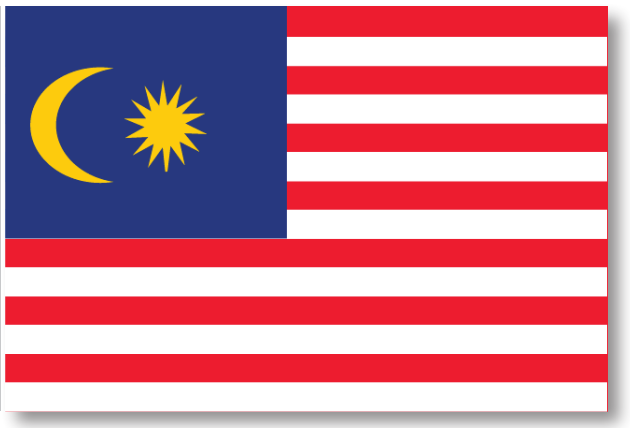

MALAYSIA

by:

Long Seh Lih

BASELINE REPORT: MALAYSIA[1]

SNAPSHOT BOX	
Number of Multinational Business Enterprises operating in the country	45 transnational corporations[1]
Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people	Total number of Small and Medium Business Enterprises operating in Malaysia – 552,849.[2]
Number of State-owned Enterprises and the industries in which they operate	118; social, infrastructure and public facilities, economy, and technology.[3]
Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)	- US$ 11.6 billion (2011); - US$ 9.1 billion (2010); - US$ 1.4 billion (2009); - US$ 7.3 billion (2008); - US$ 8.5 billion (2007).[4]
Main industries in the country	- Services, manufacturing, mining (including oil and gas) and agriculture.[5]
Number and type of cases involving business-related human rights violations reported to (i) NHRIs, (ii) other national human rights bodies (e.g. ombudsmen) , and/or (iii) international human rights bodies	(i) The Human Rights Commission of Malaysia (SUHAKAM) received 39 complaints against companies (2007 – April 2012)[6], Complaints received include trespass and damage to native customary land as a result of logging activities, denial of rest days for employees, late payment of salary, unfair dismissal. Business sectors involved – logging; plantation; security; and finance;[7] (ii) There are no other national human rights bodies in Malaysia empowered to hear human rights complaints, apart from SUHAKAM and the Courts; (iii) None.
Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?	No.

1 The Malaysian Centre for Constitutionalism and Human Rights would like to thank Long Seh Lih, Fatimah Ismail and Edmund Bon for their contribution to the research.

2 UNCTAD,World Investment Report 2011, UNCTAD/WIR/2011, Table 1.8, available at http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf

3 National SME Development Council, SME Annual Report 2009/2010, available at http://www.smecorp.gov.my

4 Figure obtained by totalling the number of Ministry of Finance incorporation companies (102) and Government-linked companies (16) which reports to Khazanah National Berhad. List of MOF incorporation companies as at 6th October 2011, available at http://www.treasury.gov.my/index.php?option=com_content&view=article&id=480&Itemid=152&lang=en

5 Malaysian Investment Development Authority, http://www.mida.gov.my; World Bank, http://data.worldbank.org/country/malaysia#cp_wdi; UNCTAD Global Investment Trends Monitor, http://unctad.org/en/docs/webdiaeia2012d1_en.pdf

6 Malaysian Investment Development Authority (MIDA), Malaysian Investment Performance Report 2011, available at http:// www.mida.gov.my; World Bank, Malaysia At A Glance, http://devdata.worldbank.org/AAG/mys_aag.pdf

7 SUHAKAM, email response to the MCCHR, April 3, 2012.

8 SUHAKAM, email response to the MCCHR, July 12, 2012.

OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

Malaysia's main industries are services, agriculture, mining (including oil and gas), and manufacturing. Over the past years, the flow of foreign direct investment to Malaysia increased from US$ 8.5 billion in 2007 to US$ 11.6 billion in 2011.

The Federal Constitution of Malaysia contains general provisions guaranteeing a range of human rights, *inter alia*, the right to life and liberty, right to fair trial, freedom of speech, assembly and association and freedom of religion. These rights are further expounded in a number of laws such as the Employment Act 1955, the Environmental Quality Act 1974, Companies Act 1965, Child Act 2001, Persons with Disabilities Act 2008 and the Industrial Relations Act 1967.

Although the Federal Constitution and other legislation do not contain an explicit recognition of the State's Duty to Protect, the generality of the language could provide a basis for the Courts to interpret the State Duty to Protect into these guarantees. As it indicates, this potentiality requires a progressive judiciary. Thus far, the Courts have been criticised for its lack of independence, its unwillingness to apply international human rights conventions into domestic law and its restrained approach towards human rights issues. In cases such as *Beatrice Fernandez*, and *Merdeka University,* the Courts have been clear that without express incorporation into domestic law by an act of Parliament following ratification of an international convention, the said convention is not binding. Having said that, despite this state of affairs, it is arguable that the recent landmark case of *Noorfadilla* (the Courts recognised the applicability of CEDAW despite an absence of an act of Parliament) could set a precedent towards greater recognition of international human rights principles, including the State Duty to Protect. The Federal Constitution and the laws are drafted in a way that would allow the Courts to interpret the State Duty to Protect into Malaysian law.

There are no specific government bodies and/or State agencies that are tasked with the responsibility of preventing, investigating, punishing or providing redress for business-related human rights abuses. However, there are a number of government agencies, which are tasked to look at issues, which could be associated with business-related human rights abuses, such as anti-corruption, labour rights, and environmental rights. Most of these government agencies are entrusted with the task of developing non-binding codes and guidelines to ensure the respect of laws and policies in their respective areas. Also, some of these agencies regulate through the issuance of licences and consideration of Environmental Impact Assessments (EIA) and some are given the power to investigate breaches of laws and regulations. However, these government agencies are not empowered to punish and redress business-related human rights abuses. All prosecution of offences rest with the Public Prosecutor, either directly by the Public Prosecutor's office or by way of consent by the Public Prosecutor.

Malaysian law is adequate in terms of holding business enterprises legally accountable as legal persons. Case law and the Companies Act 1965 recognise business enterprises as having separate legal personality. Equally, the Penal Code includes any company or association or body of person whether incorporated or not, within the definition of "person"; as such, companies can be held criminally liable, save for personal natured crimes such as rape.

Laws in Malaysia do not specifically require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. Nevertheless, the laws instil avoidance and regulate the actions of individuals, companies and businesses through the creation of offences. It must be said that enforcement of some of these laws and regulations are weak. The main laws and key human rights concerns concerning business enterprises include:

- **Labour rights** – The poor treatment of foreign workers, particularly foreign domestic servants are issues of concern in Malaysia. There have been complaints of mistreatment, exploitation by unscrupulous recruitment agencies, physically abuse and poor living and work conditions of foreign workers. This problem is compounded by the lack of law enforcement and also the exclusion of domestic servants from legal protection of the law in the area of conditions of service, maternity rights and termination; the lack of respect of gender equality is also an area of concern;
- **Sustainable development and rights of indigenous peoples** – Environmental protection is perhaps one of the more well-regulated industries in Malaysia. A number of laws and regulations exist to prevent water, air and land pollution. However, implementation appears to be weak and indiscriminate and awareness of environmental legislation may not be adequately widespread. A number of cases have come to light and subjected to public scrutiny, including the Lynas processing plant and, the building of hydroelectric dams in the state of Sarawak. Some of these activities, despite being approved by the authorities, have been criticised for not only environmental degradation but also for the lack of proper consultation with those affected and violating native customary rights and rights of indigenous people, including destruction crops and cultural heritage, such as graves and historical sites;
- **Human trafficking** – Majority of trafficking victims are among the two million documented and 1.9 million undocumented foreign workers in Malaysia. Some of them who migrated willingly are forced into labour or debt bondage or sexually exploited.[9] The Anti-Trafficking in Persons Act 2001 has put in place a legal framework to tackle this problem. However, investigation and prosecution of labour trafficking cases, particularly those who exploit victims remain slow. Concerns have also been raised that victims of trafficking and not traffickers or pimps are being arrested, charged detained and deported;
- **Corruption and lack of good governance** – The public appears to be unconvinced with efforts made to tackle corruption, misuse of public funds and corrupt procurement practices. The problem is compounded by the perception that the Malaysian Anti-Corruption Commission (MACC) lacks credibility; it (the MACC) has had to deal with controversies surrounding the death of a political aide of State Assemblyman in 2009 and other controversial issues.

In the area of corporate governance and corporate social responsibility, the government of Malaysia consolidated much of its corporate social responsibility activities in 2007, particularly with the adoption of the CSR Framework by the Securities Commission and the *Bursa* Malaysia and the Silver Book (in 2006). This paved the way for the mandatory reporting of corporate social responsibility activities by all publicly listed companies in 2007. This was followed by the promulgation of the Securities Commission Malaysian Code for Corporate Governance 2012 and the *Bursa* Corporate Governance Guide.

The aforementioned documents contain broad principles of corporate governance dealing with building a strong foundation for the board of directors, roles and duties of directors, integrity of financial information and importance of risk management and internal controls. All three guidelines are non-binding and apply only to Government Linked Companies (GLCs) (the Silver Book) and publicly listed companies. There is no meaningful rights language used to encourage directors or businesses to take into account their human rights impact; however, there is some mention of human rights, these guidelines contain broad statements of social benefit, principles to be adhered to by directors such as the importance of knowledge of potentially unethical and legal issues that could adversely affect the company, and encouragement to formulate a code of ethics. The *Bursa* Corporate Governance Guide encourages directors to consider producing Sustainability Reports that addresses community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association and fair trade.

9 US Department of State, *Trafficking in Person Report 2011*, http://www.state.gov/j/tip/rls/tiprpt/2011/

It is encouraging that a number of publicly listed companies have published Sustainability Reports to complement its Annual Reports. A cursory examination of the Sustainability Reports and Annual Reports of listed companies show that the most promising area in terms of business and human rights is reports of efforts undertaken to promote environmental sustainability. Apart from this, most activities reported tend to be philanthropic in nature, with no mention of human rights. This probably stems from the lack of guidance as to the content required in this section and also the absence of an explicit link between human rights and corporate social responsibility in the codes and guidance. Perhaps what is needed is a paradigm shift from the charitable approach of corporate social responsibility to a human rights one.

The government of Malaysia encourages business enterprises to respect human rights by providing tax incentives, particularly in the area of environmental protection.

In its business dealings with business enterprises, State owned enterprises, or State agencies, the State requires or encourages business respect for human rights through mandatory Environmental Impact Assessment reports for certain activities and licencing requirements for mining activities. Besides this, there are no known State guidelines or regulations on this issue.

Malaysian business enterprises have expanded their businesses to conflict-affected areas. Malaysian corporations, such as PETRONAS and Malaysian Smelting Corporation Berhad are carrying out businesses in conflict areas such as Iraq, Sudan, South Sudan, Myanmar and the Democratic Republic of Congo (DRC). There is no known official information that the government of Malaysia identifies, prevents or mitigates human rights-related risks. It appears that if there are any standards regarding business and human rights that are adhered to by Malaysian companies operating in these areas, they are non-binding and self-imposed, without any overt assistance or guidance from the government of Malaysia. For example, the Malaysia Smelting Corporation Berhad takes cognisance of the issue of conflict minerals in its tin business in the DRC.

The Human Rights Commission of Malaysia (SUHAKAM) has been more reactive to and vocal on the Framework and Guiding Principles. SUHAKAM has participated in a number of workshops and also organised roundtable discussions on human rights and business. The Human Rights Commission of Malaysia Act 199 confers upon SUHAKAM the power to look into the area of business and human rights and to investigate business-related human rights abuses.

Other non-State actors have not directly reacted to the Framework and the Guiding Principles save for Sime Darby, a multi-national corporation – Sime Darby pledged support for the Framework and one of its employees is a member of the UN Working Group on Human Rights and Transnational Corporation and Other Business Enterprises. UN agencies in Malaysia, particularly UNICEF works with the CCM to develop best business circulars on child care establishment and nursing others in the workplace.

Types of Business Enterprises in the Country

Name of the Type of Business Enterprise *E.g. company, partnership, business trust etc.*	***Description of the Legal structure of the Type of Business Enterprise***	***Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?***	***Any legislation specifically applicable to the Type of Business Enterprise*** *(E.g. Corporations Law)*	***Laws which the Type of Business Enterprise are expressly excluded from***
Company	There are two types of companies that can be incorporated under the Companies Act 1965: 1. Company Limited by Shares A company having a share capital may be incorporated as a private company (identified through the words '*Sendirian Berhad*' or 'Sdn. Bhd.' appearing together with the company's name) or public company '*Berhad*' or 'Bhd' appearing together with the company's name). The requirements to form a company are: (i) A minimum of two subscribers to the shares of the company (Section 14 the Companies Act 1965); (ii) A minimum of two directors (Section 122 of the Companies Act 1965); and (iii) A company secretary.	No explicit provision in the Companies Act 1965.	Companies Act 1965	None.

Name of the Type of Business Enterprise *E.g. company, partnership, business trust etc.*	***Description of the Legal structure of the Type of Business Enterprise***	***Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?***	***Any legislation specifically applicable to the Type of Business Enterprise*** *(E.g. Corporations Law)*	***Laws which the Type of Business Enterprise are expressly excluded from***
	2. Unlimited Company The procedures and incorporation documents for the incorporation of an unlimited company is the same as company limited by shares. The only difference is that for an unlimited company, the liability of its members must be stated in the Memorandum of Association as unlimited. Separate legal personality.			
Business	Two (2) type of Business: 1. Sole proprietorship Business wholly owned by a single individual using personal name as per his or her identity card or trade name. 2. Partnership Business owned by two or more persons but not exceeding 20 persons. Identity card name cannot be used as business name. No separate legal personality; partners are jointly liable for all debts and obligations of the firm.	No explicit provision in the Registration of Businesses Act 1956 and Registration of Businesses Rules 1957.	Registration of Businesses Act 1956 and Registration of Businesses Rules 1957.	None.

Name of the Type of Business Enterprise *E.g. company, partnership, business trust etc.*	***Description of the Legal structure of the Type of Business Enterprise***	***Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?***	***Any legislation specifically applicable to the Type of Business Enterprise*** *(E.g. Corporations Law)*	***Laws which the Type of Business Enterprise are expressly excluded from***
Trusts	There is no need for a trust to be registered with any parties, especially in the case of a private trust. The trust can be set up in the form of a trust deed or more commonly, using a will. The trusts principles such as certainty of trust, rule against perpetuities, rule against administrative unworkability are generally applicable save where exceptions indicate otherwise. For a trust to be workable there must be a settlor, at least one trustee and at least one beneficiary. At least 50 per cent of trustees must be outsiders who have no connection with the organisation or the founder; 50 per cent of all donations received in each calendar year must be spent within the following year on charitable purposes Business activities are limited to 25 per cent of the Foundation's funds and all profits must be utilised for the charitable purposes of the Foundation. The 25 per cent restriction does not apply where the business itself helps those for which the charity is aimed (example the blind people selling their wares). No separate legal personality; trustees are held liable for any breach of trust.	No explicit provision in the Trustees (Incorporation) Act 1952.	In Malaysia, since there is no private or public trust act, English common law is applied. However, once a trust is up and running, an application can then be made to incorporate the trust under the Trustees (Incorporation) Act 1952.	None.

I. How has the State reacted to the UN "Protect, Respect and Remedy" Framework ("Framework")?

The government of Malaysia has not made any reference to or reacted to the Framework and/or the Guiding Principles. It did however, as a member of the Human Rights Council joined in the consensus and endorsed the UN Human Rights Council resolution on the Guiding Principles and the establishment of a Working Group on business and human rights.[10] Similarly, no declarations or statements have been made in Parliament or in the Courts.

The Human Rights Commission of Malaysia (SUHAKAM) has been more reactive to the Framework and the Guiding Principles. SUHAKAM, which has been accredited status A by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), took part in the workshop on "Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform" in December 2011; seminal to discussions during the said workshop was the UN report on "Protect, Respect and Remedy: a Framework for Business and Human Rights" by Professor John Ruggie. The workshop was attended by 59 participants, from national human rights institutions of the Southeast Asian region, notable academics, representatives of indigenous peoples and members of NGOs. The output of the workshop was the Bali Declaration, which urged governments, legislatures and corporations in Southeast Asia to ensure that national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition respect the right to food, right of all peoples to freely dispose of their natural wealth and resources and the right not to be deprived of their means of subsistence. Notably, the preamble of the Bali Declaration mentioned the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises and Ruggie Report.[11] In particular, a SUHAKAM Commissioner stated in a press release that the workshop would contribute towards strengthening the work of national human rights institutions and others in fulfilling human rights and those affected by the entry of business interests.[12]

Also, SUHAKAM, during the 15th Asia Pacific Forum 2010 Annual Meeting reaffirmed its commitment to working on human rights and business and to take into account the Ruggie report.[13] In October 2010, SUHAKAM took part in the 10th International Conference of NHRIs and ICC Bureau Meeting in Edinburgh, United Kingdom, which led to the adoption of the Edinburgh Declaration;[14] the Edinburgh Declaration addressed the theme of business and human rights and the role of national human rights institutions. Subsequently, SUHAKAM participated in the Consultation on the SRSG Guiding Principles for the Implementation of the Three Pillars Framework (11 – 12 October 2010) in Geneva, Switzerland. SUHAKAM and five other national human rights institutions (NHRIs) developed a joint statement that reaffirmed the role of NHRIs in advancing the Framework within their mandates.[15]

10 The government of Malaysia did not co-sponsor the said resolution - Statement by Ms. Lene Wendland Advisor on Business and Human Rights, Office of the UN High Commissioner for Human Rights, "OECD Roundtable on Corporate Responsibility," OECD Conference Centre, June 29, 2011, http://www.oecd.org/dataoecd/36/60/48365284.pdf; UN resolutions require at least one co-sponsor. Co-sponsoring usually indicates support of the ideas in the said resolution.

11 "Bali Declaration on Human Rights and Agribusiness in Southeast Asia," http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopted-1-dec-2011.pdf

12 "Press Release: Agribusiness and Human Rights in Southeast Asia Workshop brings together Human Rights Commissioners, indigenous peoples' representatives, academics and NGOs from across the world," November 28, 2011, http://www.forestpeople.org

13 Special Representative of UNSG for BHR, Application of the UN Protect, Respect, Remedy Framework, 30 June 2011, 4, available at http://www.business-humanrights.org/media/documents/applications-of-framework-jun-2011.pdf

14 SUHAKAM, *Annual Report 2010*, 85.

15 Ibid., 86.

II. Is the State duty to protect against human rights abuses by third parties, including businesses ("State Duty to Protect"), recognised in the country's domestic legal system?

1. Do any of the State's domestic laws, including the Constitution / basic law of the State, provide a basis for a State Duty to Protect?

Malaysian law is based on the common law, with a Westminster style parliamentary democracy. The Federal Constitution is the supreme law. Federal laws enacted by Parliament apply throughout the country and state laws, enacted by the State Legislative Assemblies, applies in the particular state.[16] Article 121 (1A) of the Federal Constitution recognises the dual system of justice in Malaysia, namely, civil and *syariah* jurisdictions. Article 121(1A) excludes the jurisdiction of the High Courts and the inferior Courts (Magistrate and Sessions Courts) of any matter within the jurisdiction of *Syariah* Courts. Articles 121 (1) and (1A) reads,

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine; and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

List II (State List) of the Ninth Schedule of the Federal Constitution elaborates that *Syariah* Courts shall have jurisdiction and *Syariah* law can be promulgated in the following matters - Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trusts; *Wakafs*, and the definition and regulation of charitable and religious trusts. Except for the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, *Syariah* law is a matter for the states in Malaysia and not a Federal matter. List II (State List) reads as follows,

> *"Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so*

16 The division of law-making powers in Malaysia between Parliament and the State Legislative Assembly is governed by the 9th Schedule of the Federal Constitution - List 1 for issues within the jurisdiction of Parliament, List 2 for issues within the jurisdiction of State Legislative Assemblies and List 3 for concurrent jurisdiction.

far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom."

The Federal Constitution does not include an express recognition of the State's Duty to Protect. However, Part II of the Federal Constitution contains general provisions guaranteeing the following rights - the right to life and personal liberty,[17] right to fair trial,[18] prohibition of slavery and forced labour,[19] right to equality,[20] prohibition of banishment and freedom of movement,[21] freedom of speech, assembly and association,[22] freedom of religion,[23] and rights to property.[24] A constitutional right to privacy was judicially identified but its exact ambit is uncertain.[25] The salient articles on fundamental liberties in the Federal Constitution include:

"No person shall be deprived of his life or personal liberty save in accordance with law." – Article 5(1) of the Federal Constitution.

"No person shall be held in slavery. All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes." - Articles 6(1) and (2) of the Federal Constitution.

"All persons are equal before the law and entitled to the equal protection of the law. Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment." - Articles 8(1) and (2) of the Federal Constitution.

"Subject to Clauses (2), (3) and (4), every citizen has the right to freedom of speech and expression; all citizens have the right to assemble peaceably and without arms; all citizens have the right to form associations." - Articles 10 (1) and (2) of the Federal Constitution.

"Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it." - Article 11(1) of the Federal Constitution.

It is surmised that although the Federal Constitution does not contain an explicit recognition of the State's Duty to Protect, the generality of the language of the fundamental liberties in the Federal Constitution, could provide a basis for the Courts to interpret the State Duty to Protect into these guarantees.

Additionally, there is positive indication towards recognising the State's Duty to Protect; the Persons with Disabilities Act 2008 is the first legislation, which expressly imposes certain responsibilities and obligations on the private sector to protect human rights. At the outset, the preamble of the 2008 Act "recognises the importance of cooperation between the government and *the private sector* (emphasis added) in ensuring the full and effective participation and inclusion of persons with disabilities in society". Also, the 2008 Act establishes the National Council for Persons with Disabilities which, is empowered to review, monitor and evaluate the impact of policies, programmes and activities of the private sector. It goes further to require the private sector to cooperate and assist the National Council for Persons with Disabilities, to give due consideration to the national policy and

17 Federal Constitution, Article 5(1)
18 Ibid., Article 5(2) – (4).
19 Ibid., Article 6.
20 Ibid., Article 8.
21 Ibid., Article 9.
22 Ibid., Article 10.
23 Ibid., Article 11.
24 Ibid., Article 13.
25 The Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, held that "personal liberty" in article 5(1) of the Constitution includes within its compass other rights such as the right to privacy.

national plan relating to persons with disabilities, to undertake steps, measures or actions under any other written law and to submit reports of steps, measures and actions required to be undertaken to comply with the 2008 Act.[26]

The 2008 Act also imposes an obligation on service providers (government as well as private) to guarantee access to education to persons with disabilities, access to information, communication and technology, provide habilitation and rehabilitation programmes and services, access to health services, to take measures to prevent further occurrence of disabilities, to employ necessary health personnel such as speech therapist, physiotherapist and occupational therapist and to provide institutional care for persons with disabilities. For example, article 26(2) of the 2008 states that,

> *"the Government and the providers of such public facilities, amenities, services and buildings shall give appropriate consideration and take necessary measures to ensure that such public facilities, amenities, services and buildings and the improvement of the equipment related thereto conform to universal design in order to facilitate their access and use by persons with disabilities."*

Similarly, article 28(2) of the 2008 Act reads,

> *"the Government and private educational providers shall, in order to enable persons and children with disabilities to pursue education, provide reasonable accommodation suitable with the requirements of persons and children with disabilities in terms of, among others, infrastructure, equipment and teaching materials, teaching methods, curricula and other forms of support that meet the diverse needs of persons or children with disabilities".*

26 Persons with Disabilities Act 2008, Section 16.

2. Has the State Duty to Protect been recognised by the State's courts?

There are two cases where the Courts discussed (*albeit* negatively) the State's Duty to Protect against human rights abuses by businesses.

In the case of *Merdeka University Berhad v Government of Malaysia*[27], the Court stated that article 12(1)(a) of the Federal Constitution,[28] which prohibits discrimination on the grounds of religion, race, descent or place of birth to access to education, cannot apply to an educational institution not maintained by a public authority.

In the case of *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors*,[29] a flight stewardess who had 11 years of service with the national carrier Malaysia Airline System (MAS) was dismissed because she was pregnant. This concerned a clause in her terms and conditions of service, which required an air stewardess to resign if she became pregnant or face termination. When she became pregnant, she refused to resign and her services were terminated. The Court of Appeal in upholding the High Court's decision ruled that a constitutional safeguard such as the right to equality fell within the domain of public law and as such dealt only with "the contravention of individual rights by a public authority, that is, the State or any of its agencies".[30] The Federal Court concurred and held that "… Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual."[31] As the national carrier had not been proven to be "a government agency", this fundamental liberty did

27 [1981] 2 MLJ 356, 363.

28 Article 12(1)(a) reads, "Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth – (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees."

29 [2005] 3 MLJ 681.

30 Ibid., para. 5, 469.

31 Ibid., para. 13, 688.

not apply to the applicant's case. The decision of the High Court was upheld by the Court of Appeal and the Federal Court. The Federal Court went further to state that unless and until the Employment Act 1955 is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to the Contracts Act 1950 and continue to be valid and enforceable.[32]

This principle that the provisions in the Federal Constitution applies only to violations of individual rights by the Executive, legislative or its agencies was reiterated in the case of *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and 5 others*.[33]

To date, there are no cases concerning the Persons with Disabilities Act 2008.

At this juncture, it is also important to consider the Courts treatment of international law and international conventions that Malaysia is a party to - this could be instructive as to whether the Courts would be amenable to incorporating the State Duty to Protect into Malaysian law.

Thus far, save for the recent case of *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and 5 others,*[34] the Malaysian Courts have taken the a strict interpretation of the dualist system adhered to by Malaysia, i.e., that without express incorporation into domestic law by an act of parliament following ratification of an international convention, the international obligations in the said convention does not have any binding force; at best, it would be persuasive authority.[35] Similarly, in *Jakob Renner v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur*[36], the High Court side stepped the issue of whether the Convention on the Rights of the Child was applicable in Malaysia.

Also, Malaysian Courts have considered that domestic law takes precedence over customary international law. The Human Rights Commission of Malaysia Act 1999 (SUHAKAM Act 1999) makes reference to the Universal Declaration of Human Rights (UDHR); section 4(4) of the 1999 Act states that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution". In the case of *Mohd. Ezam bin Mohd Noor v Ketua Polis Negara and Anor Appeal*[37], the Federal Court, in discussing section 4(4) of the SUHAKAM Act 1999, held that the UDHR is not a convention subject to the usual ratification and ascension requirements for treaties and since the principles are only declaratory in nature, they do not have the force of law or binding on member states.

The landmark case of *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and 5 others*, seems to indicate a departure from the status quo. The Court for the first time held that even though the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has not been incorporated into domestic law, the Court is compelled to interpret the principle of gender equality in article 8(2) of the Federal Constitution in light of Malaysia's international obligations under CEDAW.[38] Whether the decision marks a positive beginning in the treatment of Malaysia's international obligations or an anomaly remains to be seen as the High Court decision is being appealed.

32 [2005] 2 CLJ 713.
33 *Saman Pemula* No. MT-21-248-2010, para. 23.
34 *Saman Pemula* No. MT-21-248-2010, para. 9.
35 *NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia – Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 2005,16, http://www.iwraw-ap.org/resources/pdf/Malaysia_SR.pdf; see also, Malik Imtiaz Sarwar, "Representations by Governments and Legitimate Expectations: A means to the enforcement of international norms in the domestic courts," *Infoline*, January/February 2004, http://www.malaysianbar.org.my
36 [2000] 3 CLJ 569.
37 [2002] 4 MLJ 449, 514.
38 Malaysia acceded to CEDAW in 1995.

There is also a concern that members of the judiciary, prosecutors and lawyers are not familiar with the provisions of CEDAW.[39]

Although from the above, the Courts have, thus far, not recognised the State Duty to Protect and there seems to indicate a general reluctance of the Courts to incorporate general principles of international human rights law, it is arguable that the recent case of *Noorfadilla* could set a precedent towards greater recognition of international human rights principles and possibly recognition of the State Duty to Protect. In addition, the Federal Constitution and the laws are drafted in a way that would allow the Court to interpret the state Duty to Protect into Malaysian law.

III. Is the State taking steps to prevent, investigate, punish and redress business-related human rights abuses through effective policies, legislation, regulations and adjudication?

1. Are there government bodies and/or State agencies that have the responsibility to prevent, investigate, punish and redress business-related human rights abuses? If so, how have they done so?

There are no specific government bodies and/or State agencies that are tasked with the responsibility of preventing, investigating, punishing or providing redress for business-related human rights abuses. However, there are a number of government agencies, which are tasked to look at issues, which could be associated with business-related human rights abuses, such as anti-corruption, labour rights, and environmental rights. Most of these government agencies are entrusted with the task of developing non-binding codes and guidelines to ensure the respect of laws and policies in their respective areas. Also, some of these agencies regulate through the issuance of licences and consideration of Environmental Impact Assessments (EIA) and some are given the power to investigate breaches of laws and regulations. However, these government agencies are not empowered to punish and redress business-related human rights abuses. All prosecution of offences rests with the Public Prosecutor, either directly by the Public Prosecutor's office or by way of consent by the Public Prosecutor.

Anti-corruption

The Malaysian Anti-Corruption Commission[40] (MACC) was established in 2009 and is empowered to, *inter alia*, receive, consider and investigate any report of the commission of any offence relating to graft, deceit, corruption and bribery. The MACC does not have a specific policy on business-related human rights abuses or methods of assessing business practices. It is however empowered to investigate the commission of the aforementioned offences committed by companies, societies, unions, bodies or organisations. It does not have the power to prosecute except with the consent of the Public Prosecutor.[41]

Environmental rights

The Department of Environment (DOE) in Ministry of Natural Resources and Environment has the responsibility of environment conservation and sustainable development in Malaysia. The DOE is tasked with the functions of assessing environmental impact studies for development projects as prescribed in the Environmental Quality Act 1974 (EQA 1974) and the Environmental Quality (Prescribed Activities (Environmental Impact Assessment) Order 1987.[42] Other functions of the DOE include formulating and reviewing relevant

39 Compilation Prepared by the Office of the High Commissioner for Human Rights, Universal Periodic Review, Human Rights Council, Working Group on the Universal Periodic Review, November 20, 2008, A/HRC/WG.6/4/MYS/2.

40 Replacing the Anti-Corruption Agency (ACA).

41 Article145(3) of the Federal Constitution, states, "The Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a *Syariah* Court, a native Court or a martial Court."

42 Environmental Quality Act 1974 (EQA 1974), Section 34A.

policies, guidelines, procedures and advising agencies on the implementation for development planning. Whilst the DOE does not adopt a policy on business-related human rights, the DOE (in 2002,) adopted the National Policy on the Environment, which integrates the three elements of sustainable development - economic, social and cultural development and environmental conservation. The Policy aims at continued economic, social and cultural progress and enhancement of the quality of life of Malaysians through environmentally sound and sustainable development. The DOE issues and renews licences and has the power (through the Director-General) to attach conditions to licences, require an environmental audit to be carried out,[43] and require an environmental impact assessment (EIA) report before an activity is carried out.[44]

Labour rights

As regards labour rights, the Ministry of Human Resources oversees the implementation of the Employment Act 1955, which sets out the minimum standards regarding contracts of employment, termination of employment, maternity leave, and employment of foreign employees.[45]

According to statistics provided by the Ministry of Human Resources, 193 cases were prosecuted under the Employment Act 1955 and a total of RM190,120,61 fines were collected.[46] In 2011, 58,256 workplaces were inspected and 6,307 employers (or 10.8 per cent) were not complying with labour laws; no disaggregated data on the types of non-compliance. In 2011, the Ministry of Human Resources received the highest number of complaints for non-compliance with provisions in the Employment Act 1955 (2,161 complaints); this was followed by 433 complaints of non-compliance with the Labour Ordinance of Sabah. Other complaints included violation of provisions in the Children and Young Persons (Employment) Act 1966, racial discrimination (13 complaints), illegal employment and improper treatment of migrant employees (46 complaints) and sexual harassment (33 complaints).[47] In 2010, the Labour Court heard 14,384 cases, an increase of approximately 2,000 cases compared to the previous year;[48] the statistics were not disaggregated into the nature of the cases.

Within the Ministry of Human Resource, the Department of Occupational Health and Safety (DOHS) is responsible for ensuring and developing occupational safety and health at the workplace. The DOHS has not developed any specific policy to address business-related human rights abuses. However, to ensure safety and health at the workplace, the DOHS divides its role into two areas - firstly, safe use of chemicals in the workplace and effects on the public; secondly, occupational health.[49]

In the former, the DOHS has developed a generic chemical risk assessment (to assess work places where chemicals hazardous to health are being used and their risks and control measures), a Simple Risk Assessment and Control (a system to carry out a simple assessment based on a process of grouping workplace risks into control bands based on combination of hazard and exposure information), and a Code of Practice on Indoor Air Quality.[50]

In the latter, the DOHS established an Occupational Health Division to enforce occupational health related legal requirements and to encourage the adoption of health promotion and health protection in all workplaces. The Occupational Health Division conducts investigations, monitors the occupational disease and poisoning notifications, analyses occupational disease and poisoning reports from others states in Malaysia and provides seminars and dialogues to increase occupational health awareness.

43 EQA 1974, Section 33A.
44 Ibid., Section 34A
45 Employment Act 1955 is applicable only to employees earning RM2,000 per month.
46 Ministry of Human Resources,Labour and Human Resources Statistics 201, http://www.mohr.gov.my/
47 Ibid.
48 Ministry of Human Resources, Department of Labour Annual Report 2010, http://jtksm.mohr.gov.my/
49 Department of Occupational Safety and Health, http://www.dosh.gov.my
50 Ibid.

In addition, the Occupational Health Division develops codes of practices and guidelines; for example, the said Division developed the Code of Practice on the Prevention and Management of HIV/AIDS. The purpose of this code of practice is to reduce the spread of HIV/AIDS and to guide employers and employees in managing issues related to HIV/AIDS in the workplace. During the year 2010, a total of 11 employers were monitored to promote adherence to the Code of Practice on the Prevention and Management of HIV/AIDS in the workplace. Also, the Occupational Health Division has developed a Code of Practice on Prevention and Eradication of Drug Abuse, Alcohol and Substance in the Workplace, which is intended to assist employers and employees to meet their responsibilities under the Occupational Safety and Health Act 1994 (OSHA 1994) and to address the problem of drugs and alcohol in the workplace.[51]

Companies and businesses

The Companies Commission of Malaysia (CCM) is a statutory body, which regulates companies and businesses. The CCM ensures compliance with business registration and corporate legislation through enforcement and monitoring activities. In particular, the CCM is responsible for the administration and enforcement of the Companies Act 1965, Registration of Businesses Act 1956; Trust Companies Act 1949, Companies Regulations 1966; and Registration of Businesses Rules 1957. The CCM regulates matters relating to corporations, companies and businesses and encourage and promote proper conduct amongst directors, secretaries, managers and other officers of a corporation, with a view to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance.[52]

To ensure compliance with the Companies Act 1965, the CCM has set up a Compliance Division:

- To conduct inspections on businesses and companies to ensure that the Registration of Businesses Act 1956 and Companies Act 1965 as well as their accompanying Rules and Regulations are complied with;
- To issue compound notices to business owners, companies and company officers for offences; and
- To refer cases for investigation and prosecution.

As with other government agencies, the CCM does not have a policy on business related human rights abuses.

2. Are there laws and/or regulations that hold business enterprises and individuals accountable for business-related human rights abuses, and are they being enforced?

2.1. To what extent do business enterprises and company organs face liability for breaches of laws by business enterprises?

2.1.1. Can business enterprises be held legally accountable as legal persons?

A company is recognised in law in having a separate legal personality of its own apart from the persons who comprise it. Although this principle is not explicitly provided for in the Companies Act 1965, the principle as espoused in the English case of *Salomon v. A Salomon & Co Ltd*[53] was recognised in the case of *Hew Sook Ying v Hiew Tin Hee*[54] - the Supreme Court stated the principle of law that a limited company incorporated under the Companies Act 1965 and the individuals forming the company are distinct legal entities.

The legal persona of a company enables a company to own property in its own name,[55] to have separate liabilities from its shareholders,[56] perpetuity of

51 Ibid.

52 Companies Commission of Malaysia Act 2001, Section 17.

53 [1897] AC 22 (House of Lords).

54 [1992] 2 SCR 257.

55 *Chan Foo Meng & 68 Others v Hup Seng Co. Ltd.* [1987] 2 MLJ 456.

56 *Fairview Schools Bhd. v Indrani a/p Rajaratnam (No.2)* [1998] 1 MLJ 110.

corporate existence,[57] and to sue and be sued in its own name. In addition, since a company is separate from its members, members are not liable of being sued in respect of a breach of a company's obligations. Exceptions to corporate personality include if the corporate form is used as part of a scheme, which involves the perpetration of legal or equitable fraud on the rights of their parties, actual and equitable fraud, evasion of contractual obligations or duties, or breach of fiduciary duties of directors.

Another way a company is held accountable is through the principle of agency. This principle recognises that the company delegates its powers to the board of directors or other lesser agents. And the acts of these agents will be attributed to the company as its acts, provided the internal rules governing the conferment and exercise of authority are complied with.

The principle of separate legal personality applies only to companies. As regards, sole proprietorship and partnerships, the Partnership Act 1961 states that any act or instrument relating to the business of the firm binds the firm and all the partners.[58] Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner.[59] Any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act.[60]

As regards trusts, it is the legal duty of the President, Vice-President, Secretary and Board of Trustees to administer the trust funds properly. If there is a breach of trust they will be held liable for that breach.

Apart from the separate legal entity in the Companies Act 1965, section 11 of the Penal Code regards "person" to include any company or association or body of persons, whether incorporated or not,[61] and as such, companies can be held criminally liable. However, because it cannot be imprisoned, sanctions imposed on companies found in breach of any law include fines, suspension of trading, reprimands, delisting or dissolution by the Minister.[62] Also, the prosecution of a company is confined to certain offences, to the exclusion of personal natured crimes such as rape. For other offences, *mens rea* of the company is evidenced by the state of mind of the director or other lesser agents of the company (employee, chief executive officer) and if he or she was acting in actual or apparent authority of the company.[63] In most cases, corporations are held criminally responsible for crimes in the area of environment, such as open burning and illegal toxic waste disposal.[64]

2.1.2. Do organs of a business enterprise (e.g owners – shareholders, partners, proprietors) face liability when their businesses breach laws?

2.2. Do laws and/or regulations require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities, or to prevent or mitigate adverse human rights impacts directly linked to their operations, products or services and (b) require individuals to ensure their business enterprises do so?

(Please note that 2.2 and 2.3 are answered concurrently in this section as almost all laws on employment, environment, anti-corruption,

57 *Abdul Aziz bin Atan & 37 Ors v Rengo Malay Estate Sdn. Bhd.* [1985] 2 MLJ 165.
58 Partnership Act 1961, Section 8.
59 Ibid., Section 11.
60 Ibid., Section 12.
61 Penal Code, Section 11.
62 Lim Chee Wee, "Criminal Liability of Companies Survey," 2008, Lex Mundi Publication.
63 Ibid.
64 Musbri Mohamed, "Problems Pertaining to Corporate Crime," May 2011, University Kebangsaan Malaysia, Faculty of Law.

tort, and land law treat individuals and business enterprises alike where "person" in the legislation is interpreted to include a body of persons, corporate or unincorporate[65]*)*

Laws in Malaysia do not specifically require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. However, the laws instil avoidance and regulate the actions of individuals, companies and businesses through the creation of offences.

Anti-human trafficking/ sexual exploitation

The Anti-Trafficking in Persons Act 2007 (ATPA 2007) addresses the problem of anti-human trafficking. It lists out a number of offences, namely, it makes it an offence for any person to:

- Traffic any person not being a child, for the purpose of exploitation; the penalty is imprisonment for a term not exceeding 15 years, and a fine;[66]
- Traffic a child for the purpose of exploitation; penalty is imprisonment for a term not less than three years but not exceeding 20 years, and a fine;[67]
- Obtain, give, sell or possess fraudulent travel or identity document for the purpose of facilitating an act of trafficking in persons; the penalty is imprisonment for a term not exceeding 10 years, and a fine of not less than RM50,000 but not exceeding RM500,000;[68]
- Recruit a person to participate in trafficking of persons;[69]
- Provide facilities or services in support of trafficking in persons;[70]
- Profit from the exploitation of trafficked person; the penalty is imprisonment for a term not exceeding 15 years, and a fine of not less than RM50,000 but not exceeding RM500,000.[71]

Specifically for body corporates,[72] section 64 of ATPA 2007 states that,

> *"where any offence against any provision of this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, or was in any manner responsible for the management of any of the affairs of such body corporate, or was assisting in such management, shall also be guilty of that offence unless he proves that the offence was committed without his knowledge, consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."*

The ATPA 2007 has extra territorial reach – sections 3 and 4 of the ATPA 2007 Act states that, the offences apply regardless of whether the offence took place inside or outside Malaysia, in the following circumstances:

> *"(a) if Malaysia is the receiving country or the exploitation occurs in Malaysia; or (b) if the receiving country is a foreign country but the trafficking in persons starts in Malaysia or transits in Malaysia.*

65 Interpretation Acts 1948 and 1967, Section 2.
66 Anti-Trafficking in Persons Act 2007 (ATPA 2007), Section 12.
67 Ibid., Section 14.
68 ATPA 2007, Section 18.
69 Ibid., Section 19.
70 Ibid., Sections 20 and 21.
71 Ibid., Section 15.
72 The ATPA 2007 does not contain a definition of "body corporate". The term "body corporate" is defined as an artificial legal person regardless of its nature and is an entity independent of or distinct from its members and directors - *Tan Lai v. Mohamed Bin Mahmud* [1982] 1 MLJ 338; *Development & Commercial Bank Bhd v Lam Chuan Company & Anor* [1989] 1 MLJ 318; *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714, SC.

In December 2008, the Court convicted its first trafficking offender under the ATPA 2007; an Indian national convicted of forcing a female domestic worker into prostitution was sentenced to eight years in prison."[73]

Anti-terrorism

Anti-terrorism provisions create offences, intended to protect the security of the individual and against the threat of terrorist acts. Chapter VIA of the Penal Code, though subject to criticism for its vague definitions, prohibits any person or company[74] from directly or indirectly committing a terrorist act; such offences include providing devices to terrorist groups, recruiting person to be members of terrorist groups or participating in terrorist offences, providing training and instruction to terrorist groups, knowingly incite, promote or solicit property for the commission of terrorist acts, providing facilities in support of terrorist acts, soliciting and giving support to terrorist groups for the commission of terrorist acts, providing services for terrorist purposes, dealing with terrorist property. Section 130T of the Penal Code states that if the offences in sections 130N, 130O, 130P or 130Q are committed by a body corporate, the person responsible of the management and control of the body corporate shall be guilty of the offence unless he proves that the offence was committed without his consent or connivance and he exercised all such due diligence to prevent the commission of the offence.

Chapter VIA of the Penal Code applies even if these offences are committed outside Malaysia, provided that it is committed by any citizen or any permanent resident on the high seas on board any ship or on any aircraft whether or not such ship or aircraft is registered in Malaysia; or by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.[75] No case law has been brought regarding the interpretation of the extra-territorial principle to companies. It is submitted that if an offence is committed outside Malaysia by a company registered in Malaysia, Chapter VIA of the Penal Code would apply.

Labour rights

Provisions in the Employment Act 1955, Industrial Relations Act 1967 (IRA 1967) and the OSHA 1994 ensures that employers refrain from certain actions that may violate the rights of employees. However, it should be noted that the Employment Act 1955 applies only to employees earning not more than RM1,500 per month.

The right to join or form a trade union is guaranteed by law; section 8 of the Employment Act 1955 does not allow any contract of service to restrict the right of any employee from joining a registered trade union or to participate in activities of a registered trade union or to associate with any person to organise a trade union. Similarly, the Industrial Relations Act 1967 (IRA 1967) protects the rights of workmen and employers and their trade unions; section 4 of the IRA 1967 provides that no person (which includes business enterprises) shall interfere with, restrain or coerce a workman or an employer from exercising his or her right to form and assist in the formation of and join a trade union and to participate in its lawful activities. Section 5 of the IRA 1967 prohibits discrimination on the ground that he or she is or is not a member or officer of a trade union in the area of employing, promoting or imposing any condition of employment or working conditions. Employers are also legally required to provide a minimum of 60 days paid maternity leave.[76] Also, it is an offence to terminate a female employee solely on the basis that she was absent from work as a result of illness (certified by a registered medical practitioner) arising out of her pregnancy or confinement and, which render

73 Extracted from U.S. State Dept Trafficking in Persons Report, June 2009, http://gvnet.com/humantrafficking/Malaysia-2.htm

74 Section 11 of the Penal Code includes any company or association or body of persons, incorporated or not, within the definition of 'person' in the Penal Code.

75 Penal Code, Section 4.

76 Employment Act 1955, Section 37.

her unfit for her work, provided that her absence does not exceed 90 days.[77] Reading the Employment Act 1955 and the Companies Act 1965 together, these obligations apply to domestic and foreign employers[78] alike. Enforcement is by way of the Court process. In 2010, the CCM highlighted one Court case against a foreign company in Malaysia where the CCM commenced winding up action pursuant to a complaint received from the Ministry of High Education of Malaysia that the said foreign company was illegally carrying on business as a provider of private higher education institution.[79]

Section 59 of the Employment Act 1955 requires employers to provide one whole day of rest for each week of work; employees are not allowed to work more than eight hours a day and not more than 48 hours a week;[80] employees are entitled to paid holiday.[81]

Section 15 of the OSHA 1994 provides that employers have the obligation to ensure the safety, health and welfare at work of its employees. This includes ensuring plants and systems are safe and the work place does not pose a risk to health; there is also a positive obligation to formulate a policy on safety and health.[82]

Section 6(1) of the Workers Minimum Standards of Housing and Amenities Act 1990 requires employers who provide their employees with housing at the place of employment, to ensure that such housing includes provision of free and adequate water, adequate electricity supply and that the buildings are kept in a good state of repair. In 2010, Department of Labour inspected 1,463 estates and found, amongst others, that the provision of clean water was less than 24 hours, the cleanliness of the water was inadequate.[83]

To stimulate the agriculture industry, on 1 September 2010, the Malayan Agricultural Producers Association (MAPA) issued a directive encouraging its members to subsidise at least 90 per cent of transportation cost to school of employees' children.

As regards migrant workers, there is no specific law protecting migrant workers. The Employment Act 1955 applies to all employees, including foreign workers (see above). The only additional requirement is for employers to inform the Labour Department within 14 days of employment of a foreign worker. To curb labour trafficking, the ATPA 2001 was amended in 2010 to include all actions involved in acquiring or maintaining labour services of a person through coercion, into the definition of trafficking. However, the government of Malaysia remains slow in investigating and prosecuting labour trafficking cases, particularly those who exploit victims of labour trafficking. In 2011, reportedly, the Court convicted three individuals involved in labour trafficking, two of which were drivers who were involved in the transporting of Burmese refugees from a government immigration detention centre

77 Ibid., Section 42.

78 Section 2 of the Employment Act 1955 defines employer as "employer" means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word "employ", with its grammatical variations and cognate expressions, shall be construed accordingly." Section 4 of the Companies act 1965 defines foreign company as "Foreign company is defined under the Companies Act 1965 (CA 65) as: (a) a company, corporation, society, association or other body incorporated outside Malaysia; or (b) an unincorporated society association, or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Malaysia." A foreign company may carry on business in Malaysia by either incorporating a local company with the Companies Commission of Malaysia (CCM); or registering the foreign company in Malaysia with CCM.

79 *Suruhanjaya Syarikat Malaysia v. Isles International Universite (European Union) Limited (formerly known as Irish International University)*, Kuala Lumpur High Court Companies (Winding-Up) No. D-28NCC-90-2010 in CCM Annual Report 2010.

80 Employment Act 1955, Section 60A.

81 Ibid., Section 60D

82 OSHA 1994, Section 16.

83 Department of Labour Annual Report 2010, http://jtksm.mohr.gov.my/

to the border with Thailand where they were handed over to trafficking syndicates.[84] To tackle the number of illegal workers in Malaysia, an estimate of two million illegal immigrants,[85] the government launched the 6P programme,[86] an amnesty and legalisation process; under the amnesty programme, illegal immigrants who register and wishes to return to their country of origin or those who surrender voluntarily would be given amnesty and returned home with costs fully borne by the immigrants themselves. Under the legalisation process, illegal immigrants who fulfil a certain criteria would be registered for work purposes. As of June 2012, according to the Deputy Minister of Home Affairs, over one million illegal immigrants have been registered and of those, 1,015,852 were registered for work purposes and 287,364 were registered to be sent to their country of origin.[87]

As regards domestic workers, the problem in Malaysia, centres on (some) unscrupulous recruitment agencies. The law that governs recruitment agencies is the Immigration Act 1959, where it is an offence to give or sell any Entry Permit, Pass, Internal Travel Document or Certificate issued to another person or falsifies any statement or alters any Entry Permit, Pass, Internal Travel Document or Certificate. The punishment for contravening these provisions is a fine not exceeding RM10,000 or imprisonment not exceeding five years.[88] A private employment agency is required to obtain a licence from the Director General of Labour before carrying out their business.[89] Conditions to be fulfilled for a grant of the licence includes that the person-in-charge is a person of good character; is not an undischarged bankrupt; and has not been convicted of an offence and sentence to more than one year imprisonment or a fine of more than RM2,000; there are suitable premises for carrying on such business; such individual who, or the partnership or company which, is to carry on such business undertakes that such business will be carried on in a morally and irreproachable manner.[90]

The problem above is compounded by the lack of protection of foreign domestic servants who are brought into Malaysia for work and often exploited by recruitment agencies.[91] Most conditions of employment of foreign domestic workers are governed by Memorandum of Understandings (MOU) between two governments.

Domestic servants do not enjoy protection of all the provisions in the Employment Act 1955; provisions protecting conditions of termination of contract, maternity protection, conditions relating to rest days, hours of work, holidays and lay off and retirement benefits do not apply to domestic servants (foreign and local alike). As such, concerns have been expressed that the terms of conditions of MOUs do not necessarily ensure protection for domestic workers – for example, the new MOU between Malaysia and Indonesia governments covering the employment of Indonesian domestic workers in Malaysia, which was signed in December 2011, did not address the issues of rights of domestic workers. The much criticised clause of allowing Malaysian employers to confiscate and hold passports of domestic employees, reportedly still remains in the MOU and no minimum wage was set for domestic

84 US Department of State, *Trafficking in Persons Report 2011*, http://www.state.gov/j/tip/tiprpt/2011/

85 Shannon Teoh, "Government amnesty for illegal immigrants," *The Malaysian Insider*, June 6, 2011, http://www.themalaysianinsider.com

86 *Pendaftaran* (registration), *pemutihan* (legalization), *pengampunan* (amnesty), *pemantauan* (observation), *penguatkuasaan* (enforcement) and *pengusiran* (deportation).

87 Wong Pek Mei, "More than 1.3 million illegals registered under amnesty programme," *The Star Online*, June 18, 2012, http://www.thestar.com.my

88 Immigration Act 1959, Section 55(1).

89 Private Employment Agencies Act 1981, Section 7.

90 Ibid., Section 9

91 The European Commission's Directorate-General for Enterprise and Industry is developing a year-long project to develop guidance on the corporate responsibility to respect human rights for employment and recruitment agencies. Consultation and invitation to submit Discussion Papers are on-going, which would contribute to the development of the sector guidance.

workers from Indonesia.[92]

In the area of sexual harassment, there are no laws compelling employers to take steps to prevent sexual harassment in the workplace. The only available legal provision is section 509 of the Penal Code, which makes it an offence for any person, who has the intention to insult the modesty of any woman, to utter any word, make any sound or gesture or exhibit any object intending that such word or sound to be heard or such gesture or object to be seen by such woman. This offence attracts a punishment of five years imprisonment of a fine or both. Whilst this section may be used to prosecute acts of sexual harassment, it deals with only the physical aspects of sexual harassment.

To encourage employers to address the issue of sexual harassment in the workplace, the Ministry of Human Resources is encouraging employers to adopt the Code of Practice Against Sexual Harassment and an internal mechanism to prevent sexual harassment at the workplace. Introduced in 1999, the Code of Practice provides a definition of harassment, descriptions of behaviour that constitutes harassment, how employees should handle harassment, how the company handles complaints, what kind of disciplinary action and name and phone numbers to lodge a complaint. In 2010, the Department of Labour received 19 complaints of sexual harassment. To encourage employers to adopt the Code of Practice against Sexual Harassment, the said Department has set up booths, distributed brochures on the said subject matter, and provided seminars to employers.[93]

Environmental rights

A number of laws and regulations have been formulated to ensure that activities of individuals and business enterprises do not harm the environment.

92 US Department of State, *Trafficking in Persons Report 2011*, http://www.state.gov/j/tip/tiprpt/2011; see also, "Signing of new Malaysia-Indonesia MOU: An ASEAN PR Exercise?", *Aliran,* December 4, 2011, http://www.aliran.com

93 Ministry of Human Resources, Department of Labour Annual Report 2010 of the, http://jtksm.mohr.gov.my/

The EQA 1974 governs environmental issues in Peninsular Malaysia whereas the regulatory framework for environmental issues in the states of Sabah and Sarawak are the Conservation of Environment Enactment 1996 and Natural Resource and Environment Ordinance 1958 (Cap 84) respectively.

A number of laws and regulations have been formulated to ensure that activities of individuals and business enterprises do not harm the environment. A number of activities, such as those involving agriculture, airports, drainage and irrigation, land reclamation, housing, industry, infrastructure, ports, mining, petroleum, power generation and transmission, quarries, waste treatment and disposal and water supply require an EIA report to be provided before such activities are allowed to be carried out.[94]

Similarly, the National Resources and Environment Ordinance 1994 (NREO 1994) also requires the EIA process for prescribed activities that have environmental impact. For example, mandatory EIA is required for logging activities where the extraction of felling of timber from any area exceeding 500 hectares which, have previously been logged or in respect of which coupes have previously been declared to have been disclosed by the Director of Forests under the provisions of the Forests Ordinance; extraction or felling of any timber within any area declared to be a water catchment area under section 8 of the Water Ordinance.[95]The NREO 1994 states that the public may be invited to comment on the proposed project, which has been subjected to detailed EIA.[96]

94 EQA 1974, Section 34A; see also Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (PU (A) 362/1987).

95 The First Schedule of the Natural Resources and Environment (Prescribed) Activities Order 1997; see also, Carol Yong, "Logging in Sarawak and the Rights of Sarawak's Indigenous Communities," *JOANGOHUTAN* , April 2010, http://www.bmf.ch

96 Carol Yong, "Logging in Sarawak and the Rights of Sarawak's Indigenous Communities," *JOANGOHUTAN* , April 2010, http://www.bmf.ch

A number of activities are prohibited by the EQA 1974 and the regulations thereunder. Any person or body corporate is prohibited from:

- Emitting or discharging any environmentally hazardous substance, pollutants or wastes into the atmosphere[97] or inland waters;[98] Consequences of breach is a fine not exceeding RM100,000 or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding RM1,000 a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.
- Polluting or causing or permitting to pollute any soil or surface;[99] Consequences of breach is a fine not exceeding RM100,000 or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding RM1,000 a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.
- Open burning;[100] consequences of a breach is fine not exceeding RM500,000 or to imprisonment for not exceeding five years or to both.

Except with the written approval of the Director-General, the Environmental Quality (Clean Air) Regulations 1978 prohibits any equipment, plant or facility to discharge or emit smoke as dark or darker than shade No. 1 on a Ringelmann chart or that is rated to consume pulverised fuel, any solid fuel at 20 kilogrammes or more per hour or any liquid or gaseous matter at 10 kilogrammes or more per hour, or that emits solid particles at 0.5 kilogrammes per hour or used for grain milling or polishing and consumes 1.5kw and above; or used to manufacture of paints, varnishes, lacquers and all pesticides, processing of which mercury, antimony, arsenic, cadmium, zinc, lead, copper or any compound is emitted, used for animal feed, fish manure or fertilizer or manufacture of asbestos containing products, from being situated within a residential zone or within 1000 meters from the nearest dwelling house of the housing estate.

Specifically to the mining industry, section 13 of the Mineral Development Act 1994 (MDA 1994) requires "all fossicking, panning, exploration, mining and mineral processing to be carried out in accordance with good and safe practices and such environmental standards as may be prescribed under the MDA 1994 and any written law relating to environment." Failure to comply with this provision attracts a punishment of a fine not exceeding RM50,000 or imprisonment for a term not exceeding three years or both. The MDA 1994 does not contain a definition of "good and safe practices"; no cases have been found, which judicially defines "good and safe practices". There is also a requirement for those in the mining industry to prevent or minimise the erosion of the land, which is the subject of the mineral tenement and the effects thereof.[101] Failure to do so attracts a fine not exceeding RM50,000 or imprisonment for a term not exceeding three years or both. Before commencing any mining work, section 10 of the MDA 1994 requires any individual or business enterprise who holds a proprietary mining licence or mining lease to submit an operational mining scheme to the Director of Mines; the operational mining scheme should include date of commencement, estimated annual raw ore production of the mineral tenement, and plans of the workings of the mine. An approval is only granted provided that the operational mining scheme provides a reasonably safe work place and the said scheme does not endanger adjoining communities.

What could be useful is the Second National Mineral Policy, which includes environmental protection, sustainable development and

97 EQA 1974, Section 22.
98 Ibid., Section 25.
99 Ibid., Section 24.
100 EQA 1974, Section 29A.
101 MDA 1994, Section 19.

management of social impacts.[102] The said policy provides for rehabilitation and environmental control;[103] recovery, recycling and reuse of minerals, metals and mineral-based products; effective mine waste management measures; and establishment of enduring relationship between the mine operation and the surrounding community, including implementation of a Social Impact Assessment on mineral operations. The Social Impact Assessment does not appear to be a mandatory requirement for the mining industry. The National Mineral Policy does not contain a definition of Social Impact Assessment. However, the website of the Federal Department of Town and Country Planning refers to the Social Impact Assessment; the objective of a Social Impact Assessment is to assess social impacts from the development and to minimise any negative impact. It further elaborates that the Social Impact Assessments was approved by the Master Action Plan for Combating Social Problems and that it is embedded into local plan proposals although without any systematic and detailed document in terms of the scope of the Social Impact Assessment.[104]

The EIA guidance document for sand mining/ dredging activities issued by the Department of Environment requires companies to include in their EIA report a section on potential significant impact on social economic systems.[105]

Section 18 of the MDA 1994 requires any holder of a proprietary mining licence or mining lease or manager who uses water in connection with mining to take measures to ensure that the water used shall, before it leaves the mine or waste retention area in which it has been used, comply with such water quality standards as may be prescribed and where such standards have not been prescribed such water shall be reasonably free of solid matter and from chemicals and other substances deleterious to human, animal or vegetable life. The punishment for violation of this provision is a fine not exceeding RM50,000 or to imprisonment for a term not exceeding three years or both.

Rights of the child

Section 32 of the Child Act 2001 prohibits the use of a child for begging or carrying out illegal hawking, illegal lotteries, gambling or illegal activities detrimental to the health and welfare of the child. This offence attracts a fine not exceeding RM5,000.

Section 48 of the Child Act 2001 prohibits any person from taking part in any transaction which involves the transfer, possession, custody or control of a child for any valuable consideration. It is also an offence for any person to bring or assist in bringing a child into Malaysia under any false pretence or representation or by fraudulent or deceitful means.[106] The punishment for both these offences is a fine not exceeding RM10,000 or imprisonment not exceeding five years or both.

Whilst the Child Act 2001 does not explicitly include liability of companies, it could be argued that "person" in section 32 applies also to corporations by

102 See National Mineral Policy available at http://malaysianminerals.com/policy.html

103 Under the National Mineral Police, a mining lease application must include an environmental protection plan that is approved by the Department of Environment, Ministry of Natural Resources and Environment.

104 In May 1997, the Cabinet Committee approved the Master Action Plan for Combating Social Problems (PINTAS) whereby one of its proposal is the implementation of Social Impact Assessment (SIA) in Malaysia. The application of SIA is timely and appropriate. It should be applied in various situations which are policies planning, plans and projects. SIA has been well applied in the preparation of Local Plan (LP) since 2000 to ensure that the plan proposals take into account of social impacts which are anticipated from the proposals. Although the descriptions and findings of SIA is embedded into the local plan proposal, there is not any systematic and detailed written document in terms of scope preparation for SIA in the context of project level. Therefore, this Social Impact Assessment Manual For Planning Permission Applications outlines the procedures to carry out the SIA at project level in a more systematic, standardized and simplistic way. The main purpose of the SIA at project level is to assist the project proponent to assess social impacts from the development and eventually is to minimize the negative impacts and maximize the positive impacts. This Manual consists of Introduction of SIA; Types of SIA (General SIA and Detailed SIA); Criteria that requires SIA projects; and procedures for conducting a SIA", available at http://www.townplan.gov.my/devo/en_content.php?ID=221

105 The EIA Guidance, available at http://eia.doe.gov.my/portal/?page_id=839

106 Child Act 2001, Section 49.

way of section 3 of the Interpretation Act 1948 and 1967, which includes body of persons, corporate or unincorporated under the definition of "persons".

The Children and Young Persons Employment Act 1966 (CYPEA 1966) regulates the type of work a child[107] or young person is allowed to carry out in Malaysia. A child or young person is allowed to be engaged in employment involving light work, in public entertainment subject to licensing requirements, employment approved or sponsored by the Government carried out in school or training institution or training vessel, apprenticeship approved by the Director-General of the Labour Department, domestic work, employment in any office, shop, godown, factory, workshop, store, boarding house, theatre, cinema, club or association and employment in an industrial undertaking suitable to his or her capacity. A female young person is not allowed to be employed in hotels, bars, restaurants, boarding houses or clubs unless the establishment is under the management or control of her parent or guardian.[108] A child is also not allowed to work for more than six consecutive days; between the hours of 8 p.m. and 7 a.m.; for more than a period of three consecutive hours without a 30 minute break; for more than six hours in a day.[109] Contravention of any provision in the CYPEA 1966 attracts a punishment of a term of imprisonment not exceeding six months or to a fine not exceeding RM2,000 or both. The CYPEA 1966 was amended in 2010; the 2010 amendment introduced a new provision, which explicitly imposes liability on body corporates, partnerships, societies and trade unions and that directors, managers (for body corporates), partners (for partnerships), office bearers (for society and trade unions) shall be deemed to have committed the offence.[110]

107 The Children and Young Persons Employment Act 1966 defines a child as a person below the age of 14 years and a young person as a person between the ages of 14 and 16 years. This definition of 'child' differs from the definition of a child under the Child Act 2001 which defines a child as a person below the age of 18 years.

108 Children and Young Persons Employment Act 1966, Section 2.

109 Ibid., Sections 4 and 5.

110 Ibid., Section 9A.

Land rights/ rights of indigenous people

Cases of business related human rights appear to be more prevalent in relation to land rights of indigenous peoples. Land acquisitions issues that affect others, include the recent land rights dispute between the MRT project owner and city traders, where the latter has contended that they were not given an opportunity to present alternative routes with regard to the alignment of the MRT Sungai Buloh-Kajang line.[111] Land issues at hand appear to revolve around the cost of building the MRT, the tender process, and the lack of transparency of the award to the current project owner, and the lack of consultation with those affected by the MRT project.

Most of the provisions relating to indigenous people concern their right to land. The Aboriginal Peoples Act 1954 and the Sarawak Land Code 1958 recognise native customary rights and allow indigenous peoples to reside on native land or Malay reserve land. Section 5 of the Sarawak Land Code recognises that native customary rights may be created by indigenous tribes, groups, families or individuals through the felling of virgin jungle and occupation of land, planning of land with fruit trees, occupation of cultivated land, use of land for a burial ground or shrine or use of land for rights of way.

Any acquisition of land where native customary rights is established is prohibited without adequate

111 "KL land row threatens to derail MRT project", *The Malaysian Insider*, 12 October 2011, http://www.themalaysianinsider.com/malaysia/article/kl-land-row-threatens-to-derail-mrt-project.

compensation;[112] section 11 of the Aboriginal Peoples Act 1954 states that,

> *"where an aboriginal community establishes a claim to fruit or rubber trees an any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just."*

The remedy available to indigenous peoples for any failure of the government to pay adequate compensation is by bringing an action in court for declarations, compensation and damages for trespass. A number of Court cases have emerged over the issue of adequate compensation; in the case of *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors,*[113], the High Court held that right to compensation under the Aboriginal People's Act 1954 is complementary to the rights under common law and article 13 of the Federal Constitution[114]; as such, the compensation by the government of loss of crops, fruit tree and building structures was inadequate. The Court also found that the government owed the indigenous peoples a fiduciary duty, which had been breached and therefore, they (indigenous peoples) are entitled to compensation for loss suffered, which is the value of the lands lost as a result of the government failing to protect it. Thus far, the Courts have interpreted adequate compensation to mean financial compensation and not farmlands.

Anti-corruption

Corruption disables the State from meeting its obligations to protect human rights of its citizens. The obligation to protect requires states to prevent, suppress or punish forms of corruption that causes or lead to violations of human rights. Corrupt actions by private actors trigger state responsibility and failing to act, states may infringe rights. For example, if the State failed to enact appropriate legislation to prevent or punish corruption committed by private corporations. For example, privatisation of public services may multiply opportunities for corruption and may harm the enjoyment of particular human rights, in this instance, right to access to clean water.[115]

Section 17 of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009) makes giving and receiving gratification or a reward for doing or forbearing to do something, an offence. Section 20 of the MACC Act 2009 also makes it an offence to offer gratification to withdraw a tender. Bribing a public body or a foreign public official are offences under sections 21 and 22 of the MACC Act

112 Section 19 of the Sarawak Land Rules states that every application by a non-native for a permit to acquire rights in Native Area Land or Native Customary Land shall only be granted provided that the District Officer is satisfied that the rights are of a nature recognised by the native system of personal law of the native community concerned; Section 10 of the Aboriginal Peoples Act 1954 states that an aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may continue to reside therein upon such conditions as the State Authority may by rules prescribe. However, the State Authority may order any aboriginal community to leave and remain out of any such area and may in the order make such consequential provisions, including the payment of compensation, as may be necessary; Section 12 of the Aboriginal Peoples Act 1954 states that if any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto.

113 (High Court) [2002] 2 MLJ 591; (Court of Appeal) [2005] 4 CLJ; (Federal Court) [2005] 4 CLJ 169; see also *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [*1997] 1 MLJ 418; *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 6 MLJ 241.

114 Article 13 of the Federal Constitution reads, "(1) No person shall be deprived of property save in accordance with law; (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation".

115 Transparency International and International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*, available at http://www.ichtp.org/files/reports/40/131_web.pdf

2009. Penalty for these offences is imprisonment not exceeding 20 years and a fine not less than five times the value of the gratification, which is the subject matter of the offence.

The MACC Act 2009 does not explicitly include corporations. However, the reference to "person" in the 2009 Act could include corporations by virtue of section 3 of the 1948 and 1967 Act, which includes body of persons, corporate or unincorporated under the definition of "persons". However, to date, the MACC has yet to impute liability on any corporation for corruption-related offences. The investigation into a government-linked company, Sime Darby Berhad, led to the arrest of three senior officers of Sime Darby Berhad; According to the MACC, the loss of RM 964 million suffered by Sime Darby Berhad was caused by delays and high overheads, amongst others, bribes paid to secure contracts of projects. The company was not held liable.[116]

Section 66 of the MACC Act 2009 extends the 2009 Act to offences committed by Malaysian citizens or permanent residents outside Malaysia.

Tort law

Apart from the legislation, tort law, particularly nuisance and negligence could also be used to require businesses to avoid causing or contributing to adverse human rights impacts through their activities. Nuisance and negligence suits have been used particularly to enforce environmental issues. Public nuisance suits can be used to deter acts, which materially affect the reasonable comfort and convenience of life of a class of the society.[117] In *Pacific Engineering v Haji Ahmad Rice Mill*,[118] a case based on public nuisance, the Court held that the *padi* husks from the defendant's factory, which blew into the plaintiff's premises amounted to personal discomfort and injury to property and satisfied the requirement of 'special damage'. In addition, a private nuisance suit could be used when there is interference with the use, comfort or enjoyment of land through emission of deleterious substances or things such as smoke, odours or noise.[119] In *Woon Tan Kan (deceased) & 7 Ors v Asian Rare Earth Sdn. Bhd.*, the plaintiffs were residents of Bukit Merah village and they sued the defendants for an injunction to restrain the defendant company from and continuing to operate its factory. The plaintiffs alleged that the factory produced dangerous radioactive gases harmful to the residents of Bukit Merah. The Courts held that the plaintiffs' health was being affected harmfully, insidiously, significantly and to a substantial degree and this constituted substantial interference which damage is presumed.

The law of negligence could also be used, provided that the elements of negligence are proved. In *Arab-Malaysian Finance Bhd. v Steven Phoa Cheng Loon & Ors*,[120] the Courts held that a local authority in directing the carrying out of work on a piece of land, which directly resulted in the natural course of a stream being diverted owed a duty to neighbouring landowners. In *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn. Bhd.*,[121] the plaintiffs were apartment owners of Highland Towers. They had to evacuate their apartments for fear of instability of the buildings when Block 1 collapsed in which 48 persons died. The plaintiffs sued 10 defendants in negligence, nuisance and liability for causing and contributing to the collapse of Block 1. The Courts held that pure economic loss was recoverable.

116 Malaysian Anti-Corruption Commission, *Annual Report 2010*, 37 – 38.

117 *Majllis Perbandaran Pulau Pinang v Boey Siew Than & Ors* [1978] 2 MLJ 156; a person has to prove special damage and injury over and above the ordinary inconvenience suffered by the public at large – the type or extent of the damage is more serious; the damage must be a direct consequence and is substantial.

118 [1966] 2 MLJ 142.

119 *Majllis Perbandaran Pulau Pinang v Boey Siew Than & Ors* [1978] 2 MLJ 156.

120 [2003] 2 AMR 6, CA.

121 [2000] 3 AMR 3567.

2.3. To what extent, how, and by whom have the laws and/or regulations identified in Question 2.2 above been enforced by the State?

The laws and regulations identified in section 2.2 above are enforced by different government agencies, the specific details of which are below. It must be noted at the outset that even though there are separate government agencies or statutory bodies tasked to ensure the implementation of the laws and regulations, ultimately, prosecution of violations of these laws and regulations, rests with the Public Prosecutor. The Public Prosecutor either directly prosecutes offenders or gives its consent to the prosecution of violations.

Also, because the laws and regulations cited in section 2.2 above are not specifically targeted at business enterprises but rather laws and regulations that prohibit any person, including corporations from causing or contributing human rights abuses, the data obtained from these enforcement agencies are not disaggregated. At best, these statistics can be an indicator as to the number of prosecutions against companies for their breach of the law or regulations.

Environmental rights

Environment laws and regulations are enforced by the DOE. According to the DOE Annual Report 2010,[122] a total of 1,066 offences were prosecuted under the EQA 1974 and fines totalling RM 5,201,100.00 were imposed. Out of this total, 668 (62.7 per cent) cases involved offences from motor vehicles emissions exceeding the stipulated standard under section 22(1) of the EQA 1974 and fines totalling RM 766,050.00. There were 206 (19.3 per cent) cases involved in effluent discharges exceeding the stipulated standard under section 25(1) of the EQA 1974, and fines totalling RM2,839,000. Apart from that, 102 (9.6 per cent) cases were involved in violating conditions of licences under section 16 and fined RM917,000.00 while the remaining 90 (8.4 per cent) cases were prosecuted for other offences under the EQA 1974.

Also, the DOE Annual Report 2010 states that a total of 5,854 compounds were issued in 2010 against premises and companies for various offences under the EQA 1974. Out of this total, 3,020 (51.6 per cent) were offences under Environmental Quality (Control of Emission from Diesel Engine) Regulations, 1996, 1,569 (26.8 per cent) were offences under Environmental Quality (Scheduled Wastes) Regulations, 2005, 401 (6.9 per cent) were offences under Environmental Quality (Control of Emission from Petrol Engine) Regulations, 1996, 419 (7.2 per cent) were offences under Environmental Quality (Clean Air) Regulations, 1978 and 333 (5.7 per cent) were offences under section 29A of the EQA 1974.

In 2011, a total of 811 Court cases were filed for offences committed under the EQA 1974; of the 811 Court cases, 114 cases concern either premises operating without licences or operating in contravention of terms of license; 539 cases relate to air pollution – opening burning, black smoke emission from diesel engines or from premises; and 95 cases concern water pollution, i.e., the discharge of effluent greater than the specific standard.[123]

Despite the number of laws and regulations on environmental protection, the number of prosecutions of violations of the EQA 1974 and the mandatory requirement for an EIA report for certain activities, implementation remains weak and indiscriminate as enforcements of violations of the EQA 1974 inconsistent and the and the veracity of EIA reports are sometimes questioned. Even the Malaysian officials contend that regulations and standards are in place (including guidelines), but that awareness and implementation of these regulations and standards may not be adequately

122 The DOE Annual Report 2010 is the most recent report available on the DOE's website.

123 http://www.doe.gov.my

widespread.[124] This has impacted negatively on the environment and rights of indigenous people.

The residents in the area of Gebeng, Kuantan filed a judicial review action challenging the decision of the Atomic Energy Licensing Board (AELB) to grant a temporary operating licence (TOL) to Lynas Advanced Materials Plant to construct a plant to process raw materials for lanthanide concentrates to extract rare earth; residents were living between two and 20 kilometres from the said plant. The Kuala Lumpur High Court rejected the leave for a judicial review stating that the judicial review application was premature in view that there was a pending appeal to the Minister of Science,

Technology and Innovation on the same issues.[125] A number of protests throughout the nation were organised opposing the Lynas project. Recently, the Parliamentary Select Committee on the Lynas Advanced Materials Plants issued its report, giving its approval for the company to be awarded a TOL as it found that the Lynas project complied with standards and laws in Malaysia, that it had in place a system that ensured public safety and environmental protection and that the radiation exposure from the plant was low and safe; the Parliamentary Select Committee also made 31 recommendations concerning the safe and transparent running of the plan, *inter alia*, the establishment of a monitoring committee to look into the operations at the plant, an environmental audit be conducted every six months, a baseline health study be carried out on the number of related diseases such as leukaemia, cancer, congenital malformation, asthma and upper respiratory tract infection and that one per cent of its gross annual sales of the company be set aside for research and development, half of which should go towards research on residue management.[126]

The building of the *Murum* dam in the state of Sarawak was halted pending verification from the authorities that the land has been designated for the *Penan* people (indigenous tribe).[127] Also, five indigenous *Penan* communities of Sarawak sued the Sarawak state government and three timber conglomerates. The *Penans* claimed that they and their ancestors have been using claimed rainforests and have settled in those locations. The *Penans* further alleged that various logging operators have wrongfully trespassed onto their ancestral land and have destroyed a substantial area of their forest, fruit trees, crops and cultural heritage, such as graves and historical sites.[128]

Also, the construction of 12 hydroelectric dams in the state of Sarawak attracted strong opposition from the citizens of Sarawak, environmental groups and indigenous human rights organisations. The opposition is mainly against displacement of indigenous people (one dam has already displaced 10,000 indigenous people).

Environmental groups claim that the influx of smelters and refiners will generate a lot of waste and pollution.[129]

Some have claimed that the mandatory requirement for EIA reports has been circumvented in certain instances; the Auditor-General's Report of Sarawak

124 APEC, *APEC Malaysia Environmental Industry 2010 Case Study,* 7, available at http://egs.apec.org/uploads/docs/final_malaysia_egs_case_study.pdf

125 *Zakaria bin Abdullah & 9 Others v Atomic Energy Licensing Board & 2 Ors* (Kuala Lumpur High Court R1-25-35-02/2012), *Permohonan Untuk Semakan Kehakiman* No: R2-25-35-02/2012; see also S. Pathmawathy, "Court rejects judicial review bid by Gebeng residents," *Malaysiakini.com,* April 12, 2012, http://www.malaysiakini.com/news/194827

126 "Lynas plant gets green light," *The Star ePaper*, June 20, 2012, http://thestar.com.my/news/story.asp?file=/2012/6/20/nation/11503610&sec=nation

127 "Victory for Borneo tribe over oil palm Goliath", *Survival,* July 14, 2011, http://www.survivalinternational.org/news

128 "Penan sue Sarawak government over logging plantations," *Bruno Manser Fonds*, December 10, 2009, http://www.bmf.ch/en/news/?show=185

129 Kara Moses, "Power, profit, and pollution: dams and the uncertain future of Sarawak," *Mongabay.com*, September 3, 2009, http://news.mongabay.com

2008[130] noted that, between 2006 and 2008, the Sarawak Forestry Corporation had issued 79 Permit To Enter Coupe (PEC) for re-logged areas. Of this, 49 PEC were licenced areas of less than 500 hectares[131] and 30 PEC more than 500 hectares. Even so, among the 30 PEC, the Auditors could not confirm if EIA studies were conducted prior to the licence holders commencing re-logging activities because there were no records of their EIA reports being submitted to the NREB for the period between 2006 and 2008.[132]

The Auditor-General's Report of Sarawak further showed that out of the randomly audited 178 PEC in the Forest Department in Sibu, Bintulu and Miri districts, an EIA was demanded in 117 PEC whereas the remaining 61 PEC avoided the process by being less than 500 hectares. Of the 117 PEC in question, only 17 EIA reports were given approval for the Forest Department to grant the timber licence for coupe area over 500 hectares. Another 19 of the total 117 PEC were randomly audited whereby it was found that four licence holders – two in Miri and two in Bintulu - in fact had logging coupes into blocks of less than 500 hectares to avoid submitting an EIA report, although the extent of the areas totalled 5,762 hectares.[133] Concerns have been raised of the possibility of companies breaking up logging coupes into blocks less than 500 hectares (each operating under a different subsidiary company) to avoid having to conduct an EIA each and operate them under different subsidiary companies.[134]

Anti-corruption

The MACC looks at the investigation and prosecution of offences under the MACC Act 2009 and other relevant offences in the Penal Code. In the year 2010, the MACC arrested 944 individuals compared to the 500 individuals from the previous year, an increase of 88.8 per cent. From this total, 293 were public officials, 102 individuals were from the private sector and four political party members.

A total of 380 individuals were arrested for the offence of receiving gratification and 430 individuals were arrested for giving bribe; 84 individuals were arrested on account of giving bribe; four individuals were caught for money laundering offences and 45 individuals were caught in 2010 for committing other offences, such as offences under the Election Offences Act 1954 (Act 5) and the Penal Code.

In 2010, 381 individuals were charged in Court, of which 56 individuals were from the private sector. A total of 811 cases were tried at the Subordinate Courts and 309 defendants were convicted. In the same year, 769 appeal cases were heard by the High Court and the Court of Appeal where 144 convictions were upheld. A total of RM497,250 worth of property was seized from the trials relating to forfeiture of property. [135]

Since its inception, the credibility of the MACC continues to be criticised; in July 2009, a political aide of a State Assemblyman was found dead at the MACC office, hours after he was interrogated by MACC officers; in April 2011, a customs officer was found dead after falling from the third floor of the MACC office, after he was investigated for being involved in a corruption case involving 62 customs officers. In addition, the MACC was criticised for

130 Activity of Ministry/Department/Agency and Sarawak State Government Corporation, Auditor-General's Report 2008, 81. Original report in Malay [*Laporan Ketua Audit Negara, Aktiviti Kementerian/Jabatan/Agensi Dan Pengurusan Syarikat Kerajaan Negeri Sarawak, Tahun 2008, Jabatan Audit Negara, Malaysia*], available at http://www.audit. gov.my/ filename Sarawak2008. pdf

131 The First Schedule of the Natural Resources and Environment (Prescribed Activities) Order 1994, states that logging activity will require mandatory EIA only if it is going to fall into areas exceeding 500 hectares.

132 Carol Yong, "Logging in Sarawak and the Rights of Sarawak's Indigenous Communities," *JOANGOHUTAN* , April 2010, available at http://www.bmf.ch/files/news/Logging_in_Sarawak_JOANGOHUTAN_report.pdf

133 Ibid.

134 "Modern Forest And Land Legislation And Native Customary Rights In Sarawak: Briefing Paper II," *Sahabat Alam*, January 15, 2007, http://indigenouspeoplesissues.com

135 Malaysia Anti-Corruption Commission, *Annual Report 2010*, 47 - 58.

ordering two lawyers for questioning because they had acted as legal counsel for a person being investigated by the MACC.[136]

Companies and businesses

The CCM is the regulatory body which oversees the conduct of all companies and businesses, particularly their compliance with the Companies Act 1965 and the Registration of Businesses Act 1965 (ROBA) In the year 2010, the CCM received 1,604 complaints, of which 400 were fraud cases committed by companies and 155 cases of fraud by businesses. CCM also received 60 cases of improper conduct of directors.

In 2010, a total of 497 cases were investigated for various offences under the Companies Act 1965 and the ROBA. Of the total, the majority (30.38 per cent) of the alleged offences were in relation to breach of section 364(2) of Companies Act 1965 whereby false and misleading statements were submitted to CCM. This was followed by breach of section 125(1) of Companies Act 1965 where undischarged bankrupts were serving as directors of companies, accounting for 26.36 per cent of the cases while offences under section 132 constituted 13.28 per cent of the overall investigations.

In 2010, CCM prosecuted a total of 7,552 cases under various Acts administered by CCM. The CCM also initiated nine criminal prosecutions against company directors for contravening section 132 of the Companies Act 1965;[137] of the nine cases prosecuted, CCM obtained two convictions.[138] The Prosecution Section also took other proactive measures to monitor convicted directors in Malaysia. This was done through the regular monitoring of the 'Delinquent Directors Register' (DDR) system. The DDR is a database which records, stores and maintains information on directors who have been convicted under the Companies Act 1965.[139]

3. Is the State periodically assessing the adequacy of the laws and/or regulations identified in Question 2 above, and addressing any gaps?

Within the Attorney-General's Chambers, the Law Revision and Law Reform Division is tasked with the responsibility of ensuring that Malaysian laws are up to date, accurate and in tandem with current needs.[140] According to the Attorney-General's Annual Report 2010, it has reviewed or is reviewing laws such as the Industrial Designs Act 1996, Law Reform (Marriage and Divorce) Act 1976, Aboriginal Peoples Act 1974, and highlighted the need to formulate laws regarding mediation and protection of whistle-blowers.[141] Thus far, no mention has been made (in the Annual Report 2010) with regard to promulgating laws in the area of human rights and business.

4. Is the State using corporate governance measures to require or encourage respect for human rights?

The government's efforts in the area of corporate governance measures are concentrated in the capital market. The Ministry of Finance, as the head of the Securities Commission of Malaysia and the *Bursa*

136 Press Release: MACC's demand to question lawyers accompanying witnesses is tantamount to intimidation of lawyers, *The Malaysian Bar*, http://www.malaysianbar.org.my

137 Section 132(1)A of the Companies Act 1965 states that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

138 Companies Commission of Malaysia, *Report on Enforcement Initiative 2010*, 69, available at http://eaduan.ssm.com.my/AR2010/Eng_Web/report%20enforcement.pdf

139 Companies Commission of Malaysia, Annual Report 2010, available at http://www.ssm.com.my/sites/default/files/annual_report/SSM%20Annual%20Report%202010.pdf

140 The Attorney General's Chamber of Malaysia, *Objective of Law Revision and Law Reform Division*, available at *http://www.agc.gov.my/index.php?option=com_content&view=article&id=49&Itemid=117&lang=en*

141 The Whistleblower Protection Act 2010 was promulgated and came into effect on 15 December 2010.

Malaysia (Stock Exchange of Malaysia),[142] and the Putrajaya Committee on GLC High Performance to transform Government Linked Corporations (GLCs) launched the CSR Framework, the Malaysian Code on Corporate Governance (MCCG 2012) and the Silver Book, respectively.

It appears that the contents of the MCCG 2012, the Silver Book and the Bursa CSR Framework does not demonstrate a clear link to human rights, which could be a reflection of the general restrained approach of the government towards human rights. There is no meaningful rights language used to encourage directors or businesses to take into account their human rights impact. Rather, the MCCG 2012, Silver Book and the *Bursa* CSR Framework, particularly the Silver Book and the MCCG 2012, contain broad principles on corporate governance for corporations; the *Bursa* CSR Framework provides more detailed guidance, including pertinent questions that should be considered by listed companies. The principles and recommendations set out in these three documents deal mainly with building a strong foundation for the board of directors and its committees to carry out their roles effectively, promote integrity of financial information and importance of risk management and internal controls.

The Silver Book, which was launched as part of the GLC Transformation Programme,[143] contains three principles to guide GLCs – 1) GLCs primary objective should be to enhance shareholder returns; 2) GLCs should proactively contribute to society in ways that create value for shareholders; 3) GLCs should actively manage their contributions to society efficiently and effectively.[144]

The *Bursa* Malaysia CSR Framework looks at four main focal areas - the environment, the workplace, the community and the marketplace. Listed companies are now required to submit reports detailing compliance with the said code (see section 4.3 below). As there is no guidance as to the content of corporate social responsibility activities, most listed companies list philanthropic activities such as scholarships and fund-raising events.

The Securities Commission MCCG 2012, which is part of a five-year Corporate Governance Blueprint (Blueprint) will come into effect on 31 December 2012 and listed companies will then be required to report on their compliance with the principles and recommendations of the MCCG 2012 in their annual reports. The MCCG 2012 focuses on six principles and recommendations – 1) establish clear roles and responsibilities; 2) strengthen composition; 3) reinforce independence; 4) foster commitment; 5) uphold integrity in financial reporting; 6) recognise and manage risks; 7) ensure timely and high quality disclosure; 8) strengthen relationship between company and shareholders.

The aforementioned three instruments contain broad statements of social benefit. For example, the Silver Book encourages GLCs to ensure that activities that benefit to society become an integral component of a company's business. The statements in the Silver Book could be elaborated to include concrete and practical policies and guidelines GLCs could adopt to ensure respect for human rights as part of its benefit to society. Also, environmental sustainability seems to be the most developed area - both the *Bursa* CSR Framework and the MCCG 2012 encourage companies to ensure environmental sustainability. In addition to the above, awards for good practices have been

142 The Bursa Malaysia is an exchange holding company approved under Section 15 of the Capital Markets and Services Act 2007; The Securities Commission is the regulatory oversight body that supervises and monitors Bursa Malaysia with regards to its listing, trading, clearing, settlement and depository operations to ensure Bursa Malaysia performs its regulatory duties and obligations in an effective manner.

143 See *Putrajaya Committee on Government-linked Companies*, http://www.pcg.gov.my/about_us_overview.asp

144 Putrajaya Committee on Government-linked Companies, *The Silver Book: Achieving Value Through Social Responsibility*, Malaysia, 2012

created to raise awareness on corporate governance and corporate social responsibility; the awards include the Prime Minister's CSR Award, the ACCA Malaysia Sustainability Reporting Awards, Ansted Social Responsibility International Award (ASRIA) and the StarBiz-ICR Malaysia CR Awards.[145]

The Silver Book, MCCG 2012 and the *Bursa* Malaysia CSR Framework applies only to GLCs (Silver Book)[146] and public listed companies only (MCCG 2012 and the *Bursa* Malaysia CSR Framework), respectively. There is no explicit mention of its application to business enterprise abroad or subsidiaries abroad; a plain reading of the text would presume that the content of these three instruments would apply to activities of GLCs and public listed companies and their subsidiaries abroad.

Seeing the progress made since 2007 in terms of development of the CSR Framework and the MCCG 2012, it is opined that the MCCG 2012 and the *Bursa* CSR Framework could be developed further with stronger links with human rights principles, particularly in the area of environmental sustainability.

The government has taken cognisance of the importance of socially responsible indices and have made reference to international socially responsible indices such as the Dow Jones Social Index, the FTSE4Good and the Jantz Social Index; the (then) Minister of Finance alluded to the positive correlation between companies that have sound corporate social responsibility practices and their share price performance when the said Minister launched the *Bursa* Malaysia's CSR Framework in 2006.[147] In addition, the *Bursa* Malaysia chief regulatory officer stated that *Bursa* Malaysia intends to launch its environmental, social and corporate governance (ESG) index by 2012; the ESG index will not be mandatory for public listed companies but it is merely to encourage listed companies to enhance their corporate governance and business sustainability practices.[148]

The private sector has embarked on creating a Socially Responsible Investment index. OWW, a consulting firm, formulated an index of companies with corporate social responsibility programmes; the 100 most valuable companies listed on *Bursa* Malaysia are given scores for engagement in relation to different dimensions of corporate social responsibility, corporate governance and respect of human rights.[149]

4.1. Is the State requiring or encouraging directors of business enterprises to exercise due diligence in ensuring that their business enterprises respect human rights?

It is not evident from the Companies Act 1965, the MCCG 2012, the Silver Book and the *Bursa* CSR Framework, that the State is requiring or encouraging corporations to exercise due diligence in ensuring that their business enterprises respect human rights. All the Companies Act 1965 require from directors is to not to do anything, which may harm the business enterprise. Given that human rights abuses may result in reputational damage as well as financial liability, directors may be required to refrain from running the business enterprise in a manner that could result in human rights abuses, and their directors' duties may require them to take

145 CSR WeltWeit, *The Role of CSR in Malaysia*, available at http://www.csr-weltweit.de/en/laenderprofile/profil/malaysia/index.html

146 The Silver Book states that it is relevant to the government, government linked investment companies, board of directors, management and staff.

147 Tan Sri Nor Mohamed Yaakob, "Launch of Bursa Malaysia's CSR Framework for PLCs in Conjunction with the Rat Race 2006", 5 September 2006, http://www.treasury.gov.my

148 Eugene Mahalingam, "Index set to draw socially responsible funds", *The Star*, 25 December 2010, http://www.biz.thestar.com.my

149 OWW Consulting, *Socially Responsible Investment Index*, available at http://www.oww-consulting.com

into consideration the business enterprises' impacts on non-shareholders.

4.1.1. What are the general legal due diligence obligations that directors have to comply with?

The general due diligence obligations that company directors have to comply with include:

(a) Fiduciary duty[150]

Fiduciary duties are owed individually by each director. There are four major facets of a director's fiduciary duties - **the duty to act in good faith; the duty to exercise power for a proper purpose; the duty to exercise discretion properly; and the duty to avoid conflict and self-dealing.** The duty to act in good faith means that directors must act honestly in line with what they believe to be the company's interests; the duty to exercise powers for proper purpose requires a director to act in the company's best interest, including shareholders' interests; the duty to exercise discretion properly means a director should not fetter these powers by abdicating an independent exercise of such discretion and merely doing what is wanted by another person; the duty to avoid conflict and self-dealing prohibits directors from improperly using a company's property, position, corporate opportunity or competing with the company by a director or an officer of a company.

Making improper use of information. Directors are also required to use information properly. Any improper use of information, such as insider trading and securities market misconduct that are prescribed in the Capital Markets and Services Act 2007 (CMSA), which prohibits trading in corporate securities where there is price sensitive information that has not been made available in the public domain, are prohibited. Directors are also not allowed to conduct false trading and market rigging transactions, manipulations, making false or misleading statements, fraudulent inducement of persons dealing in securities and the use of manipulative and deceptive devices.

Secret profit. A director who makes a 'secret profit' is liable to account for it to the company. No one in a role that requires him to act in good faith may enter into an arrangement or have a personal interest which conflicts with the interests of those he is bound to protect**.**

Contracts with the company. Directors are permitted to deal with the company on the condition that full disclosure is made to the company and shareholder approval is procured where required under the Companies Act 1965 or the Listing Requirements. The Companies Act 1965 and the Listing Requirements also provide specific criteria and thresholds which, when triggered, will require the consent of shareholders at a general meeting.

Duty of disclosure. A director's obligation to disclose an interest related to a contract or proposed contract now includes the interest of the spouse and child (including adopted or step child) of the director. A company is required to keep a register showing the particulars of each director's shareholdings and any other interests.[151]

Duty to refrain from participation and voting. A director who is directly or indirectly interested in a contract or proposed contract is not allowed to participate in any discussion of consideration of the contract, or vote at the board meeting on the contract or proposed contract.

Duty to ensure integrity of financial information. Every company and director have the legal responsibility to keep such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached

150 Companies Act 1965, Section 132(1) and section 132(2); Capital Markets and Services Act 2007, sections 175, 176, 177, 178 and 179.

151 Companies Act 1965, Sections 131(7A) and 134.

thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.[152]

Duty to ensure compliance with the Listing Requirements by directors and its listed issuer. Directors of companies listed on the Official List of *Bursa* Malaysia are required to comply with the Listing Requirements. A listed company's failure to comply with the Listing Requirements will amount to a breach in respect of which actions may be taken and/or penalties may be imposed not only against the listed company but also the directors, officers and advisers of the company.

(b) Duty to use reasonable care, skill and diligence
A director is required to exercise reasonable care, skill and diligence' according to the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and based on the facts, any additional knowledge, skill and experience which the director in fact has. Therefore, the standard in deciding whether a director has exercised 'reasonable care, skill and diligence' is an objective one, although a Court will consider the particular characteristics of the director in question. The *Bursa* Malaysia has issued a Guideline for Discharging Duty of Care, Skill and Diligence. The said guideline states that directors ought to ensure, amongst others, that the company has established an effective governance system and process; refrain from rushing into decision-making; make informed decisions based on the information provided and analysis and recommendations of the company's independent professional advisers; and periodically test internal control and risk assessment systems set-up for integrity and soundness.

152 In addition, under the Listing Requirements, companies are required to issue accurate financial statements within the prescribed timeframes.

4.1.2. Do directors have specific legal obligations to consider their business enterprises' human rights impacts in carrying out their duties?

The duties and obligations of directors are provided in the Companies Act 1965 and there is no provision, which specifically includes a duty to consider the company's impacts on human rights.

Having said that, the law regarding the standard of care required by directors has been further refined and a new standard called the business judgement rule of "proper purpose" has been introduced; this could be used by the Courts to impose a legal obligation on directors to consider human rights impacts of the company business or activities. The former (refined standard of care) was introduced where by way of section 132(1A); directors of a company are now subject to an objective standard and a subjective standard of care. This is in contrast to the status prior to the amendment where directors were merely required to use reasonable diligence in the discharge of his duties.[153] Section 132(1A) of the Companies Act 1965 states that a director of a company shall exercise "reasonable care, skill and diligence with the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and any additional knowledge, skill and experience which the director in fact has".

Additionally, the 2007 amendments to the Company Act 1965 introduced the business judgement rule (section 180(2B)) where a director who makes a business judgement is deemed to meet the requirements of the duty if the director makes the business judgement in good faith for a proper purpose, does not have material personal interest in the subject matter, is informed about the subject matter and reasonably believes that the business judgement is in the best interest of the company. It

153 Sujata Balan, "Reform of the Law Relating to Directors' Duties in Malaysia," *SEGi Review*, 4/1, (2011), 9 - 10.

remains to be seen whether the Courts will examine a director's business judgement where a director has made a grave error in their decision making process, raising doubts as to his or her good faith.[154]

4.1.3. Do directors have specific legal obligations to take into account the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad (supply chain)?

See section 4.1.2 above.

4.1.4. Have any of the directors' duties identified above been enforced by the State in relation to business-related human rights abuses?

No, save for prosecutions of directors for violations of obligations set out in the Companies Act 1965, there has been no specific enforcement by the State of business-related human rights abuses.

4.1.5. Has the State provided non-binding guidelines encouraging directors to take into account (a) their businesses' human rights impacts in carrying out their duties, and/or (b) the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad (supply chain)?

The closest initiative by the State in providing guidelines encouraging directors to take into account their businesses' human rights is the *Bursa* Malaysia Corporate Governance Guide and the Silver Book issued by the Putrajaya Committee on High Performance GLC. These two non-binding guidelines encourage directors to take into account social impacts of their businesses, including their subsidiary companies.

The Corporate Governance Guide by *Bursa* Malaysia is designed to help directors understand their role and duties to the company and its stakeholders. Its primary objective is to enhance professionalism in boards and their committees by providing suggestions on how to fulfill the governance obligations of companies listed on *Bursa* Malaysia; and practical examples of how the principles and best practices of corporate governance can be implemented.[155] Specifically, the *Bursa* Malaysia Corporate Governance Guide encourages the Board of Directors to have knowledge of potentially unethical and legal issues that adversely impact the company and to monitor ethical and compliance obligations. It further encourages Board of Directors to formulate a code of ethics that spells out the company's values and principles and that makes transparent the value framework within which the company pursues its business objectives. The *Bursa* Malaysia Corporate Governance Guide goes further to spell out that the code of ethics should contain clear rules about how employees of the company should behave towards each other, agreement on how the company should treat is people.

The said Guide also includes a chapter on corporate social responsibility, which encourages directors to consider producing sustainability reports that addresses issues such as community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association, and fair trade. The Corporate Governance Guide applies only to listed companies.

As regards risks, the Corporate Governance Guide by *Bursa* Malaysia urges the Board of Directors to focus on the company's principal risks and to ensure

154 Ibid., 14 - 15.

155 Bursa Malaysia, *Corporate Governance Guide - Towards Boardroom Excellence*, 2009, available at http://www.bursamalaysia.com/website/bm/regulation/corporate_governance/downloads/CG_Guide.pdf

the implementation of appropriate systems to identify and manage risks that threaten the business. This should encompass financial, operational and compliance risks.

The said Guide provides examples of risks indicators and of significance to this research is that it points out that risks should not be seen solely related to finance.

Most of the provisions regarding fiduciary duties of directors relate to ensuring financial reporting integrity and the requirement to establish an audit committee tasks to oversee the financial reporting process. This includes urging the directors to focus on changes in or implementation of major accounting policy changes, significant and unusual events and compliance with accounting standards and other legal requirements.

The Silver Book contains a section aimed at the Chief Executive Officer and Board of Directors on how to implement the recommendations in the Silver Book, which could be relevant to the correlation between human rights and business. Amongst others, the ensure the implementation of the Silver Book, it calls upon the CEO to appoint a project champion and cross-functional taskforce to execute the action steps in the Silver Book, assess and develop a transformation plan outlining key areas of focus and implementation targets and milestones. Also, the Board of Directors is encouraged to adopt the Silver Book as the company's primary reference for all contributions to society.[156]

4.2 Does the State require or encourage business enterprises to communicate their human rights impacts, as well as any action taken to address those impacts?

There is no requirement by the State for enterprises to communicate their human rights impacts, save for reporting requirements set out in the Companies Act 1965, Listing Rules and the EIA report (see section 2.2 above and section 4.3 below).

4.3. s/are the country's stock exchange regulator(s) taking steps to require or encourage business enterprises listed on the stock exchange to respect human rights? If so, what are these steps?

There are no apparent steps, guidelines or codes by *Bursa* Malaysia and the Securities Commission to encourage or require listed companies to respect human rights. However, both bodies have taken steps towards raising awareness on the social impact of business activities amongst public listed companies.

With effect from 31 December 2007, *Bursa* Malaysia requires all public listed companies to disclose corporate social responsibility activities and practices and activities undertaken by them and their subsidiaries and if there are none, a statement to that effect (CSR Statement).[157] The *Bursa* Malaysia also encourages public listed companies to adopt open and transparent business practices that are based on ethical values and respect for the community, employees, the environment, shareholders and other stakeholders.[158] These requirements, to a certain extent, reflect human rights issues.

However, there is no guidance as to the content of the CSR Statement in the annual report, with no mention of any need to include human rights impact of businesses. As such, the content of the CSR Statement varies. What is observed is that multinational or subsidiary companies whose parent company is outside Malaysia, have a more detailed section on corporate social responsibility

156 PCG, *The Silver Book: Achieving Value Through Social Responsibility*, 8.

157 Bursa Malaysia Main Market Listing Requirements, Chapter 9, section 9.25 read with Appendix 9C, Part A, sub-paragraph 29.

158 Bursa Malaysia, *CSR Framework*, 2006, available at http://www.csr-weltweit.de/uploads/tx_jpdownloads/Boerse_Malaysia.pdf

activities. For example, the corporate social responsibility section for Nestlé Malaysia Berhad includes committed adherence to the Nestlé Supplier Code and the Company Standing Instruction of Procurement of Services with the objectives to engage good quality service providers to protect Nestlé's customer service and competitive and transparent bidding process to deliver competitive pricing. In addition, Nestlé Malaysia Berhad's Creating Shared Value report 2011 outlines its efforts to ensure sustainable development, such as the use of environment-friendly microbial supplements that minimises rice farming's environmental footprint whilst achieving increase in participating farmers' real income through yield improvement and cost reduction.

Some annual reports of Malaysian listed companies tend to narrate activities that are charitable in nature, such as educational programmes for under privileged students, consumer awareness programmes, distribution of food aid to hardcore poor families, provision of free health education for students and community in rural areas, and contributions to orphanages during festivals.

5. Has the State adopted other non-binding measures to foster corporate cultures respectful of human rights?

5.1. Is the State implementing any non-binding initiatives requiring or encouraging business enterprises to respect human rights?

To encourage business enterprises to respect human rights, the State has provided tax and financial incentives to companies and organisations.

Specifically on the environment, as part of the National Green Technology policy, the government provides financial incentives including giving companies a two percent interest rate discount (which will be borne by the government) to encourage companies produce or use green technology. Also, the government will also guarantee 60 percent of the financing amount via Credit Guarantee Corporation Malaysia Berhad (CGC) whilst the participating financial institutions will bear the remaining 40 percent financing risk.[159]

As regards tax incentives, the tax incentives are given to encourage the respect of the following human rights:

Labour rights

- Companies that provide safety training programmes and organises such training for non-employees are entitled to a single tax deduction.[160]

Rights of persons with disabilities

- Companies setting-up and managing a school for children with learning disabilities will qualify for tax exemption;[161]
- Companies employing persons with disabilities qualify for double tax deduction on remuneration paid for the said employment;[162]
- Expenditure incurred by companies and business on the provision of any equipment necessary to assist any person with disabilities employed is eligible to a single tax deduction.[163]

Environmental rights

- Organizations implementing processes to manage the recycling of its waste is eligible for claiming its six-year capital allowance within a two-year period;[164]

159 The Green Technology Financing Scheme, available at http://www.gtfs.my/
160 Income Tax Act 1967, Section 34(6) (n).
161 P.U. (A) 247/2008 Income Tax (Exemption) (No.5) Order 2008.
162 P.U. (A) 73/1982 – Income Tax (Deductions for the Employment of Disabled Persons) Rules 1982.
163 Income Tax Act 1967, Section 34(6)(e).
164 Income Tax (Accelerated Capital Allowances) (Recycling of Wastes) Rules 2000.

- Companies, which incur high capital expenditure in installing its own water chilling plant to recycle its water to produce electricity, generation of energy using biomass and other sources of renewable energy or conservation of energy for own consumption, will be given Pioneer status with tax incentives;[165]
- Companies or individuals acquiring property with Green Building Index (GBI) certification[166] is entitled to exemption of stamp duty;[167]
- Expenditure incurred for the provision of services, public amenities pertaining to conservation or preservation of the environment, incurred by companies or individuals can qualify for a single tax deduction;[168]
- Tax exemption for income derived from trading of Certified emission Reductions certifications;[169]
- Accelerated capital allowances for recycling of wastes and renewal energy.[170]

5.2. Is the State providing guidance to business enterprises on how to respect human rights throughout their operations?

As said above, the State has not provided any guidance to business enterprises on how to respect human rights throughout their operations; at best the State provides guidance on implementation of corporate governance and corporate social responsibility where references and issues pertaining to human rights are mentioned.

Guidance materials such as the Securities Commission's MCCG 2012, the *Bursa* Malaysia Corporate Governance Guide and the Silver Book, contain references to human rights issues. These manuals are designed to help companies develop meaningful corporate social responsibility agendas, policies and initiatives. (see sections 4, 4.1, and 4.1.5 above).

A number of industries have adopted specific frameworks to assist them in meeting sustainability challenges unique to the nature of its operations. Industries such as the palm oil, oil and gas, cement and financial services have all adopted voluntary framework or agreements, which contain best practices, performance indicators, practice guidelines and benchmarks. The respective government agencies have lent their support by attending roundtable discussions.[171]

6. Is the State taking steps to require or encourage business respect for human rights in its own relationships and dealings with businesses?

To ensure protection of the environment, the government requires individuals and business enterprises carrying out activities involving agriculture, airports, drainage and irrigation, land reclamation, housing, industry, infrastructure, ports, mining, petroleum, power generation and transmission, quarries, waste treatment and disposal and water supply to submit an EIA.[172] (see above)

Apart from the aforementioned requirement, there are no known official State guidelines or regulations

165 Promotion of Investments Act 1986.

166 The GBI is a comprehensive rating system designed for Malaysian tropical weather, environmental and development context, to evaluate the environmental design and performance of Malaysian buildings.

167 P.U. (A) 410/2009 Income Tax (Exemption) (No.8) Order 2009.

168 Income Tax Act 1967, Section 34(6)(h).

169 P.U. (A) 378/2008 Income Tax (Exemption) (No.8) Order 2008.

170 Income Tax (Accelerated Capital Allowances) (Recycling of Wastes) Rules 2000; Income Tax (Accelerated Capital Allowances) (Renewable Energy) Rules 2005.

171 See *The Roundtable on Sustainable Palm Oil*, http://www.rspo.org

172 EQA 1974, Section 34A; see also Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (PU (A) 362/1987).

on the issue of human rights in business. However, State officials have made aspirational public statements about corporate social responsibility. The Prime Minister's CSR Awards launched in 2007 by the Ministry of Women, Family and Community Development recognises companies that have actively contributed to communities through their corporate social responsibility programmes in various fields such as workplace practices, the environment, empowerment of women, culture and heritage and education. This reward mechanism depends on entries submitted by the public for consideration of an award, and does not represent a binding overarching State policy with consistent human rights principles on all businesses to adhere to.

Companies that have won the Prime Minister's CSR Awards include the Sunway Group (in 2010), PETRONAS Berhad (in 2009); Digi Telecommunications Sdn. Bhd. (in 2007). The Sunway Group Annual Report 2010 substantially addresses the issue of environment and waste management – the company outlined three targets for its construction division, namely, to achieve zero compound and fine from federal and local authorities, to segregate construction waste at designated areas by type of waste for 3R (Reduce, Reuse and Recycle) and disposal and to improve awareness within the company of good environmental practices.[173]

The annual reports of PETRONAS Berhad touched on its charitable projects and activities such as its outreach programmes for under privileged children, and awareness raising campaign on drug abuse. PETRONAS began issuing sustainability reports in 2007.

Digi Telecommunications started producing Sustainability Reports from 2009. In its 2011 Sustainability Report, Digi highlighted the number of disabled employees it hires, supply chain management which included expected conduct from suppliers and contractors on issues relating to human rights, labour standards including freedom of association and the right to collective bargaining, forced labour, child labour, non-discrimination, as well as prohibited business practices including corruption, gifts, hospitality and expenses, business courtesies, money laundering and competition regulations and laws.[174]

6.1. Does the State require or encourage State-owned or controlled business enterprises to respect human rights?

Whilst there are no specific requirement or encouragement by the State, the Silver Book within the GLC Transformation Manual (see sections 4 and 5.2 above), a manual, which is formulated by the government through the Putrajaya Committee on GLC High Performance, encourages GLCs to include as an integral part of the company's business and operations, activities that will benefit society. This could be interpreted to also include an encouragement to respect human rights. Compliance with the Silver Book is not mandatory.

GLCs are governed either by its own incorporating statutes such as the Petronas Development Act 1974 (which establishes PETRONAS) or incorporation under the Companies Act 1965 and thus subject to the said 1965 Act; examples include Khazanah Nasional.

6.2. Does the State require or encourage businesses that receive substantial support and services from State agencies ("beneficiary enterprises") to respect human rights?

There are no known official State guidelines or regulations on requiring or encouraging businesses that receive substantial support and services from

173 Sunway Holdings Berhad, *Annual Report 2010*, 70 – 79.

174 Digi.com Berhad, *Sustainability Report*, 17 – 21.

State agencies to respect human rights. From our research, there are no official and public records of such instances.

6.3. When services that may impact upon the enjoyment of human rights are privatized, is the State taking steps to ensure that the business enterprises performing these privatized services respect human rights?

Save for prosecution of businesses and companies that violate laws and regulations stated above regarding land, companies and business and the environment, the State is not taking steps to ensure that business enterprises carrying out privatised services respect human rights.

In addition, a large majority of legal documents including agreements of privatisation are not publicly available for scrutiny. As such, it is difficult to ascertain, with some precision, the obligations of the private business enterprises. Such agreements are governed by laws, which are dependant upon the subject matter; for example privatisation of water will be governed by the Water Services Industry Act 2006, which regulates the proper control and regulation of water supply services and sewerage services.

However, since the last General Elections in 2008 where the Federal Opposition coalition formed five State Governments in Selangor, Kelantan, Perak, Kedah and Penang, various statements by the coalition have been made that water, land and waste management issues could have been better handled in accordance with human rights standards by the previous government. The Menteri Besar of Selangor, Tan Sri Khalid Ibrahim stated at the 6th World Water Forum, that water privatisation in Malaysia had failed as it has been used to benefit the rentier class at the expense of consumers. He went further to state that in the state of Selangor, the private concession companies chosen to treat and distribute water were neither skilled nor experienced in the water services industry.[175]

6.4. Does the State require or encourage respect for human rights in carrying out public procurement?

There are no specific official State guidelines or regulations on requiring or encouraging respect for human rights in carrying out public procurement. A majority of State contracts are awarded via direct negotiations and without an open tender system. Further, these contracts are commonly not available for public scrutiny.

Malaysia is not a party to the WTO General Procurement Agreement.[176]

7. Is the State taking steps to support business respect for human rights in conflict-affected and high-risk areas?

7.1. Is the State engaging with business enterprises operating in conflict-affected and high-risk areas in relation to identifying, preventing and mitigating the human rights-related risks of their activities and business relationships?

There is no information that the State identifies, prevents or mitigates human rights-related risks when engaging with business enterprises operating in conflict-affected and high-risk areas. The websites of ministries, laws, regulations and policies of government agencies do not reveal any such measures. Malaysian businesses and companies do carry out businesses in conflict areas such as Iraq,

175 "Khalid: Water privatization a failure," *The Selangor Times,* March 16, 2012, http://www.selangortimes.com/index.php?section=news&permalink=20120316103204-khalid-water-privatisation-a-failure

176 See http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm

Sudan, South Sudan, Myanmar and the Democratic Republic of Congo (DRC).

However, the Ministry of Foreign Affairs' website contains a general statement that the main focus of bilateral diplomacy is, amongst others, promotion of peace and stability.[177] It also includes general support for the Kyoto Protocol and the UN Framework Convention on Climate Change, human rights. The Foreign policy of the government of Malaysia includes efforts to end injustice and oppression and to uphold international law and opposes genocide.

The agreement between the governments of Malaysia and Sudan in 1998, which applies to all investments made in Malaysia and Sudan, does not contain provisions relating to human rights.[178]

It would appear that most Malaysian companies doing business in conflict-affected areas have self-imposed standards regarding business and human rights, without any overt assistance from the government. For example, the website of the Malaysia Smelting Corporation Berhad, a GLC, states that it adopts a policy on conflict minerals in its tin business in the DRC. According to its website, the Malaysia Smelting Corporation recognises the concerns regarding minerals which may fund conflict. It states that it will avoid trade in cassiterite that directly or indirectly finances or benefits armed groups in the DRC and/or adjoining countries, promote ways for legitimate minerals from the region to enter the global supply chain, and promote sustainable development of tin industries in DRC and Rwanda.[179] The same website maintains that the relevant Ministry is kept updated on the various developments in this area since 2009. Malaysia Smelting Corporation Berhad went as far as to issue a statement supporting the ban (by the government of DRC) on exports of mineral which are used to back armed movements.[180]

PETRONAS, a wholly owned corporation of the Malaysian government, carries out exploration and production and downstream business of oil and gas in conflict-affected areas such as Sudan, South Sudan,[181] Myanmar, Iraq and Democratic Republic of Congo.[182] The Petroleum Development Act 1974 does not contain any provisions requiring Petronas to prevent or mitigate human-rights related risks in countries that PETRONAS operate in; although, the PETRONAS Annual Report 2011 iterates PETRONAS' (including companies incorporated in the aforementioned conflict-affected areas) commitment to good corporate governance, transparency, ethical conduct and anti-corruption laws.[183] PETRONAS is a member of the International Petroleum Industry Environmental Conservation Association (IPIECA). While IPIECA is an observer to the Voluntary Principles on Security and Human Rights, attends the annual plenary meeting and launched a new three-year Business and Human Rights Project in June 2011, there appears to be no information found on PETRONAS' involvement in these subject areas, through its membership with IPIECA.

However, allegations against the conduct of business of PETRONAS in Sudan have surfaced; the reports by the European Coalition on Oil in Sudan

177 See http://www.kln.gov.my
178 See http://www.miti.gov.my
179 See http://www.msmelt.com/abt_policy

180 Michael J. Kavanagh, "Malaysia Smelting Backs Congo Government Ban on Tin-Ore Exports from East," *Bloomberg*, September 13, 2010, http://www.bloomberg.com/news/2010-09-13/malaysia-smelting-backs-congo-government-ban-on-tin-ore-exports-from-east.html
181 "Sudan/Malaysia business: Firms sign oil exploration deal," *BBC Monitoring*, March 12, 2011, http://www.memss.org/docs/Petronas.doc
182 PETRONAS, *Annual Report 2011*, 3.
183 PETRONAS, *Annual Report 2011*, 26 - 27.

(ECOS)[184] and Human Rights Watch (HRW)[185] allege that the government of Sudan is directly responsible for forced displacement, which it has undertaken to provide security to the operations of international and mostly foreign state-owned oil companies, including GNPOC (Greater Nile Petroleum Operating Company), a joint venture with, amongst others, PETRONAS. The reports accuse oil companies of inaction in the face of the continued displacement campaign rolling through the oil areas; the oil areas targeted for population clearance are those where a concession has been granted and a pipeline is imminent and/or nearby.

Other allegations include assisted forcible displacement and attacks on civilians, i.e., that it allowed government forces to use the Talisman/ GNPOC airfield and road infrastructure in circumstances in which it knew or should have known that the facilities would be used to conduct further displacement and wage indiscriminate or disproportionate military attacks that struck and/or targeted civilians and civilian objects.[186]

The Annual Reports and the Sustainability Reports of PETRONAS does not contain any statement regarding the aforementioned allegations. In addition, no statements were issued by the government of Malaysia on this effect.

7.2. Is the State providing assistance to business enterprises operating in conflict-affected and high-risk areas to assess and address the heightened risks of human rights abuses, including gender-based and sexual violence?

There is no known official assistance provided by the government of Malaysia to business enterprises operating in conflict-affected and high risk areas to assess and address the heightened risks of human rights abuses, including gender-based and sexual violence.

7.3. Is the State denying access to public support and services for business enterprises operating in conflict-affected and high-risk areas that they are involved with human rights abuses and refuse to cooperate in addressing the situation? Are there laws, regulations and/or policies that have the effect of doing so?

There are no known sanctions on public support and services imposed by the government on Malaysia on any business enterprises operating in Sudan, the Democratic Republic of Congo or any other conflict-affected area. There are also no laws, regulations or policies in Malaysia, which allows the government of Malaysia to impose sanctions on business enterprises operating in conflict-affect and high-risk areas because they are involved with human rights abuses.

There is no information or statement by the government of Malaysia regarding allegations of forcible displacement and attacks on civilians in areas where PETRONAS is operating in Sudan.

184 Diane de Guzman, "Depopulating Sudan's Oil Regions," *European Coalition on Oil in Sudan (ECOS)*, May 14, 2002, http://www.ecosonline.org/reports/2002/%5Eindex.html/depopulatingsudansoilregions.pdf.html

185 Human Rights Watch, "Sudan, Oil and Human Rights," November 25, 2003, available at http://www.hrw.org/reports/2003/11/24/sudan-oil-and-human-rights

186 Ibid., 66.

7.4. Has the State reviewed its policies, legislation, regulations and enforcement measures with a view to determining whether they effectively address the risk of business involvement in human rights abuses in conflict-affected and high-risk areas, and taken steps to address any gaps?

There is no information that the State is reviewing its policies, legislation, regulations and enforcement measures with a view to determining whether they effectively address the risk of business involvement in human rights abuses in conflict-affected and high-risk areas. The review of policies, legislation and regulations are done routinely and not specifically to tighten the State Duty to Protect.

8. Is the State taking steps to ensure coherence in its policies domestically and internationally such that it is able to mplement its international human rights obligations?

Malaysia is a party to CEDAW, the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on Biological Diversity (CBD).

As Malaysia adheres to the dualist system, it requires an Act of Parliament before the rights of these international human rights conventions are directly applicable in Malaysia. No law has been passed to incorporate these three international human rights conventions into domestic law, save for the Child Act 2001, where only parts of the CRC is reflected in the Child Act 2001. It is encouraging that although the Persons with Disabilities Act 2008 does not expressly mention the CRPD, it can be said that the inclusion of the private sector in realising the rights of persons with disabilities in the 2008 Act could have been guided by the obligation to prevent violations of rights of persons with disabilities by third parties in the CRPD.

Whilst there are no structured mechanisms or steps taken to implement these international human rights conventions, the government has taken steps to streamline compliance and implementation in its obligations under international human rights conventions;[187] in 2004, a Cabinet Committee on Gender Equality, chaired by the Prime Minister, was established to enhance the status of women in Malaysia. However, not much information can be derived about the work of the said Cabinet Committee or whether they have worked with the business community.

The National Council for Persons with Disabilities, chaired by the Minister of Women, Family and Community Development is an inter-ministerial body tasked to ensure the development of persons with disabilities. Members of the National Council include representatives from the Ministry of Finance, Ministry of Transport, Ministry of Human Resources, Ministry of Health and Ministry of Education.[188] No information regarding the issues discussed by the National Council for Persons with Disabilities and whether the said Council has interacted with business authorities.

8.1. Is the State taking steps to 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?

Human rights in business does not officially or routinely feature as part of discussions and coordination between governmental departments, agencies and other State-based institutions unless expressly required by Ministers or policy-makers.

187 Malaysia National Report, Universal Periodic Review, Working Group on the Universal Periodic Review Fourth Session, (19 November 2008), Human Rights Council, A/HRC/WG.6/4/MYS/1/Rev.1, para.23.
188 See http://www.jkm.gov.my

8.2. Is the State taking steps to maintain adequate domestic policy space to meet its human rights obligations when concluding economic agreements with other States or business enterprises?

From our research, there are no known official statements or evident steps by the State to meet its human rights obligations when concluding economic agreements with other States or business enterprises. The only indication is in the area of protection of the environment, in particular clean transport equipment, in 2010, the government of Malaysia adjusted its National Automotive Policy, which opened up opportunities for foreign automakers to invest in the production of hybrid and electric vehicles.[189]

Other agreements available for the public are Agreements for Protection of Investment between the government of Malaysia and other countries, which contain general provisions, with no human rights provisions.

It was reported that the Trans-Pacific Partnership negotiations (involving Australia, New Zealand, Vietnam, Singapore, Malaysia, Brunei, Chile, Peru and the United States)[190] will aim to raise international standards in areas like workers' rights, environmental protection and intellectual property rights.[191] The agreement is aimed at establishing a free trade area and to include a fully-fledged investment chapter with high standards for investment liberalisation and protection.[192] It will address, amongst others, new and emerging trade issues and 21st-century challenges in the Asia Pacific Region.[193]

189 UNCTAD, *World Investment Report 2010*, 131, available at http://www.unctad.org/en/docs/wir2010_en.pdf

190 Canada and Mexico have been formally invited to join the negotiations and Japan has also expressed an interest.

191 Mergawati Zulfakar, "All eyes on Miti negotiations," May 25, 2012, *The Star ePaper*, 33.

192 UNCTAD, *World Investment Report 2012*, 84, available at http://www.http://unctad.org/en/docs/wir2011

193 See http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership

8.3. Is the State taking steps to ensure and promote business respect for human rights when acting as members of multilateral institutions that deal with business-related issues?

Malaysia is a member of the International Finance Corporation (IFC), an institution of the World Bank Group. The IFC recently reviewed and updated its 2006 Sustainability Framework, which includes a thematic area of business and human rights; it explicitly acknowledges the responsibility of the private sector to respect human rights and to recognise that it may be appropriate for clients to undertake additional due diligence in some high risk circumstances. The updated 2012 edition of IFC's Sustainability Framework applies to all investment and advisory clients whose projects go through IFC's initial credit review process after January 1, 2012;[194] this would presumably mean that Malaysia would need to ensure that investments by IFC in Malaysia abide by the IFC Sustainability Framework, particularly, the Performance Standards on Assessment and Management of Environmental and Social Risks and Impacts; Labour and Working Conditions; Resource Efficiency and Pollution Prevention; Community Health, Safety, and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Management of Living Natural Resources; Indigenous Peoples; and Cultural Heritage. Recently, it was reported that the IFC plans to invest in the planned $1.5 billion listing of Malaysia's Integrated Healthcare Holdings.[195]

Apart from the above, there are no known official statements or evident steps by the State to promote business respect for human rights when acting as

194 Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy, available at http://www1.ifc.org/wps/wcm/connect/fca42a0049800aaaaba2fb336b93d75f/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES

195 "IFC plans to invest in Malaysia's Khazanah healthcare arm," *The Star Online*, May 27, 2012, http://biz.thestar.com.my

members of multilateral institutions dealing with business-related issues.

9. Is the State taking steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur within their territory and/or jurisdiction those affected have access to effective remedy?

There is no grievance procedure specific to business-related human rights abuses. Complainants of business-related human rights abuses are entitled to seek relief from the Courts as in other types of cases or lodge a complaint with SUHAKAM. It must be noted that the perception that the Judiciary is not as independent from the Government as it ought to be, have fuelled complaints that human rights cases particularly against GLCs are not properly dealt with thereby denying effective and meaningful access to justice for complainants.[196]

There are no specific provisions in domestic laws for civil compensation for breach of business related human rights statutory obligations by business enterprises.

Judicial review is available to any aggrieved person affected by the decision of a public authority and arguably a body that exercises public function. However, the legal procedures under contract or tort law filed pursuant to a writ of summons or originating summons to challenge business decision that affects the public are complementary and alternative remedies available. Under the ISA 1960 and Immigration Act, ouster clause bars the court from reviewing ministerial decisions save for procedural non-compliance.

9.1. What are the legal and non-legal State-based grievance mechanisms available to those seeking remedy for business-related human rights abuses?

There is no grievance procedure specific to business-related human rights abuses, and complainants are entitled to seek relief from the courts as in other types of cases. Depending on the nature of the complaint, a complainant may file a civil case at the Magistrates' Court, Sessions Court or High Court. The Court of Appeal and the Federal Court are superior courts hearing appeals from the aforementioned courts. In relation to employment-related complaints, the less formal Industrial Court and Labour Court may be utilised. The consumer tribunal is another avenue for smaller consumer claims.

SUHAKAM also receives and investigates complaints regarding human rights abuses. (see section 10 below for more details about SUHAKAM's mandate and powers).

For indigenous peoples in the states of Sabah and Sarawak, in addition to civil Courts, they can elect to seek settlement to their disputes at the Native Courts. Native Courts are headed by native chiefs assisted by the village head. Appeal of decisions of the Native Courts it to district officers and then to the Native Court of Appeal, presided by a High Court judge. Native Court tends to be informal, records are rarely kept and judgement and grounds of decisions are rarely issued. Cases do not form binding precedents and are confined to the district or village.[197]

196 "Justice in Jeopardy: Malaysia in 2000", *International Bar Association*, April 2000, http://www.ibanet.org; see also, Charles Hector, "Towards an impartial, incorruptible and independent judiciary", *The Malaysian Bar*, August 19, 2002, http:///www.malaysianbar.org

197 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia – Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005, 112, available at http://www.iwraw-ap.org/resources/pdf/Malaysia_SR.pdf

9.2. What barriers to access to remedy through these State-based grievance mechanisms have been reported?

In Malaysia, the Courts are one of the main remedies for any violations of the law, including violations of human rights. However, the Court process is problematic, which could affect a victim's right to effective remedy and prompt redress.

Firstly, the Court process is lengthy. SUHAKAM has documented that in general, cases in Malaysia are cumbersome, slow, expensive and time-consuming and the undue delay has impacted on the right to an expeditious and fair trial in Malaysia.[198] The inordinate delay in the hearing of cases has improved since the former Chief Justice Tun Zaki implemented a Key Performance Index scheme. Complaints now centre on the inordinately speedy disposal of cases without properly giving parties the meaningful right to be heard.

Further, the Malaysian Judiciary has not been known to be "human rights friendly" to complainants hence continuing to erode the people's confidence in the Courts to provide effective solutions to human rights abuses.[199] The Court's treatment of human rights and the application of international treaties and norms, as evident in cases such as *Beatrice Fernandez* and *Jakob Renner* could prevent business-related human rights abuses from seeking effective remedy in Courts. Also, concerns have been raised that most members of the judiciary are not familiar with international human rights conventions[200] and that the training given to the Judiciary tend not to focus on application of human rights.[201]

9.3. Are there laws, regulations, policies and/or initiatives requiring or encouraging the establishment of non-State-based grievance mechanisms?

There are no known official laws, regulations, policies and/or initiatives requiring or encouraging the establishment of non-State-based grievance mechanisms.

10. Is the State giving the country's National Human Rights Institution sufficient powers to enable it to contribute to the area of business and human rights?

SUHAKAM is the national human rights institution of Malaysia. Section 4 of the SUHAKAM Act 1999 provides for the functions and powers of SUHAKAM, which includes promoting awareness in relation to human rights; to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken; to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and to inquire into complaints regarding infringements of human rights. In exercise of its powers, since its inception, SUHAKAM has carried out trainings, public inquiries (where it has the power to subpoena any persons in Malaysia to facilitate in the public inquiries), research on various laws, investigations of allegations of human rights violations, visits to places of detention, and roundtable discussions and dialogues with government agencies, civil society and members of

198 SUHAKAM, *Report on the Forum on the Right to an Expeditious and Fair Trial*, Malaysia, 2005.

199 International Bar Association, "Justice in Jeopardy: Malaysia in 2000", April 2000, http://www.ibanet.org

200 Compilation Prepared by the Office of the High Commissioner for Human Rights, Universal Periodic Review, Human Rights Council, Working Group on the Universal Periodic Review (20 November 2008), A/HRC/WG.6/4/MYS/2.

201 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia – Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005, 15,available at http://www.iwraw-ap.org/resources/pdf/Malaysia_SR.pdf

the public. The powers and conduct of SUHAKAM thus far show that the SUHAKAM Act 1999 confers upon SUHAKAM, the power to look into the area of business and human rights and to investigate business-related human rights abuses.[202]

SUHAKAM's engagement in the area of business and human rights is through its investigation of complaints against companies, roundtable discussions on the subject matter and participation at conferences and seminars relating to human rights and business. SUHAKAM has investigated and address business-related human rights abuses; between 2007 and 2012, it received a total of 39 complaints against companies. The types of complaints receive include trespass and damage of native customary land by logging companies to carry out logging activities, denial of rest days for employees, late payment of salary by employers, and unfair dismissal on the grounds of illness arising out for an employee's pregnancy.[203] To resolve such complaints, SUHAKAM communicates (via letter or meetings) with the relevant government agency and/or the parties to the complaint, to enquire into the subject matter of the complaint. Generally, SUHAKAM issues findings for public inquiries and researches it conducts. SUHAKAM does not make public its findings and recommendations regarding individual complaints it receives; it merely communicates its findings to the complainant and the relevant public authority.

Throughout 2010 and 2011, SUHAKAM organised three roundtable discussions with government agencies, corporations and civil society organisations on the issue of human rights and business.[204]

SUHAKAM took part in the workshop on "Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform" in December 2011; the output of the workshop was the Bali Declaration where the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises and Ruggie Report was mentioned.[205] In October 2010, SUHAKAM took part in the 10th International Conference of NHRIs and ICC Bureau Meeting in Edinburgh, United Kingdom, which led to the adoption of the Edinburgh Declaration;[206] the Edinburgh Declaration addressed the theme of business and human rights and the role of national human rights institutions. Subsequently, SUHAKAM participated in the Consultation on the SRSG Guiding Principles for the Implementation of the Three Pillars Framework (11 – 12 October 2010) in Geneva, Switzerland. SUHAKAM and give other NHRIs developed a joint statement that reaffirmed the role of NHRIs in advancing the Framework within their mandates.[207]

SUHAKAM is accredited with status A by the ICC.[208] SUHAKAM's status was under scrutiny in 2009 when the ICC felt that the process of appointment, dismissal and length of appointment of SUHAKAM Commissioners were not sufficiently independent; and the lack of interaction of SUHAKAM with mechanism of the international human rights system. As a result, in January 2011, the SUHAKAM Act 1999 was amended with a new process of appointment of commissioners, with civil society involvement and an increase in the length of appointment.

The powers and functions of SUHAKAM and the new system of appointment of SUHAKAM Commissioners appear to confer greater independence on SUHAKAM. Thus far, there have been no known incidents or decisions of SUHAKAM, which has brought the independence of SUHAKAM into question. It remains sufficiently independent

202 Section 4(4) of the Human Rights Commission of Malaysia Act 1999 states that "For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution".
203 SUHAKAM, e-mail message to the MCCHR, April 3, 2012.
204 SUHAKAM, *Annual Report 2011*.
205 Press Release: Agribusiness and Human Rights in Southeast Asia Workshop brings together Human Rights Commissioners, indigenous peoples' representatives, academics and NGOs from across the world," November 28, 2011, http://www.forestpeople.org
206 SUHAKAM, *Annual Report 2010*, 85.
207 SUHAKAM, *Annual Report 2010*, 86.
208 See http://nhri.ohchr.org

from the Government. However, SUHAKAM receives its budget from the government; section 19(1) of the SUHAKAM Act 1999 Act provides that the government is obliged to provide SUHAKAM with adequate funds annually to enable SUHAKAM to discharge its function. This means that there is a possibility that the government may reduce the budget of SUHAKAM if SUHAKAM is vocal in criticising the government.

The effectiveness of SUHAKAM has been questioned by civil society organisations; some concerns have been raised that SUHAKAM has not been doing enough to pressure the government into having the report debated or adopting its recommendations.[209] Many of SUHAKAM's recommendations and findings/decisions based on public inquiries and factual research have not been accepted or implemented by the Government and SUHAKAM's annual reports remain undebated by Parliament. It is submitted here that national human rights institutions should have the authority to take recommendations to court for enforcement, for example when related to criminal offences, national human rights institutions should have the power to refer the matter to the appropriate prosecuting or judicial authority, so that courts can consider and enforce them if they are upheld; national human rights institutions should have the authority to appear before a court when their decisions are challenged.[210]

209 Kuek Ser Kuang Keng, "Suhakam awaits 'historic' day in Parliament," May 10, 2011, http://www.malaysiakini

210 "Assessing the Effectiveness of National Human Rights Institutions," *International Council on Human Rights Policy and the UN Office of the High Commissioner for Human Rights*, 22, available at http://www.ohchr.org/Documents/Publications/NHRIen.pdf

11. What are the efforts that are being made by non-State actor to foster State engagement with the Framework and the Guiding Principles?

Apart from SUHAKAM's work on the Framework and the Guiding Principles (see section 10 above), one Malaysian multinational corporation, Sime Darby, issued a letter to Professor Ruggie, pledging support for the UN 'Protect, Respect and Remedy' Framework and that the said Framework would help businesses better understand and manage their roles and responsibilities in human rights.[211] . Mr. Puvan Selvanathan, Chief Sustainability Officer of Sime Darby, is a member of the UN Working Group on Human Rights and Transnational Corporation and Other Business Enterprises.[212] No other information of efforts made by other corporations in Malaysia.

As regards the UN agencies in Malaysia, there are no specific programmes or activities to foster State engagement with the Framework and the Guiding Principle. Having said that, UN agencies in Malaysia have carried out programmes to promote the respect of human rights by businesses. In 2010, UNICEF Malaysia, together with CCM launched the SSM-UNICEF Best Business Practice Circular 1/2010 on the "Establishment of a Child Care Centre at the Work Place by Business and Corporate Employers".[213] The said circular provides guidance for employers in the private sector on the setting-up of child care centres for their employees to promote greater awareness of child rights issues amongst the corporate and business sector.[214] In 2011, UNICEF and CCM launched it second circular -

211 Letter from Sime Darby to Professor John Ruggie, May 20, 2011, http://www.business-humanrights.org

212 See http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx

213 Indra Kumari Nadchatram, "SSM and UNICEF call for childcare centres in the workplace," February 1, 2010, http://www.unicef.org/malaysia/media_news10-ssm-unicef-call-for-childcare-centres-in-workplace.html

214 UNICEF, SSM-UNICEF Best Business Practice Circular 1/2010 on the "Establishment of a Child Care Centre at the Work Place by Business and Corporate Employers," available at http://www.unicef.org/malaysia/SSM-UNICEF-BBPC1-Childcare-Centres-FINAL.pdf

the SSM Best Business Practice Circular 2/2011 on "Establishing a Conducive Working Environment for Women: Nursing Mothers Programme at the Workplace". This second circular is intended to ensure productive and sustainable female workforce participation, to highlight the role that companies and businesses can play in supporting the national promotion of exclusive breastfeeding practices and to achieve optimal child health development.[215]

Similarly, there is no information of any engagement by UNDP Malaysia with the government of Malaysia on the Framework and Guiding Principles. However, UNDP Malaysia does engage with government agencies such as the Economic Planning Unit, Ministry of Natural Resources and Environment and Ministry of Health, particularly in the area of the environment where UNDP works with government agencies to strengthen their capacities to plan and implement energy efficient, renewable energy and green house data management.[216]

In 2010, the UN Resident Coordinator in Malaysia underlined the importance of the respect of human rights by companies.[217]

215 UNICEF, SSM Best Business Practice Circular 2/2011 on "Establishing a Conducive Working Environment for Women: Nursing Mothers Programme at the Workplace, available at http://www.unicef.org/malaysia/Unicef-BBPC-Nursing-Mothers-Program-at-Workplace-Malaysia.pdf

216 See http://www.undp.org.my

217 Kamal Malhotra, "Malaysia: Extending Frontiers, Widening Horizons: Corporate Responsibility: The Role of Enterprises in the Promotion and Protection of Human Rights," (paper presented at the 15th Malaysian Law Conference, Kuala Lumpur, Malaysia, July 30, 2010), available at http://www.undp.org.my/files/media/14/16.pdf

Executive Summary

To date, there are no reported response by the Government of Malaysia to the UN "Protect, Respect, and Remedy" Framework ("Framework") or its Guiding Principles. However, the Malaysian Federal Constitution and other legislation could provide a basis for a robust recognition of the State Duty to Protect; the Federal Constitution of Malaysia contains general provisions guaranteeing a range of human rights, inter alia, the right to life and liberty, right to fair trial, freedom of speech, assembly and association and freedom of religion. These rights are further expounded in a number of laws such as the Employment Act 1955, the Environmental Quality Act 1974, Companies Act 1965, Child Act 2001, Persons with Disabilities Act 2008 and the Industrial Relations Act 1967.

As the laws in Malaysia is based on the common law legal system, this potentiality (recogition of the State Duty to Protect) requires the Courts to interpret the State Duty to Protect into Malaysian law. Whilst case law have indicated a rather restrained approach towards human rights issues and unwillingness to apply international human rights conventions into domestic law, the recent landmark case of Noorfadilla (the Courts recognised the applicability of CEDAW despite an absence of an act of Parliament) could set a precedent towards greater recognition of international human rights principles, including the State Duty to Protect.

There are no specific government bodies and/or State agencies that are tasked with the responsibility of preventing, investigating, punishing or providing redress for business-related human rights abuses. However, there are a number of government agencies, which are tasked to look at issues, which could be associated with business-related human rights abuses, such as anti-corruption, labour rights, and environmental rights. Most of these government agencies are entrusted with the task of developing non-binding codes and guidelines to ensure the respect of laws and policies. Also, some of these agencies regulate through the issuance of licences and consideration of Environmental Impact Assessments (EIA) and some are given the power to investigate breaches of laws and regulations.

Malaysian law is adequate in terms of holding business enterprises legally accountable as legal persons. Case law and the Companies Act 1965 recognises business enterprises as having separate legal personality. Equally, the Penal Code includes any company or association or body of person whether incorporated or not, within the definition of "person"; as such, companies can be held criminally liable, save for personal natured crimes such as rape.

Laws in Malaysia do not specifically require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. Nevertheless, the laws instil avoidance and regulate the actions of individuals, companies and businesses through the creation of offences. It must be said that enforcement of some of these laws and regulations are weak. The main laws and key human rights concerns concerning business enterprises include:

- Labour rights – The poor treatment of foreign workers, particularly foreign domestic servants are issues of concern in Malaysia. There have been complaints of mistreatment, exploitation by unscrupulous recruitment agencies, physically abuse and poor living and work conditions of foreign workers;
- Sustainable development and rights of indigenous peoples – Environmental protection is perhaps one of the more well-regulated industries in Malaysia. A number of laws and regulations exist to prevent water, air and land pollution. However, implementation appears to be weak and indiscriminate and awareness of environmental legislation may not be adequately widespread. Concerns have been raised,

particularly the lack of proper consultation with those affected and violation of native customary rights and rights of indigenous people, including destruction crops and cultural heritage, such as graves and historical sites;

- Human trafficking – Majority of trafficking victims in Malaysia are among the two million documented and 1.9 million undocumented foreign workers in Malaysia. Some of them who migrated willingly are forced into labour or debt bondage or sexually exploited. zThe Anti-Trafficking in Persons Act 2001 has put in place a legal framework to tackle this problem. However, investigation and prosecution of labour trafficking cases remain slow and concerns have been raised that victims of trafficking and not traffickers or pimps are being arrested, charged detained and deported;

- Corruption and lack of good governance – The public appears to be unconvinced with efforts made to tackle corruption, misuse of public funds and corrupt procurement practices. The problem is compounded by the perception that the Malaysian Anti-Corruption Commission (MACC) lacks credibility; it (the MACC) has had to deal with controversies surrounding the death of a political aide of State Assemblyman in 2009 and other controversial issues.

In the area of corporate governance and corporate social responsibility, the government of Malaysia consolidated much of its corporate social responsibility activities in 2007, with the adoption of the CSR Framework by the Securities Commission and the Bursa Malaysia and the Silver Book (in 2006) and the imposition of a mandatory requirement (for all publicly listed companies) to report corporate social responsibility activities. Recently, the Securities Commission promulgated the Malaysian Code for Corporate Governance 2012 and the Bursa Corporate Governance Guide.

The aforementioned documents are non-binding and apply only to Government Linked Companies (GLCs) (the Silver Book) and publicly listed companies. They contain broad principles of corporate governance, with some mention of human rights, broad statements of social benefit, principles to be adhered to by directors such as the importance of knowledge of potentially unethical and legal issues that could adversely affect the company, and encouragement to formulate a code of ethics. For example, the Bursa Corporate Governance Guide encourages directors to consider producing Sustainability reports that addresses community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association and fair trade. It must be pointed out that there is no meaningful rights language used to encourage directors or businesses to take into account their human rights impact.

It is encouraging that a number of publicly listed companies have published Sustainability Reports to complement its Annual Reports. A cursory examination of the Sustainability Reports and Annual Reports of listed companies show that the most promising area in terms of business and human rights is reports of efforts undertaken to promote environmental sustainability. Apart from this, most activities reported tend to be philanthropic in nature, with no mention of human rights. This probably stems from the lack of guidance as to the content required in this section and also the absence of an explicit link between human rights and corporate social responsibility in the codes and guidance.

Malaysian business enterprises have expanded their businesses to conflict-affected areas such as Iraq, Sudan, South Sudan, Myanmar and the Democratic Republic of Congo (DRC). There is no known official information that the government of Malaysia identifies, prevents or mitigates human rights-related risks. It appears that if there are any standards regarding business and human rights that are adhered to by Malaysian companies operating in these areas, they are non-binding and self-imposed.

The Human Rights Commission of Malaysia (SUHAKAM) has been more reactive to and vocal on the Framework and Guiding Principles. SUHAKAM has participated in a number of workshops and also organised roundtable discussions on human rights and business. The Human Rights Commission of Malaysia Act 1999 confers upon SUHAKAM the power to look into the area of business and human rights and to investigate business-related human rights abuses.

Other non-State actors have not directly reacted to the Framework and the Guiding Principles save for one a multi-national corporation, which pledged support for the Framework. UN agencies in Malaysia, particularly UNICEF works with the Companies Commission of Malaysia to develop best business circulars on childcare establishment and nursing others in the workplace.