-related human rights abuses. The Commission, as a statutory body established under an Act of Parliament, is an appropriate body to serve as a grievance mechanism for business and human rights issues. However, as the Commission has earlier proposed to the Government, its powers to address these complaints should be strengthened.<sup>112</sup>

119. Another potentially relevant mechanism is the Integrity Unit in individual Government ministries and agencies, and Certified Integrity Officers that some GLCs and other private companies have. This integrity initiative is administered by the MACC, and involves the establishment of independent Integrity Units in individual public agencies, and the voluntary appointment by private companies of Certified Integrity Officers. These integrity units and officers may be a better alternative to the ordinary administrative complaints processes of ministries and regulatory agencies, as they may have greater independence. The mandate, capacity and resources of these units and officers could be expanded to include addressing complaints regarding business-related human rights abuses that involve corruption.

120. The Government should also consider adding new State-based non-judicial grievance mechanisms to specifically address business and human rights issues. The Commission’s consultation participants have suggested establishing non-judicial grievance mechanisms, such as alternative dispute resolution processes, to address complaints of non-compliance with standards for responsible business conduct. An OECD NCP would be such a mechanism.

121. Non-judicial grievance mechanisms could be established at State-linked development and investment finance institutions. The large-scale impacts of development projects and the financial leverage that these institutions have in relation to the projects they support are some of the reasons why MDBs and the development and investment finance institutions of other countries have established their own accountability mechanisms. Non-judicial grievance mechanisms could

also be established at GLCs. This would be an initiative to drive higher standards of performance at GLCs, in line with the GLC Transformation Programme.

122. In relation to existing State-based non-judicial grievance mechanisms that address business-related human rights abuses, such as administrative mechanisms for receiving complaints regarding consumer issues and workplace gender discrimination, their effectiveness should be evaluated against the effectiveness criteria in Guiding Principle 31.

123. **Recommendations:** The Commission therefore recommends that:

- i. When addressing specific thematic issues and sectors in the NAP, the Government identify gaps in the provision of non-judicial remedy, evaluate the effectiveness of relevant non-judicial mechanisms against the effectiveness criteria in Guiding Principle 31, and address these gaps by expanding the mandate of the relevant non-judicial mechanisms or establishing new ones.
- ii. The Government strengthen the Commission's mandate, powers and capacity to enable it to effectively serve as a grievance mechanism for business-related human rights abuses.
- iii. The Government assess the avenues for using existing State-based non-judicial grievance mechanisms to address business-related human rights abuses and adopt appropriate recommendations for doing so.
- iv. The Government assess the need for establishing new non-judicial grievance mechanisms to address business-related human rights abuses, including establishing mechanisms at State-linked development and investment finance institutions and GLCs, and adopt appropriate recommendations for doing so.





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